

ARKANSAS MUNICIPAL LEAGUE



Human Resource and Personnel Matters Affecting Arkansas Municipalities

(5 hour Core Certification Course)

October 2016





HUMAN RESOURCE AND PERSONNEL MATTERS AFFECTING ARKANSAS MUNICIPALITIES AGENDA

Wednesday, October 12, 2016

9:00 a.m. – 9:30 a.m.	Registration	
9:30 a.m. – 9:45 a.m.	Welcome & Opening Remarks	Harry Brown, Mayor, Stephens AML President
9:45 a.m. – 10:00 a.m.	DBSquared: How We Can Serve You	Bruce Johanson, Principal Officer/Partner Johanson Group
	IT in a Box: Protecting Your Data	Dave Mims, President Sophicity – IT in a Box
10:00 a.m. – 10:15 a.m.	Trends and Challenges in the World of Human Resources	Ken Wasson, Director of Operations AML Staff
10:15 a.m. – 10:45 a.m.	Employment Law: Traps to Avoid	Mark Hayes, Director of Legal Services AML Staff
10:45 a.m. – 11:00 a.m.	BREAK	
11:00 a.m. – 12:15 p.m.	Employment Law Continued	Mark Hayes, Director of Legal Services AML Staff
12:15 p.m. – 1:00 p.m.	LUNCH	

1:00 p.m. – 1:45 p.m.	Succession Planning: Steps to Hiring The Right Person	Ken Wasson, Director of Operations AML Staff Tracey Pew, MHBF Coordinator AML Staff
1:45 p.m. – 2:15 p.m.	Employee Personnel Files and Record Retention	David Schoen, Legal Counsel AML Staff
2:15 p.m. – 3:00 p.m.	The Do's and Don'ts of Drug Testing and Background Checks	David Schoen, Legal Counsel AML Staff Jeff Sims, President a'TEST Consultants
3:00 p.m. – 3:30 p.m.	Social Media and Its Impact on the Workplace: The Rights of the Employer and the Employee	Lanny Richmond Staff Attorney
3:30 p.m.	Concluding Remarks	Harry Brown, Mayor, Stephens AML President



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Document Management

Protect city records. Apply record retention schedules.

- > Protect your city documents from **fire, flooding, tornadoes**, and other disasters.
- > **Scan** your paper files. Free up file cabinets and floor space.
- > Apply the **state's record retention schedules** to keep archives up-to-date.
- > **Search** for documents based on their content as well as data fields.

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Separate personal and city business. Share calendars. Includes Microsoft Office Professional Plus.

- > Hosted **email** on your **city domain**. Includes email **archiving**.
- > **Shared calendars** and contacts with 50GB **mailbox storage** per user.
- > **Office Professional Plus** for your desktop providing the latest versions of Outlook, Word, Excel, PowerPoint, Access, InfoPath, Publisher, and OneNote.

Open Records Requests

Be prepared for FOIA and Open Records Requests. We will help the clerk process them.

Vendor Management

No more frustrating calls with vendors. We got it.

- > Issues with your software? **Call us for support**. We will work with the vendor directly to resolve the issue instead of you losing hours and days on the phone.
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- > **Love I.T.** We don't meet your expectation, cancel the service!
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24x7. We are always there when you need help.

- > **U.S.-based IT Helpdesk**. All staff undergo criminal background checks and drug screening.
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- > Experienced senior engineers to address any IT issue remotely **ASAP**. **No trip charges** for scheduled onsite support visits.
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Experienced certified senior engineers. We are GCIC certified.

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Guard against Cyber risks. Keep your computers patched, protected, and healthy.

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- > Windows **Updates** and Patch Management. Performance and **Health** monitoring.
- > Secure remote access when **teleworking**.
- > Asset Management.



The Changing World of HR:

Trends and Challenges

Ken Wasson
October 12, 2016

Employment Law: Traps for the Unwary

MARK R. HAYES

DIRECTOR OF LEGAL SERVICES

ARKANSAS MUNICIPAL LEAGUE

FALL 2016

Employment at-will:

The well established **rule in Arkansas** is that when an employee's employment is for an indefinite term, either party may **terminate the relationship without cause or at-will.** *Griffin v. Erickson*, 277 Ark. 433, 437, 642 S.W. 2d 308, 310 (1982).

Examples

The employee, being 50% finished on a massive project that will make the mayor and the council city “officials for life...”

...QUITS despite previous promises to finish the project.

You’re toast. Per Travis Tritt: “Here’s a quarter, call someone who cares!”

Examples

The employer is in a meeting with several employees asking why a project isn't done.

Response: if you don't like it, fire me.

Employer: Ok

The Importance of State Law... BE CAREFUL!

To determine whether an employee enjoys a protected property interest in continued employment, for purposes of a procedural due process claim (**as discussed later**), the court of appeals **looks to state law**.

Eddings v. City of Hot Springs, 323 F.3d 596, 601 (8th Cir. 2003).

The Importance of State Law...

BE CAREFUL! (part II)

The at-will doctrine has been modified providing that where an at-will employee relies on a personnel manual or employment agreement that expressly states that he or she cannot be discharged except **for cause**, the employee may not be arbitrarily discharged in violation of such provision.

Gladden v. Arkansas Children's Hospital v. Saline Memorial Hospital, 292 Ark. 130, 136, 728 S.W. 2d 501, 505 (1987).

Additional Exceptions to the Employment at-will Doctrine:

Cases in which the employee is discharged **for refusing to violate a criminal statute.**

Cases in which the employee is discharged **for exercising a statutory right or a constitutional right.**

Cases in which the employee is discharged **for complying with statutory duty.**

Cases in which an employee is discharged **in violation of the general public policy of the state.**

Employment **contracts for time.**

Sterling Drug Inc. v. Oxford, 294 Ark. 239, 743 S.W. 2d 380 (1988).

U.S. Constitution; Property Right: Pre Deprivation Due Process

Remember, recognized by state law.

Remember the exceptions to at will.

Primarily the “just cause” exception.

Pre as in before.

One more time: pre as in before. As in before you decide to fire.

BEFORE NOT AFTER.

What is Due Process?

Simplest Form:

Notice; and

An opportunity to be heard.

Claims under 42 U.S.C. § 1983 & the Fourteenth Amendment

PROCEDURAL DUE PROCESS

What does this mean?

The Due Process Clause within the Fourteenth Amendment to the United States Constitution.

It provides that government may not deprive an individual of life, liberty, or *property* without due process of law.

Procedural Due Process

Procedural due process requires...

A meaningful opportunity to be heard...

Must be afforded to a public employee...

Who has a property or liberty interest in his or her employment.

Also, the employee must be given notice both of the underlying issue and...

The time and place to be heard.

U.S. Supreme Court

In fact, the Supreme Court has decided several cases involving the procedural due process rights of public employees.

These cases employ a multipart test.

First, whether there is a sufficient interest grounded in state or local law or practice,

and second, a balancing test to determine what particular process is due. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542-545 (1985).

Supreme Court

That minimum procedural due process requirements are a matter of federal constitutional law.

An individual with a property interest in public employment cannot be deprived of that interest without **constitutionally** adequate procedures.

In determining what process was due, *Loudermill* applied the three-part balancing test.

Mathews v. Eldridge. Loudermill, 470 U.S. at 542-43.

The Balancing Test

1. The employee's private interest in retaining employment and,
2. The risk of an erroneous deprivation of such interest through the procedures used; versus:
3. The governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of fiscal and administrative burdens

The Supreme Court:

If Due Process is needed the high Court has noted:

The “...public employee is entitled to oral or written **notice** of the charges against him, an explanation of the employer's evidence, and an **opportunity to present his side of the story.**”

470 U.S. at 546.

The Hearing Requirements:

First requirement is that the employee receive reasonable **notice** of all charges against him.

The **purpose of notice** under the due process clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing.

Notice is sufficient if it apprises the employee of the "nature of the charges and the general evidence against him and if the notice is timely under the particular circumstances of the case."

Most cases provide that notice must occur **prior to the meeting**, such that the employee can prepare his or her response.

Rogers v. Masem, 788 F.2d 1288, 1295 (8th Cir. 1985).

The Notice Requirement: Be Specific

Tell the employee the "specific **nature and factual basis**" for the discharge.

Brouillette v. Bd. of Dirs. of Merged Area IX, 519 F.2d 126, 128 (8th Cir. 1975).

"**Conclusory terms** such as 'conduct unbecoming an [officer]' are not sufficient."

Bugard v. Unified Sch. Dist. No. 298 of Lincoln Co., Kan., 432 F. Supp. 895, 904 (D. Kan. 1977).

The Hearing Requirement

The courts aren't terribly clear on this.

Suggestions:

Allow the employee to address any and all things.

Make sure the employee has been fully informed of all items being considered.

If the individual wishes to allow others to make statements, allow but don't go too far afield.

Not a trial.

No witnesses or cross examinations.

Be fair.

Practical Lessons

Do you have employee writings?

ALL WRITINGS.

Employee handbook?

Ordinances?

Resolutions?

Memos?

Do you know what these things say?!

Knowing Your Employee Writings (Practical Tips cont'd)

If you know what your writings say, are you following them?

Do they need a review and possible revision?

Yearly Review

Just Cause; Contract for Time

Who should review? You

Whom else should review? Your City Attorney Too!

Additional Ideas

KISS method.

Find your historical documents

Sources for Help

Employee Handbook

http://www.arml.org/pdfs/publications/sample_personnel.pdf

FLSA, FMLA, ADA Lookie Here:

[http://www.arml.org/pdfs/publications/Personnel Law Avoiding Lawsuits 02.pdf](http://www.arml.org/pdfs/publications/Personnel_Law_Avoiding_Lawsuits_02.pdf)

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And Here:

[http://www.arml.org/pdfs/publications/ADA compliance 2004.pdf](http://www.arml.org/pdfs/publications/ADA_compliance_2004.pdf)

And Here:

http://www.arml.org/pdfs/publications/Drug_testing.pdf

Who Appoints...

Who Removes...

Department Heads versus Non-Department Heads

State Law dictates who appoints and removes department heads.

No State Law for non-department heads.

Non-department heads are a matter of local policy.

Local as in...YOUR POLICY or PRACTICE!

Department Heads; Appoint and Remove vs. Local Policy

Appoint = Hire

Remove = Fire

Ark. Code Ann. § 14-42-110 says department heads are appointed and removed by the mayor

But... the council can over-ride with a two thirds vote

But... the council CANNOT appoint and remove department heads

More Appoint and Remove

Non-department heads are a matter of local policy.

What does your policy say?

No policy?

What's your practice? And let's carefully take a look...

Recommendations versus decisions...

Who's actually hiring and firing?

A Department Head Example

Need a police chief (department head by local designation)

Mayor hires Mark

Council over-rides by a two thirds vote

Mark is out and Mayor goes back to the drawing board

A Non-Department Head Example

City needs to fill a non-department head position

Writing(s)?

Practice?

A Non-Department Head Example

Practice is as follows...

Department head talks to mayor, mayor goes to council and council okay's the particular candidate as the choice.

Who appointed?

The Council

Appoint and Remove

Non-department policy or practice...be careful

Council, legislative policy maker and legislative immunity

Mayor, elected to run the day to day operations

Mayor makes contracts

Employment is a contract

Maybe only the mayor is entitled to hire/fire

MAYBE is maybe!

9th Grade Civics...

Civics Reminder

Three branches of government

Judicial

Legislative

Executive/Administrative

By staying in your role, less likelihood of liability

Fair Labor Standards Act

Updates coming December 1, 2016

Salary levels for exempt employees are rising!

- Executive, Administrative, Professional and the Highly Compensated Employee exemption salary are all going up.
- For the first time non-discretionary bonuses, incentive pay, and commissions can be counted as salary to qualify for exemptions.

The rules will now update every three years beginning January 1, 2020

- Stay on your toes!

Fair Labor Standards Act

Who is entitled to overtime pay?

Generally, every employee is entitled to overtime compensation. However, there are key exemptions to this general rule.

Key exemptions

Elected officials and their personal staff; executive employees, administrative, and professional employees. 29 U.S.C. § 203(e)(2)(C).

Title of position is not the determining factor of whether an individual is exempt.

Fair Labor Standards Act – Elected Officials

Elected Officials aren't just exempt, they aren't even employees under the FLSA!

- Not entitled to overtime or minimum wage.

Also excluded are:

- Personal staff of elected officials,
- Persons appointed to serve as policy makers, and
- Advisors on Constitutional or legal powers of elected official's office.

Elected Officials' Personal Staff

This exception appears to be rarely used, and is “narrowly construed.”

Don't rely on it applying except in very rare instances.

Some factors to consider in determining “Personal Staff Exemption:”

- 1) whether the elected official has plenary powers of appointment and removal,
- 2) whether the person in the position at issue is personally accountable to only that elected official,
- 3) whether the person in the position at issue represents the elected official in the eyes of the public,
- 4) whether the elected official exercises a considerable amount of control over the position,
- 5) the level of the position within the organization's chain of command, and
- 6) the actual intimacy of the working relationship between the elected official and the person filling the position. *Rutland v. Pepper*, 404 F.3d 921, 924 (5th Cir. 2005)

Fair Labor Standards Act

Executive Employees: 29 C.F.R. § 541.100

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

- (1) Compensated on a **salary basis** at a rate of not less than \$ 913 per week (\$47,476 per year) (\$455 per week, or 23,660 annually until Dec. 1st);
- (2) Whose **primary duty** is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who **customarily and regularly** directs the work of two or more other employees; and
- (4) Who has the **authority to hire or fire** other employees **or whose suggestions and recommendations** as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

EXAMPLES: Police Chiefs, Fire Chiefs, and Department Heads

Fair Labor Standards Act

Administrative Employees: 29 C.F.R. § 541.200

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

- (1) Compensated on a **salary** or fee basis at a rate of not less than \$ 913 per week (\$47,476 per year) (\$455 per week, or 23,660 annually until Dec. 1st);
- (2) Whose **primary duty** is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- (3) Whose primary duty includes the **exercise of discretion and independent judgment with respect to matters of significance.**

EXAMPLES: HR Director, Computer/Systems Administrator, Financial Officer

Fair Labor Standards Act

Professional Employees: 29 C.F.R. § 541.300

http://www.dol.gov/dol/cfr/Title_29/Chapter_V.htm

Professional Employee Elements:

(1) Compensated on a **salary** or fee basis at a rate of not less than \$ 913 per week (\$47,476 per year) (\$455 per week, or 23,660 annually until Dec. 1st); and

(2) Whose **primary duty** is the performance of work:

- (i) Requiring **knowledge of an advanced type** in a field of science or learning customarily acquired by a **prolonged course of specialized intellectual instruction; or**
- (ii) **Requiring invention, imagination, originality or talent** in a recognized field of artistic or creative endeavor

EXAMPLES: City Engineer, Wastewater Professionals, Planning Directors, City Attorneys

Highly Compensated Employees

A highly compensated employee is deemed exempt if:

1. The employee earns total annual compensation of \$134,004 or more.
2. The employee's primary duty includes performing office or non-manual work; and
3. The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Thus, for example, an employee may qualify as an exempt highly-compensated executive if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.

Recap December First Updates

Executive, Administrative, and Professional Employees must be paid \$913/week - \$47,476/year to meet the exemption;

- In addition to the meeting the same old duties test.

Highly Compensated Employees must be paid \$134,004 to meet the exemption.

10% of the salary can come from non-discretionary bonus, incentive, or commission payments, that are paid out quarterly (Does not apply to HCEs)

Will automatically updated every 3 years starting Jan. 1, 2020.

Impact of the New Rules

The Department of Labor predicts:

4.2 Million salaried workers will be affected by this rule because of their salaries not meeting the new level.

8.9 Million will be indirectly affected because their salaries are above the new salary level, but don't meet the duties tests.

DOL hopes this will result in more money going to middle class workers and their families: DOL estimates an extra \$1.2 Billion will go to the workers.

Things to Consider in implementing the new rules

May need to raise salary;

Hire extra help to prevent workers going overtime;

Figure out an hourly rate which doesn't change an employees salary

- This might be unpopular

What works will always depend on the situation, don't expect a one size fits all solution.

Fair Labor Standards Act

Are all non-exempt employees the same?

There is a key difference between uniformed (police and fire) and non-uniformed employees and their entitlement to overtime.

What is a uniformed employee?

- Generally, uniformed employees are police and fire personnel, but does not include radio operators, clerks, secretaries, or janitors. 29 C.F.R. §§ 553.210 & 211.
- EMTs may qualify if their services are substantially related to firefighting or law enforcement activities. 29 C.F.R. § 553.215.

Fair Labor Standards Act

To what overtime provisions are non-uniformed employees entitled?

Time-and-a-half for every hour of work over 40 for a workweek. 29 U.S.C. § 207.

What is a workweek; does it need to be Monday thru Sunday?

Any 7-day period; the employer can establish a workweek that does not coincide with the calendar week. **Generally, a workweek beginning and ending at 5pm on Friday is appropriate.** 29 C.F.R. § 778.104.

Fair Labor Standards Act

Does every city owe its uniformed employees overtime?

- There is an exemption for police and fire departments that have less than 5 employees, including chiefs. 29 U.S.C. 213(b)(20).
 - Volunteer firefighters and auxiliary police officers are “volunteers” and are not treated as employees
 - Part-time Employees are considered employees. 29 C.F.R. § 553.200(b).
 - Employees who are on leave and not working are also considered employees. 29 C.F.R. § 553.200(b).

Fair Labor Standards Act

To what overtime provisions are uniformed employees entitled?

The FLSA provides a partial overtime exemption to the 40 hour work week for law enforcement officers and firefighters who work a “work period” of no fewer than 7 days and no more than 28 days. 29 U.S.C. § 207(k).

Fair Labor Standards Act

- *What is a uniformed employees “work period”?*
- An employer can establish a uniformed officers work period as anywhere between 7 and 28 days consecutively. 29 U.S.C. 207(k).
- The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel. Law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171. Fire department employees working in excess of 212 hours within a 28-day period must also be compensated for overtime hours in excess of 212. These amounts are prorated for shorter work periods. 29 C.F.R. § 553.201.

Fair Labor Standards Act

Is there an option other than paying overtime?

Instead of paying overtime pay, an employer can compensate an employee with compensatory time (“comp time”), and that time must accrue at time-and-a-half. 29 U.S.C. § 207(o)(1).

The City may only elect to provide “comp time” if an agreement or understanding existed between the employer and the employee before the performance of that work; the employee must understand that the city has a policy of giving compensatory time. 29 U.S.C. § 207(o)(2)(A)(ii).

The agreement between the employee and employer can be made individually or collectively (i.e. collective bargaining agreement), although the employee must understand prior to performing the work. *See generally, United Food & Commercial Workers Union, Local 1564 of New Mexico v. Albertson's, Inc.*, 207 F.3d 1193 (10th Cir. 2000).

Fair Labor Standards Act

When can employees use “comp time”?

An employee can request the use of “comp time” at any time; the employer is obligated to allow the use of that “comp time” within a reasonable time unless by doing so, it would disrupt the operations of the employers. 29 U.S.C. § 207(o)(5)(B).

Can an employer require the use of comp time?

An employer can require an employee to use “comp time”.
See Christensen v. Harris County, 529 U.S. 576, 585 (2000).

Fair Labor Standards Act

Is there a limit on the amount of “comp time” an employee can accrue?

A non-uniformed employee can only accrue a total of 240 hours of “comp time” (160 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(3)(A).

A uniformed employee can only accrue 480 hours of “comp time” (320 actual overtime working hours) before the employer is required to pay the additional hours of overtime in cash. 29 U.S.C. § 207(o)(2)(A)(ii).

Do not eliminate unused comp time without paying the employee for that overtime!

Fair Labor Standards Act

How do I pay accrued “comp time” when the employee quits or is terminated?

Payment of “comp time” at termination is time-and-a-half at a wage equaling the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 U.S.C. § 207(o)(4).

Because unused “comp time” must be paid at the time of termination, it is advised to “pay as you go.” Compensate employees for their unused “comp time at the end of each year, or mandate that the employees use their comp time at your discretion.

Arkansas Civil Rights Act ACRA AND TITLE VII

EMPLOYMENT
DISCRIMINATION

A solid orange horizontal bar at the bottom of the slide.

ACRA § 16-123-105

(a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to **the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution** shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.

(b) In the discretion of the court, a party held liable under this section shall also pay the injured party's **cost of litigation and a reasonable attorney's fee** in an amount to be fixed by the court.

(c) When construing this section, a court **may look for guidance to state and federal decisions interpreting the federal Civil Rights Act** . . . in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

ACRA § 16-123-107

Specifies that, “the right of an otherwise qualified person to be free from discrimination ***because of race, religion, national origin, gender, or the presence of any sensory, mental, or physical disability*** is recognized and declared to be a civil right.

“This right shall include but not be limited to: (1) the right to obtain and hold employment without discrimination.”

ACRA § 16-123-108

Prohibits retaliation against those who opposed any act or practice made unlawful by the ACRA.

In practical terms this is **all about timing**

If an employee speaks up as a witness for a complaining employee and within a week negative action is taken...

Timing says your actions were retaliatory.

ARCA § 16-123-102. Definitions

(1) “Because of gender” means, but is not limited to, on account of pregnancy, childbirth, or related medical conditions;

(2) “Compensatory damages” means damages for mental anguish, loss of dignity, and other intangible injuries, but “compensatory damages” does not include punitive damages;

(3) “Disability” means a physical or mental impairment that substantially limits a major life function, but “disability” **does not include:**

- (A) Compulsive gambling, kleptomania, or pyromania;
- (B) Current use of illegal drugs or psychoactive substance use disorders resulting from illegal use of drugs; or
- (C) Alcoholism; . . .

ARCA § 16-123-102. Definitions

(5) “Employer” means a person who employs **nine (9) or more employees in the State of Arkansas in each of twenty (20) or more calendar weeks in the current or preceding calendar year**, or any agent of such person;

(6) “National origin” includes ancestry; . . .

(8) “Religion” means all aspects of religious belief, observance, and practice.

Title VII: Federal Law that also prohibits discrimination

Title VII makes it **unlawful** for an employer to **discriminate** against any individual with respect to the terms, conditions, or privileges of employment because of such individual's **race, color, religion, sex, or national origin**.

An employer includes an employer's agents for purposes of the law.

Discrimination Claims

Generally

Where an employee can show that they meet the required elements of a discrimination claim through indirect evidence and they were subject to an adverse employment action, the City must then show that it had a legitimate, non-discriminatory reason for the adverse employment action.

If the City shows a legitimate reason for the adverse employment action, the employee/Plaintiff is then given the opportunity to show that the reason the City has given for the employment action is false and discrimination is the real reason.

Hostile Work Environment

If a supervisor creates a hostile work environment for another employee, the employer is liable unless it can show:

- It exercised reasonable care to prevent and correct the harassing behavior, **AND**
- The harassment victim unreasonable failed to take advantage of the preventative or corrective opportunities that the employer provided.
- = You have to have some process to provide for corrective measures if an employee complains of harassment.
- If the harasser is not a supervisor, the victim can still recover if the employer was negligent in correcting or trying to remedy the co-worker's harassing behavior.

Retaliation

There are many statutes/laws that prohibit retaliation.

Generally, To establish a prima facie case of retaliation a Plaintiff must show that “(1) [he] engaged in statutorily protected activity; (2) an adverse employment action was taken against him or her; and (3) a causal connection exists between the two events.” *Id.* (quoting *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 914 (8th Cir.2006)).

Retaliation Generally

Employee does something protected by statute or constitution.

They are given discipline including but not limited to being terminated.

The discipline is a motivating factor behind the disciplinary action taken. In some instances, the employee will have to prove the disciplinary action was taken *because of* the protected conduct (if the claim is a Whistleblower claim under the State Act).

Retaliation Laws

These laws prohibit retaliation:

- Family and Medical Leave Act
- Fair Labor Standards Act
- Retaliation for exercising one's First Amendment rights
- Title VII
- Age Discrimination in Employment Act
- Arkansas Whistleblower Act

Family Medical Leave Act (FMLA)

Family Medical Leave Act

Posting Requirement

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintroduction briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy, or is in outpatient status; or is on the temporary disability retired list.

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.



For additional information:
1-866-4US-WAGE (1-866-425-9243) TTY: 1-877-829-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division



U.S. Wage and Hour Division
WHD Publication 1420 Revised January 2009

<http://www.dol.gov/whd/fmla/index.htm>

Family Medical Leave Act

Posting Requirement

All covered employers are required to display and keep displayed a poster prepared by the Department of Labor summarizing the major provisions of The Family and Medical Leave Act (FMLA) and telling employees how to file a complaint. The poster must be displayed in a conspicuous place where employees and applicants for employment can see it. A poster must be displayed at all locations **even if there are no eligible employees.**

Located at: www.dol.gov/esa/whd/

Family Medical Leave Act

Handbook Requirement or Other Writing

If an employer is covered by FMLA and has any FMLA eligible employees it shall publish in writing a general notice that the employer recognizes and honors FMLA leave

along with general statements of FMLA leave rights of the employee.

Family Medical Leave Act

Who is covered

☞ Employers : Local Governments with 50 or more employees for at least 20 calendar workweeks in the current or preceding calendar year. 29 C.F.R. § 825.104(a). The calendar workweeks do not necessarily have to be consecutive. 29 C.F.R. § 825.105(e).

☞ Employees: Those employees who have completed at least 12 months of employment and worked at least 1,250 hours within the prior 12 months. The determination of a “working hour” is governed by the principles of “working hours” found in the FLSA. See 29 C.F.R. § 825.110 (for employee coverage generally); 29 C.F.R. § 785.6 (for determining “work hours”).

Family Medical Leave Act

How much leave can employees receive?

The rule of 12.

Employees entitled to 12 weeks of unpaid leave in a 12 month period. **29 C.F.R. § 825.200(a)**

The 12 weeks can be intermittent. **29 C.F.R. § 825.200(c)**

Family Medical Leave Act

Is the Employee entitled to leave?

Reasons for leave: 29 C.F.R. § 825.112(a)

Birth of child or care for a newborn

Placement with employee of adoptive or foster child\

Spouse, child or parent is on active duty (or notified) and causes a “qualified exigency” to occur

Care for an injured or ill armed services member in the line of duty (see later slide)

Employee has “serious health condition” that causes employee to be unable to perform functions of the job

Employee’s spouse, son, daughter or parent has “serious health condition”

Family Medical Leave Act

Caring for Family Injured in the Line of Duty on Active Duty.....

26 weeks of leave to care for immediate family member (spouse, son, daughter, parent or *next of kin*) if seriously injured, or suffering from a serious illness, in the line of duty on active duty. 29 C.F.R. § 825.127(b).

If used, no more FMLA is available for any other reason during the same 12 month period. 29 C.F.R. § 825.127(c)(2).

Family Medical Leave Act

What is a Serious Health Condition?

An illness, injury, impairment, or physical or mental condition that involves inpatient care requiring an overnight stay in a hospital or residential medical care facility. 29 C.F.R. § 825.113(a).

This includes follow ups regardless of whether the follow up is inpatient care, as well as days prior to the first inpatient setting. 29 C.F.R. § 825.113(b).

This also includes continuing treatment by health care provider. 29 C.F.R. 7 825.113(c).

Family Medical Leave Act

What is a Serious Health Condition?

“Continuing treatment...includes any one or more of the following”: 29 C.F.R. § 825.115.

- Period of incapacity and treatment for more than 3 consecutive days
- Period of incapacity due to pregnancy
- Period of incapacity due to a chronic serious health condition (periodic visits of at least twice a year, continues over an extended period of time, etc.)
- Period of incapacity that is permanent or long-term (may not need active treatment, i.e.: Alzheimer's)
- Any absences to receive multiple treatments (includes periods of recovery, i.e.: chemo, physical therapy etc.)

Family Medical Leave Act

What Notice should the Employee Provide?

Caveat: all employee notice requirements may be waived by the employer. 29 C.F.R. § 825.304(e).

29 C.F.R. § 825.302(a) – *Foreseeable Leave* – Requires:

- 30 days advance notice if:
 - Expected birth or placement for adoption/foster care,
 - Planned medical treatment for serious health condition of employee or family member (employee is obligated to work with employer so as not to disrupt operations)
 - Planned medical treatment for the serious injury or illness of a covered service member
 - In event employee fails to notify, the employer may ask why the employee failed to meet deadline

Family Medical Leave Act

What Notice should the Employee Provide?

29 CFR 825.302(b) – *Foreseeable Leave* – Con't:

- If 30 days isn't practicable then notice as soon as is practicable (generally the same day or next business day)
- If the leave is qualified exigency based, notice must be given as soon as practicable, even if its in advance of 30 days
- Notice need only be given one time but must advise employer should leave logistics change in as practicable manner as possible (i.e.: spouse with terminal cancer but actual leave dates unknown)

Family Medical Leave Act

What Notice should the Employee Provide?

29 C.F.R. § 825.303(a) – Unforeseeable Leave –
Requires:

- Notice as soon as is practicable under the particular circumstances of the case and that notice must meet all employer required notice provisions (i.e.: calling of immediate supervisor and mayors office etc.)

Family Medical Leave Act

Some things to remember about employee notices.....

Notice need not specify the FMLA

Notice can be done verbally

*Initially notice may only contain minimal information
(remember the term “when practicable”)*

*Make sure you review 29 C.F.R. §§ 825.302(c) & 303(c) for a
more complete description of content of employee notices.*

Family Medical Leave Act

What notice should the Employer Provide?

Employers should notify w/in 1 or 2 days after receiving employee's notice: 29 C.F.R. §§ 825.300-301.

- ❧ That the leave will be counted as FMLA leave;
- ❧ Any requirement of providing medical certification, 29 C.F.R. §§ 825.305-308;
- ❧ Employees right to use accrued paid leave, or employers decision to use accrued paid leave, 29 C.F.R. § 825.207;
- ❧ Any requirement that the employee make co-premium payments on health coverage; and
- ❧ Any requirement to present fitness for duty certification before job restoration.

Family Medical Leave Act

What does an employer do with employees health benefits and seniority benefits?

- ❧ Employer must maintain health benefits, but can require employee to continue paying share of premiums if portion was required prior to leave. 29 C.F.R. § 825.209(a).
- ❧ An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (e.g., holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate). 29 C.F.R. § 825.209(h).

Family Medical Leave Act

What to do when the employee returns?

“General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment

An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.” 29 C.F.R. § 825.214.

Family Medical Leave Act

What to do when the employee returns?

Equivalent Benefits: 29 C.F.R. § 825.215(d).

- Benefits must be resumed in the same manner and at the same levels as provided when the leave began,
- An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.
- With respect to pension and retirement plans, any period of unpaid FMLA is not a break in service for vesting and eligibility to participate.
- They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken.
- An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave.

Family Medical Leave Act

What to do when the employee returns?

Equivalent Pay: 29 C.F.R. § 825.215(c).

- An employee is entitled to any unconditional pay increases, such as cost of living increases.
- Pay increases conditioned upon seniority, length of service, or work performed must be granted in accordance with the employer's policy or practice with respect to other employees on an equivalent leave status for a reason that does not qualify as FMLA leave.
- Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees.

Family Medical Leave Act

What to do when the employee returns?

Equivalent terms and conditions of employment : 29 C.F.R. § 825.215(e)

- The employee must be reinstated to the same or a geographically proximate worksite,
- The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule,
- The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments,
- FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position.

The Americans With Disabilities Act Recent Amendment Act.... ADAAA

The American's with Disabilities Act: Recent Amendment Act...ADAAA

Major shift in the law.

Prohibits employers from considering mitigating measures (other than eyeglasses and contact lenses) when considering whether a job applicant is “substantially” limited in a major life activity.

It rejected the need for a medical condition to significantly limit a major life activity or affect an entire class of jobs in order to be considered a covered disability.

ADAAA

Finally, the Act expanded the list of major life activities to include major bodily functions and cognitive skills, and requires a broad interpretation of “disability” in favor of ADA coverage.

In other words, virtually anything is a disability.

ADA Post-Employment

Once an employee begins work, medical testing and medical inquiries must be job-related and consistent with business necessity.

This usually takes the form of a “fitness for duty” examination.

Reasonable Accommodations!

Sexual Harassment under the Arkansas Civil Rights Act

Island v. Buena Vista Resort, 352 Ark. 548, 103 S.W. 3d 671 (2003)

In this case, the Supreme Court of Arkansas held that the ACRA provides a remedy for sexual harassment by an employer.

An employee alleged that her supervisor had sexually propositioned her, that she had rebuffed those advances, and that he had repeatedly made lewd comments to her.

She claimed that, following her refusal of his sexual advances, she was fired in retaliation - a violation of the ACRA.

The Supreme Court of Arkansas Said:

- The court noted that federal courts have interpreted this language as providing an employee protection against both:
 - “sexual harassment due to a hostile work environment” or
 - “sexual harassment based on *quid pro quo*.”

Hostile Work Environment Claims:

A plaintiff asserting a hostile work environment claim must show: *Island*, 352 Ark. at 558, 103 S.W.3d at 676.

- (1) Membership in a protected group or class,
- (2) Unwelcome sexual harassment
- (3) Based upon gender
- (4) Resulting in an effect on a term, condition, or privilege of employment, and
- (5) That the employer knew or should have known about the harassment and failed to take proper remedial action.

In addition, the plaintiff must show that the sexual harassment created an environment that was both objectively and subjectively abusive.

Quid Pro Quo Harassment

For a plaintiff to make a *prima facie* case for *quid pro quo* harassment, [she] must show that:

- (1) she was a member of a protected class;
- (2) she was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors;
- (3) the harassment was based on sex; and
- (4) her submission to the unwelcome advances was an express or implied condition of receiving job benefits or her refusal to submit resulted in tangible job detriment.

Island, 352 Ark. at 558, 103 S.W.3d at 676-77

The First Amendment and the Arkansas Whistle-Blower Act

ARK. CODE ANN.

§§ 21-1-601 THROUGH 21-1-609



FIRST AMENDMENT RETALIATION CLAIMS

Under the First Amendment, an employee can sue if they commented on matters of public concern, their interest in making such comments outweigh the employer's interests in maintaining workplace harmony. The main defenses are (a) *Garcetti*, where the employee is speaking as part of their job, it's not considered a matter of public concern or (b) if the employer can show it would have taken the same action, i.e., termination for instance, whether the employee spoke or not.

Ark. Code Ann. § 21-1-603

Retaliation prohibited

A public employer shall not take adverse action against a public employee because the public employee or a person authorized to act on behalf of the public employee communicates in good faith to an appropriate authority:

- The existence of waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or
- A violation or suspected violation of a law, rule, or regulation adopted under the law of this state or a political subdivision of the state.

Ark. Code Ann. § 21-1-603

Retaliation prohibited

Also cannot take adverse action against a public employee for giving information in an investigation, hearing, court, legislative or other inquiry, or any form of administrative hearing. Finally, cannot take adverse action against a public employee for the employee's refusal or objection to a directive that the employee reasonably believes violates a law, rule, or regulation adopted by the state or City.

Ark. Code Ann. § 21-1-603

Elements

Public employment relationship

Good faith communication of waste or violation

Reasonable basis in fact

To an appropriate authority

Provide reasonable notice of the need to correct

Adverse action based on the communication

Adverse Employment Action

Ark. Code Ann. § 21-1-602(1) states that adverse action “means to discharge, threaten, or otherwise discriminate or retaliate against a public employee in any manner that affects the employee’s employment, including compensation, job location, rights, immunities, promotions, or privileges...”

Adverse Action: Constructive Discharge

Case Law: A constructive discharge exists when an employer intentionally renders an employee's working conditions intolerable and thus forces him to resign. [*Harris v. Wal-Mart*, 658 F.Supp. 62 \(E.D.Ark.1987\)](#). It exists only when a reasonable person would have resigned under the same or similar circumstances.

Case Law: An employee is not constructively discharged, however, if she quits “without giving her employer a reasonable chance to work out a problem.” *Alvarez*, 626 F.3d 410 (8th Cir. 2010).

Bad performance evaluation: adverse action?

No law on this topic under the Ark Whistle-blower act.

Federal law under Title VII: A lower satisfactory performance evaluation, *by itself*, does not provide a material alteration of employment and is not an actionable retaliation claim under Title VII. *Sutherland*, 580 F.3d 748 (8th Cir. 2009).

Who is a proper Defendant?

Public Employer: “an agency, department, board, commission, division, office, bureau, council, authority, or other instrumentality of the State of Arkansas, including the offices of the various Arkansas elected constitutional officers and the General Assembly and its agencies, bureaus, and divisions;

A state-supported college”

The Supreme Court, Court of Appeals, the AOC, circuit courts, and prosecutors;

“An office, department, commission, council, agency, board, bureau, committee, corporation, or other instrumentality of a county government or municipality or a district court, a county subordinate service district, a municipally owned utility, or a regional or joint governing body of one (1) or more counties or municipalities; or

A public school district, school, or an office or department of a public school district in Arkansas.”

What is Waste? A Violation?

WASTE: “a public employer’s conduct or omissions which result in *substantial* abuse, misuse, destruction, or loss of public funds, property, or manpower belonging to or derived from state or local political subdivision’s resources.

VIOLATION: “an infraction or a breach *which is not of a merely technical or minimal nature* of a state statute or regulation, of political subdivision ordinance or regulation, or of a code of conduct or code of ethics designed to protect the interest of the public or a public employer.

SO, there are some possible defenses built into the definitions here.

What is a Whistle-Blower?

“A person who witnesses or has evidence of a waste or violation *while employed with a public employer* and who communicates in good faith or testifies to the waste or violation, verbally or in writing, to one of the employee’s superiors, to an agent of the public employer, or to an appropriate authority, *provided that the communication is made prior to any adverse action by the employer.*”

The latter part of this definition is a key feature in many cases. It results in a race to discipline/whistle-blow literally in some fact scenarios.

Ark. Code Ann. § 21-1-604(c).

Civil Action for Violation

A “public employee” must establish by a preponderance of the evidence that there is a causal connection between an employee suffering an adverse employment action and the employee engaging in conduct protected by the Arkansas Whistle-Blower Act.

A lot of these cases hinge on this. Consider the definition of whistleblower above.

The Arkansas Supreme Court considers the timing between the communication and the termination a primary factor in establishing that connection. *Smith v. Brt*, 363 Ark. 126, 131, 211 S.W.3d 485, 490 (2005). While a civil rights case, argue *Brt*’s temporal proximity should apply in whistleblower cases.

Ark. Code Ann. 21-1-604(e)(1)

Affirmative defense

The public employer has an affirmative defense to whistle-blower claims where the adverse action is based on employee misconduct, poor job performance, or a reduction in workforce unrelated to the public employee's protected conduct. Again, this is the issue of causation and a pivotal issue in most of these cases.

Where the public employer demonstrates a legitimate non-discriminatory reason as set forth in the statute, the public employee must come forward with evidence that the stated reason is pretextual. *Wingfield v. Contech Const. Products, Inc.*, 83 Ark. App. 16, 115 S.W.3d 336, 339 (2003) (citing *General Electric Co. v. Gilbert*, 76 Ark. App. 375, 65 S.W. 3d 893 (2002)).

Good Faith (Not in the statute).

What Constitutes Good Faith?

There is no definition in the statute, but there is a definition of what good faith is not.

“Good faith is lacking when the public employee does not have personal knowledge of a factual basis for the communication or when the public employee knew or reasonably should have known that the communication of the waste or of the violation was malicious, false, or frivolous.” Ark. Code Ann. § 21-1-603 (b)(2).

What Constitutes Good Faith?

Whether a report was made in good faith:

Look at content of the report, and also at the reporter's purpose in making the report.

“Whistle-blower laws are not “intended to be used by employees to shield themselves from the consequences of their own misconduct or failures.””

Freeman v. Ace Telephone Ass'n, 404 F.Supp.2d 1127, 1140 (D. Minn. 2005).

Ark. Code Ann. §§ 121-1-605, 121-1-606

Available Remedies

Injunction

Reinstatement

- Federally, reinstatement will not be ordered where there is animosity between the parties; in lieu of reinstatement, often front pay is ordered.

Compensation

- Lost wages, benefits, and any other remuneration

Ark. Code Ann. §§ 121-1-605, 121-1-606

Available Remedies

Costs and attorney's fees

- The decision to award these fees is discretionary. *Arkansas Dep't of Health & Human Servs. v. Storey*, 372 Ark. 175, 271 S.W.3d 500 (2008).
- Also available to an employer if the court determines the action is without basis in law or fact.
- The employee shall not be assessed attorney's fees if, after exercising reasonable and diligent efforts, the public employee files a voluntary nonsuit concerning the employer within sixty (60) calendar days after determining that the employer would not be liable for damages.

Causal Connection

To reach a causal connection there must be a relationship between the activity and the termination such that one event is generated by the other. *Zhuang v. Datacard Corp.*, 414 F.3d 849, 856 (8th Cir. 2005).

The Supreme Court of Arkansas considers the timing between the communication and the termination a primary factor in establishing that connection. *Smith v. Brt*, 363 Ark. 126, 131-32, 211 S.W. 3d 485, 490 (2005) (court found 15 days sufficient).

Ark. Code Ann. § 21-1-603(a)(2)

A protected communication must give the employer “reasonable notice” of the need to correct the alleged waste or violation.

What is Reasonable Notice?

The Supreme Court of the United States defines “reasonable notice” as “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Act 1103 POSTING REQUIREMENT

Requires Employers to post in a conspicuous place, a printed sign at least 8 ½ X 11 that:

- Informs a public employee of the provisions of the Whistleblower Act;
- Describes an appropriate authority to whom the public employee may communicate in good faith regarding the existence of waste or a violation of law;
- If a telephone hotline exists for the reporting of fraud, waste, or abuse in government, contains the number of the telephone hotline

Act 1103 continued . . .

Arkansas Legislative Audit will prepare the sign and it will be available for download online. We've been told mid-July.

The Act also requires employers (Cities included) to “obtain a state criminal background check,” conducted by the Identification Bureau of the State Police, before finalizing the hiring of any applicant for an employment position with “**supervisory fiduciary responsibility over all fiscal matters.**”

The applicant must sign a release of information to the public employer; the employer may pay for the check or require the applicant to pay for the background check.

Upon completion of the check, the State Police must furnish all “releasable information obtained concerning the applicant.”

Act 1103 continued (crime for failure to report)

A public employee with supervisory fiduciary responsibility over all fiscal matters of the City shall report a loss of public funds to Legislative Audit, including without limitation: “apparent unauthorized disbursements of public funds; or the apparent theft or misappropriation of public funds or property.”

The report must be made within 5 business days of the date the public employee learns of the loss of funds;

A public employee with supervisory responsibility over all fiscal matters who ***purposefully fails to comply with the above*** is ***guilty of a Class A Misdemeanor***.

Act 1103 (FOIA Exemption)

All materials . . . Gathered in connection with a communication regarding the existence of waste or of a violation are privileged and confidential and are exempt from the FOIA, except:

- Final reports issued by a public employer or an appropriate authority concerning a communication regarding the existence of waste or of a violation and any supporting documents shall be open to public inspection and copying, except for documents that are exempt under other law;
- This section does not apply to the name and identifying information of a state employee eligible to receive a reward;
- This section applies without limitation to communications regarding the existence of waste or of a violation received by a telephone hotline allowing for reporting of fraud, waste, or abuse in government.

Drug Testing Non-CDL Employees

Drug Testing NON-CDL Employees

See this link:

http://www.arml.org/pdfs/publications/Drug_testing.pdf

Quick thoughts

Drug Testing NON-CDL Employees

Safety Sensitive Employees May be Randomly Tested.

Who are the safety sensitive folks?

- Law enforcement officers
- Motor vehicle operators who carry passengers, including, but not limited to, ambulance drivers
- Fire department employees who directly participate in fire-fighting activities.
- Medical personnel with direct patient care responsibilities including physicians, nurses, EMT's etc
- Mechanics etc who work on vehicles designed to carry passengers i.e.: buses, ambulances, police cruisers, vans etc

Drug Testing NON-CDL Employees

Security Sensitive Employees May be Randomly Tested.

Who are the security sensitive folks?

Those with access to information concerning ongoing criminal investigations and criminal cases, which information could, if revealed, compromise, hinder or prejudice the investigation or prosecution of the case. (police officer, jailer, dispatcher and police department employee, including clerical workers)

(2) Law enforcement officers may also be considered security-sensitive by reason of their duty to enforce the laws pertaining to the use of illegal substances.

Some Things to Watch and Do...Be Smart

Emotional decisions are bad decisions

Be consistent (do things the same way, even if its your buddy!)

Documentation

KISS Method (Keep It Simple Stupid)

Follow your policies. (You must know if you have policies and also WHAT THEY SAY)

Politics. Remember you work for government no matter how much you'd like to believe to the contrary

Be Smart

Don't ignore bad behavior

Bad behavior starts with little things and always leads to VERY BIG THINGS

You must manage

De-certify or not to de-certify

Common sense and initial reactions

Get involved

Stay informed

Understand what your employees are doing

You Must Discipline in These Cases

Actual Harassment

Un-reasonable use of Force, Deadly or Not (ASP, mace, gun, Taser, etc.)

False Arrest

Theft or Other Illegality (Liberty Interest)

The End!

The Fair Labor Standards Act

"21 Things You Should Know"



June 2016

The Fair Labor Standards Act - “21 Things You Should Know”

All Employees

1. The federal minimum wage is \$7.25 per hour. 29 U.S.C. § 206(a). However, the Arkansas minimum wage has been increased as follows:

“Beginning January 1, 2015, every employer shall pay each of his or her employees wages at the rate of not less than seven dollars and fifty cents (\$7.50) per hour, beginning January 1, 2016 the rate of not less than eight dollars (\$8.00) per hour and beginning January 1, 2017 the rate of not less than eight dollars and fifty cents (\$8.50) per hour except as otherwise provided in this subchapter.” Ark. Code Ann. § 11-4-210. Since the Arkansas rate is higher, it is applicable to municipal employees in place of the federal rate.

2. Overtime or compensatory time must be paid at time and one-half of the employee’s regularly hourly rate. 29 U.S.C.A. § 207(a)(1). Even if the employee receives a salary, overtime or compensatory time must be granted unless the employee is exempt as explained below.

Employers cannot avoid paying overtime or compensatory time by averaging hours over several workweeks. The FLSA requires that each workweek stand alone. 29 C.F.R. 778.104. (But see chart below for information on uniformed employee shifts).

3. If an employee volunteers to substitute shifts with another employee after first obtaining the employer’s approval and works more than the maximum hours for a given work period as a result of the switch, his employer is not responsible for paying the additional overtime. The regulations state that this may occur “only if employees’ decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or ‘trade time’ with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision.”

Employers are not required to maintain a record of time traded and there is no specific period of time in which the shift must be paid back. Therefore, the employee’s paycheck for that period would not reflect the switch in additional hours or overtime pay. 29 C.F.R. 553.31.

4. Employees do not have to be paid for “on-call” time unless their activities are “overly restricted.” On-call time should not be counted as compensable unless the employee is required to remain at or near the employer’s premises or otherwise cannot use his or her time freely. 29 C.F.R. § 785.17. Providing electronic pagers or cell phones to employees can solve many on-call time problems.

Exempt Employees

5. Elected municipal officials, their personal staffs, persons appointed by elected officials to serve on a policy making level, and legal advisors are considered exempt employees and are excluded from coverage under the Fair Labor Standards Act. 29 C.F.R. § 553.11.

6. Trainees and students are not employees within the meaning of the Fair Labor Standards Act if they meet all six criteria below:

- (1) The training, even though it includes actual operation of the facilities of the Federal activity, is similar to that given in a vocational school or other institution of learning;
- (2) The training is for the benefit of the individual;
- (3) The trainee does not displace regular employees, but is supervised by them;
- (4) The Federal activity which provides the training derives no immediate advantage from the activities of the trainee; on occasion its operations may actually be impeded;
- (5) The trainee is not necessarily entitled to a job with the Federal activity at the completion of the training period; and
- (6) The agency and the trainee understand that the trainee is not entitled to the payment of wages from the agency for the time spent in training.

5 C.F.R. § 551.104

7. Volunteers are not employees and an employee cannot volunteer to do the same work for which he is being paid. 29 C.F.R. §§ 553.100, 553.102.

8. Prisoners are generally not treated as employees under FLSA. *United States Department of Labor Field Operations Handbook 10b27*, http://www.dol.gov/whd/FOH/FOH_ch10.pdf

9. Executive, administrative, and professional employees are exempt from both minimum wage and overtime provisions if they meet all the requirements specified for their job category. These are not the only exemptions, but are the most typical in Arkansas cities and towns.

Note: the mere fact that an employee is being paid a salary is not sufficient by itself to exempt him or her from overtime requirements.

a. **Executive employees** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a "salary" basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee's "primary duty" must be that of an exempt executive employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.100(a) the primary executive duties are:

- “(2) The employee’s primary duty must be managing the enterprise in which the employee is employed or managing a customarily recognized department or subdivision of the enterprise;
- (3) The employee must customarily and regularly direct the work of two or more other full-time employees or their equivalent; and
- (4) The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.”

b. **Administrative employee** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” or fee basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee’s “primary duty” must be that of an exempt administrative employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.200(a) the primary administrative duties are:

- “2. Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- 3. Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”

c. **Professional employee** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year) (excluding doctors, lawyers, or teachers);
- (2) At least 90% of the salary level (\$822 per week) must be paid on a “salary” or fee basis, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments(excluding doctors, lawyers, or teachers); and
- (3) The employee’s “primary duty” must be that of an exempt professional employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.300(a) the primary professional duties are:

- “2. Whose primary duty is the performance of work:

- (i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or
- (ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."

d. **Computer employee** - this exemption requires three requirements before it can be applied:

- (1) The employee make at least \$913 a week (\$47,476 per year), or at least \$27.63 per hour;
- (2) At least 90% of the salary level (\$822 per week) must be paid on a "salary" or fee basis unless the employee is paid on an hourly basis and receives at least \$27.63 per hour, up to 10% (\$91 / week) may be satisfied with nondiscretionary bonuses or incentive payments; and
- (3) The employee's "primary duty" must be that of an exempt computer employee, as described in the statute (contained below).

Per 29 C.F.R. § 541.400 the primary computer employee duties are:

"In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
- (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
- (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- (4) A combination of the aforementioned duties, the performance of which requires the same level of skills."

10. Employees of amusement or recreational establishments are exempt from minimum wage and overtime if one of the following requirements is satisfied:

- (a) The establishment must not operate for more than seven months in any calendar year.
- (b) During the preceding calendar year, the establishment's average receipts for any six months of that year must have been equal to or less than one-third of its average receipts for the other six months of that year.

29 C.F.R. § 779.385

Uniformed Employees-Police and Fire

11. Law enforcement officers in cities and towns with fewer than five (5) law enforcement officers, including the chief or marshal, are exempt from the overtime provisions. 29 U.S.C. § 213(b)(20); 29 C.F.R. §§ 553.200, 553.211. To count as a law enforcement officer, the officer must be someone: (1) who is a uniformed or plainclothed member of a body of officers and subordinates who are legally authorized to enforce laws designed to maintain public peace and order and to protect both life and property from accidental or willful injury, and to prevent and detect crimes, (2) who has the power to arrest, and (3) who is presently undergoing or has undergone or will undergo on-the-job training and/or a course of instruction and study which typically includes physical training, self-defense, firearm proficiency, criminal and civil law principles, investigative and law enforcement techniques, community relations, medical aid and ethics. 29 C.F.R. § 553.211.

Volunteers are not considered "employees" for this purpose however. No distinction is made between part-time and full-time employees.

This means that if you have four (4) or fewer than four (4) law enforcement officers (not including radio operators), the city does not have to pay overtime. You must be sure your officers receive a minimum wage for all hours worked in a work period.

12. Cities and towns with fewer than five (5) paid firefighters, including the chief (if paid), are exempt from paying overtime to those employees who meet the following definition: "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who--

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S.C.A. § 203(y).

You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period. 29 U.S.C. § 213(b)(20); 29 C.F.R. § 210.

13. Volunteer firefighters and auxiliary police officers are "volunteers" and are not treated as employees under the 1985 Amendments to the Fair Labor Standards Act. 29 C.F.R. § 553.104(b).

14. The FLSA provides a partial overtime exemption for law enforcement officers and firefighters who work a "work period" established by the city of no fewer than seven days and no more than twenty-eight days. The city can establish separate work periods for the police department and the fire department. If the city fails to establish a work period, 207(k) does not

apply and a fire or police employee working over forty hours will accrue overtime compensation. 29 C.F.R. § 553.230.

The Secretary of Labor has set maximum hour standards based on a 28-day work period for both fire department and law enforcement personnel, determining that law enforcement employees who work over 171 hours within a 28-day work period must be compensated for those hours in excess of 171 and that fire department employees working in excess of 212 hours within a 28-day period must also be compensated. These 28-day standards can be used as ratios to determine maximum hours for other approved work periods. See the following chart.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.

Maximum Hour Standards for work periods of 7 to 28 days – section 7(k). 29 C.F.R. § 552.230.		
Work period (days)	Maximum hours standards	
	Fire protection	Law enforcement
28	212	171
27	204	165
26	197	159
25	189	153
24	182	147
23	174	141
22	167	134
21	159	128
20	151	122
19	144	116
18	136	110
17	129	104
16	121	98
15	114	92
14	106	86
13	98	79
12	91	73
11	83	67
10	76	61
9	68	55
8	61	49
7	53	43

When determining compensatory time for either law enforcement personnel or firefighters who miss a shift due to illness, vacation, personal leave, or any other reason, hours missed will not count as hours worked and are not compensable for overtime purposes. 29 C.F.R. §§ 553.201, 553.230.

15. Civilian radio operators, clerks, secretaries, and janitors of police and fire departments are on a 40-hour work week with time and one-half for all hours over 40 hours per week. They do not qualify for the law enforcement officers or firefighters' "work period" hours exemption. 29 C.F.R. §§ 553.210, 553.211.

16. The city as employer has the option of paying overtime or of giving comp time off. The employee must understand that the city has a policy of compensatory time off. Compensatory time is accrued at 1 ½ hours for each hour worked. Public safety employees - police and fire - and emergency response employees can accrue a maximum of 480 hours of comp time or 320 hours worked. After an employee has accrued maximum compensatory time, the employee must be paid in cash for overtime worked.

An employee shall be permitted to use accrued comp time within a reasonable period after requesting it if to do so would not disrupt the operations of the employer. Payment of accrued comp time upon termination of employment shall be calculated at the average regular rate of pay for the final three years of employment or the final regular rate received by the employee, whichever is higher. 29 C.F.R. § 553.21.

If the employer pays cash wages for overtime hours rather than in compensatory time, the wages must be paid at one and one-half times the employee's regular rate of pay. 29 C.F.R. § 553.232.

The United States Supreme Court has held that a public employer may require its employees to use their accumulated compensatory time. *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655 (2000). If employees do not use accumulated compensatory time, the employer must pay cash compensation in some circumstances. In order to avoid paying for accrued compensatory time, Harris County, Tex., enacted a policy requiring its employees to schedule time off in order to reduce the amount of accrued compensatory time.

The Court described Harris County's policy as follows: "The employees' supervisor sets a maximum number of compensatory hours that may be accumulated. When an employee's stock of hours approaches that maximum, the employee is advised of the maximum and is asked to take steps to reduce accumulated compensatory time. If the employee does not do so voluntarily, a supervisor may order the employee to use his compensatory time at specified times." The Court held that, although § 207(o)(5) limits an employer's ability to prohibit the use of compensatory time when requested, that does not restrict the employer's ability to require employees to use compensatory time.

Non-Uniformed Employees

17. All non-uniformed employees are entitled to overtime or compensatory time off after 40

hours per week worked unless they are otherwise exempt (see, for example the categories discussed in No. 8 above). 29 C.F.R. § 778.101.

18. There is no FLSA limit on the number of hours per day worked (other than child labor). 29 C.F.R. § 778.102.

19. A work week under the FLSA is defined as seven consecutive 24-hour periods (although this may be altered for police and firefighters as discussed above). Note that this may not be the same as the city's "pay period." The city can determine the day and the time of day that the work week begins. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of the Act. 29 C.F.R. § 778.105. We recommend that the city work week for water, sewer, street, sanitation, etc., employees begin at 5 p.m. on Fridays.

The city can schedule the hours worked within the work week to limit or prevent overtime. If an emergency occurs over the weekend and some employees must work 16 hours Saturday and 16 hours Sunday, then the city can (if their services are not absolutely needed) tell those employees to take off the rest of the week after working one eight hour shift each. This way each employee is limited to 40 hours per week for the week beginning 5 p.m. on Friday.

20. Only hours worked count in calculating overtime. Pay for holidays, vacations, sick time, jury duty, etc., do not count as hours worked. 29 C.F.R. § 778.102.

21. If an employee works more than 40 hours per week, the city could give him compensatory time off at the rate of 1 ½ hours for each hour worked over 40 hours per week. The compensatory time belongs to the employee and can accrue to a maximum of 240 hours (160 hours actual work).

The employee must be allowed to use his comp time when he desires unless it would unduly disrupt the city's operations to do so at that particular time. For a discussion of requiring the employee to take accumulated compensatory time, see point 16 above.

In case of termination of employment, an employee shall be paid for all accrued comp time at his then salary or the average rate of pay for the final three years of employment, whichever is greater.

29 C.F.R. §§ 553.21, 553.25.

(Prepared by Arkansas Municipal League Staff 6/2016)



Succession Planning: Steps to Hiring the Right Person

**Presented by Ken Wasson
and
Tracey Pew**

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Interviews, Offer Letters and Onboarding

Finding and Keeping the Perfect Employee!

Tracey Cline-Pew, SPHR, SHRM-SCP

I've got applications, so what next?

- ▶ Carefully review applications.
- ▶ Questions? Need clarification? Call and pre-screen.
- ▶ Process taking a long time? Keep applicants informed.
- ▶ Choose applicants whose knowledge, skills and abilities most closely correspond to the open position.



Types of Interviews

- ▶ Prescreening
- ▶ In-Depth Interview
- ▶ Structured Interview
- ▶ Patterned Interview
- ▶ Stress Interview
- ▶ Behavioral Interview
- ▶ Situational Interviews
- ▶ And the list goes on. . .



Plan for the Interview



- ▶ Review job and position description.
- ▶ Prepare questions or skill sets you intend to ask about.
- ▶ Know what you cannot ask, and educate others who will participate in the interview.
- ▶ Prepare everyone who will be involved in the interview process for his or her role.

What can't I ask??

- ▶ Number of children/childcare arrangements.
- ▶ Marital status.
- ▶ Spouse's occupation.
- ▶ Maiden name.
- ▶ Applicant's race or skin color.
- ▶ Ethnic association of surname.
- ▶ Nationality, lineage or national origin.
- ▶ Nationality of applicant's spouse.
- ▶ Applicant's native tongue.
- ▶ Religious affiliation.
- ▶ Religious holidays observed.
- ▶ Age or date of birth (unless job-related such as Bartender must be 21 or older.)
- ▶ Date of high school graduation.
- ▶ If applicant has a disability.
- ▶ Whether applicant has ever filed workers' compensation claim.
- ▶ Recent or past surgeries and dates.
- ▶ Past medical problems.
- ▶ Number and kinds of arrests.
- ▶ Height and weight, unless if a bona fide occupational qualification.
- ▶ Veteran status, discharge status, branch of service.



The Interview

- ▶ Establish a rapport with the candidate.
- ▶ Be careful of your own bias (yes, we all have them).
- ▶ Listen carefully.
- ▶ Observe non-verbal behavior.
- ▶ Focus on asking open, probing questions that encourage candidates to tell you as much as possible.
- ▶ Provide realistic information about job and organization.
- ▶ Take notes (but not on application or resume).
- ▶ Summarize.
- ▶ Give applicant an opportunity to ask questions.



After the Interview

- ▶ Review each applicant's strengths and weaknesses.
- ▶ Compare notes with the parties conducting the interview.
- ▶ Contact prospective employee to ensure they want the position, and advise of all contingencies such as passing drug test, background screening, etc.
- ▶ Notify all applicants, whether chosen or not, of job status.
- ▶ Set up time for applicant to comply with contingent screenings - such as drug testing, PAT testing, etc.
- ▶ If performing drug screenings, background screenings, PAT testing, etc. be consistent and comply with all Personnel Policies, Federal and State Guidelines.



Employment Offer

- ▶ An employment offer should immediately follow the final decision to hire a candidate.
- ▶ Employment offers should be worded carefully.
- ▶ Language should never imply an employment contract.
- ▶ Offer should clearly state employment is at will, and confirm that the candidate is not relying on any information or promises that are not reflected in the offer letter.



Offer Letter Do's and Don'ts

Do's

- ▶ Use a standard letter or customized version that has been reviewed by legal counsel.
- ▶ Clearly state the terms of the offer.
- ▶ Set a reasonable acceptance deadline.
- ▶ Clarify contingencies.
- ▶ Clarify acceptance details.
- ▶ Use the transition period to help new employee feel welcome.

Don'ts

- ▶ Back down on any promises made during interview.
- ▶ Set an excessively short acceptance time.
- ▶ Lose touch with candidate once the offer is accepted.
- ▶ Don't quote salary terms in an annual format.

Onboarding



- ▶ Most employers have a 90-day introductory period for a new employee to prove themselves in a new job. The faster a new hire feels welcome and prepared for their job, the faster he/she will be able to successfully contribute to the organization's mission.
- ▶ Onboarding starts as early as the interview, when you have the opportunity to introduce not only the job, but your organization's mission and culture to the job candidate. Face it, in today's competitive climate, not only does the candidate have to sell himself/herself to you, but you have to sell your organization to the candidate.

Onboarding Tips -

- ▶ Start onboarding early.
 - ▶ Between the time your offer is accepted and the new employee begins work, stay in touch with your new team member.
 - ▶ Fill out employee paperwork before they start if possible.
 - ▶ Make sure the new employee knows their work schedule, where to park, company dress code, etc. before they show up on their first day.
 - ▶ If you communicate with other employees or vendors that relates to the work your new employee is doing, be sure to include the new employee in the discussion.



Onboarding Tips -

► Make Introductions

- The first week should focus on orientation.
 - Provide new employee with tour of workplace.
 - Introduce new employee to coworkers, managers, directors, etc.
- Be sure to include the following in your new employee orientation:
 - Practices for handling software and licensing.
 - Password policies.
 - Social media policies.
 - Email protocols.
 - Workload expectations.
 - Employee directories.
 - Decision making processes.
 - Reporting and workflow hierarchy.
 - Corporate culture.
 - Communication during and after hours.



Onboarding Tips -

- ▶ Discuss Workflow - and don't leave out the small stuff!
 - ▶ Make sure a new employee knows how work gets done and who does what in your organization.
 - ▶ Don't ignore the small stuff. Include everything right down to how to get an outside line; where office supplies are kept; where to find Kleenex, paper towels, etc.; where to get coffee; where and when lunch breaks occur. Uncertainty about the little things can frustrate a new employee.
 - ▶ Make sure the new employee knows how to use the copier, fax machine, computer software, desktop printer, etc.



Onboarding Tips -

- ▶ Make sure the new employee is familiar with the role they are filling.
- ▶ Ensure the new employee understands his/her job duties and responsibilities.
- ▶ Provide the new employee with the training and tools they need to be successful.
- ▶ Treat workstations, equipment, software, lighting and other items as an investment in the individual.
- ▶ Accommodate requests that will help a new employee better perform his/her job.



Onboarding Tips -

- ▶ Continue to engage.
 - ▶ Onboarding does not stop when orientation is complete.
 - ▶ Immerse your new employee in the culture of your organization.
 - ▶ Include the new employee in company social events.
 - ▶ Make each point of contact a two way discussion.
 - ▶ Successful employees make successful organizations!





Job Descriptions And Sample Forms



October 12, 2016

JOB DESCRIPTION

TITLE: All city employees should have a job title, even part-time Employees.

DEPARTMENT: _____

SUPERVISOR: _____

SALARY: Annual and/or expected weekly salary.

JOB SUMMARY: This section should be no more than three or four sentences and be a summary of the duties and responsibilities associated with the job.

ESSENTIAL JOB DUTIES

[This section should only list duties which are critical to the successful performance of the job as it currently exist. As jobs change, job descriptions should be rewritten.]

WORKING CONDITIONS

[This section is used to describe the physical environment in which the work is being performed. Especially important are any conditions which are unpleasant or hazardous.]

MINIMUM QUALIFICATIONS

[This section is used to describe the education or experience required to obtain this specific job.]

PHYSICAL DEMANDS

[This section is used to describe any physical demands required to successfully perform the essential functions of the job.]

POSITION TYPE AND BENEFITS

[This section is used to describe the employment type (full-time/part time), expected hours to be worked, as well as the benefit package provided to an employee of this class.]

DISCLAIMER

[This statement indicates that the job description is not intended to be an exhaustive list of all duties performed of the incumbent.]

JOB DESCRIPTION

TITLE: Patrol Officer

DEPARTMENT: Police Department

SUPERVISOR: Sergeant

SALARY: Annual and/or expected weekly salary.

JOB SUMMARY: Under the general supervision of the Patrol Sergeant, assists in the prevention of crime and the preservation of order. This position is responsible for enforcing laws and ordinances, providing detention and courtroom services, patrol and guard duty and related supportive law enforcement activities.

ESSENTIAL JOB DUTIES

Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

1. Provide good customer service to both internal and external customers, maintain positive and effective working relationships with other employees (especially members of his or her own team), and have regular and reliable attendance that is non-disruptive.
2. Perform preventive patrol in assigned areas, both in vehicle and on foot.
3. Enforce state and federal laws and local ordinances.
4. Operate motor vehicle while on patrol in a safe manner for extended periods of time in all environmental conditions and on occasion operate the vehicle at high speeds and in congested traffic situations.
5. Make arrests on criminal and traffic related offenses including DWI detection and apprehension.
6. Become familiar with patrol districts, geographical locations, known offenders, neighborhood routines, and potential problem areas. Conducts security inspections and surveys buildings and businesses; handles complaints made by the public; conduct preliminary and follow-up investigations.
7. Seeks and serves arrest warrants, search warrants, and other court documents. Assist various prosecutors and attorneys in preparation of cases for trial; assists judges during court sessions; testifies clearly and truthfully in front of a judge and jury in court.
8. Direct and control vehicular and pedestrian traffic by use of hand signals and the blowing of a whistle. Traffic control for blocked traffic, parades, accidents, special events; provide crowd control, security, and information during special events.
9. Clean and fire a variety of police weapons, including pistols, rifles, and shotguns both in the field and to meet department standards of proficiency.
10. If assigned to bike patrol, having working knowledge and skills to maintain bicycle.

JOB DESCRIPTION

TITLE: Animal Control Officer

DEPARTMENT: Law Enforcement

SUPERVISOR: _____

SALARY: Annual and/or expected weekly salary.

JOB SUMMARY: Performs animal control work for the locality. Work regularly involves patrolling assigned areas to enforce animal control ordinances and related laws, rules, and regulations. Workers are responsible for handling animals for the purpose of investigations of mistreatment, or control of abandoned, dangerous, and unattended animals.

ESSENTIAL JOB DUTIES

Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

1. Provide good customer service to both internal and external customers, maintain positive and effective working relations with other employees (especially members of his or her own team), and have regular and reliable attendance that is non-disruptive.
2. Enforce state and local laws, issue citations pertaining to animals to violators and handle hostile individuals as needed.
3. Euthanasia – handle animal safely, euthanize humanely and track the use of controlled substances. Euthanize multiple animals per session. High level of stress due to rescue and euthanasia rates.
4. Trap and impound loose animals to include dogs and cats as well as livestock and wildlife.
5. Investigate animal cruelty and bite cases.
6. Testify in municipal and district court as necessary.
7. Work with animal shelter software and answer phone calls. Greet and assist the public visiting the shelter.
8. Prepare and present educational programs for youth groups, schools, and civil organizations and interact with the public at community events.
9. Respond to emergency calls involving animal attacks or injured animals. Administer first aid to injured animals. Respond to after-hours emergency calls.
10. Assist public in friendly and professional manner.
11. Transport animals and supplies.
12. Pick up deceased animals struck by vehicles or in neighborhoods.

13. Load and operate incinerator.
14. Perform chemical capture of animals utilizing dart rifle and other trapping devices.
15. Process adoptions, applications, and redemptions. Collect necessary fees.
16. Prepare rabies specimens for shipment to health department.
17. Cleans and maintains the animal shelter and animal control truck in a sanitary manner.
18. Performs related work as required.

WORKING CONDITIONS

Working conditions include driving in a pickup truck throughout the area. Employees are required to work around various types of dogs, including vicious dogs and dogs that may be diseased. Employees are regularly exposed to wet and/or humid conditions, moving mechanical parts, fumes or airborne particles, toxic or caustic chemicals, and outside weather conditions.

MINIMUM QUALIFICATIONS

1. A valid Arkansas Driver's License.
2. High school diploma or GED required; 6-12 months of animal handling experience preferred.
3. Must obtain Level I, II, and III Animal Control Training, Euthanasia Certification, Chemical Capture, and Bite Stick Certification within two years.
4. Ability to be on call 24 hours a day, 7 days a week.
5. Effectively communicate with others orally and in writing.
6. Working knowledge of routine animal care, animal diseases, and afflictions.
7. Ability to diplomatically respond to common inquiries or complaints from citizens, regulatory agencies, or members of the business community.
8. Must be proficient in the use of a computer and other related software programs. Must be able to effectively operate standard office equipment.

PHYSICAL DEMANDS

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job.

1. While performing the functions of this job, the employee is regularly required to talk or hear.
2. The employee regularly is required to stand, walk, run, and sit; use hands to finger, handle, or feel; reach with hands and arms; climb or balance; stoop, kneel, crouch, or crawl.

3. The employee must regularly lift and/or move up to 100 pounds, including the ability to lift a 50 lb. dog three feet up into the back of the Animal Control truck.
4. The employee must regularly use close and distance vision, color vision, peripheral vision, depth perception, and ability to adjust focus.

POSITION TYPE AND BENEFITS

Full-time, 40 or more hours per week, non-uniformed employee. Eligible for all benefits offered to full-time non-uniformed employees and all full-time accruals of paid leave. Required to be on call, and work irregular hours including nights and weekends as necessary.

DISCLAIMER

Please note this job description is not designed to cover or contain a comprehensive listing of activities, duties, or responsibilities that are required of the employee for this job. Duties, responsibilities, and activities may change at any time with or without notice.

11. Type on mobile computer terminal in police vehicle as a means of gathering and exchanging information. Complete traffic/criminal citations issued to violators of local and state laws. Investigate traffic accidents and report on the electronic system.
12. View crime scenes and identify/preserve physical evidence of a crime.
13. Write narrative reports as required in the performance of duty.
14. Respond to, and deal with, domestic disputes and resolve issues in a way that minimizes harm to the disputing parties.
15. Deal with children of all ages in a variety of situations, such as delinquents, minors requiring authoritative intervention, neglected, abused, runaways, lost, found, victims of crimes, public relations and instructional functions, and informants.
16. Provide interpersonal and business contacts and stand-by assistance in civil disputes.
17. Direct civilian employees and the public at the scenes of crimes, accidents, disasters, assemblies, etc.
18. Administer first aid when needed and coordinate emergency personnel and resources in crisis situations.
19. Act as public relations officer for the locality and foster good relationships with businesses, schools, etc.
20. Attend training as assigned; develops and maintains required skills and licenses.
21. Transports inmates and juveniles to and from correctional facilities and court.
22. Gives advice on laws, ordinances, and general information the public.
23. Perform other related duties as required or assigned.

WORKING CONDITIONS

While performing the duties of this job, the employee will be required to perform both inside and outside work with exposure to weather conditions. There is a possibility of exposure to fire, chemical, electric, mechanical, and firearm hazards. The majority of the time spent in this position will be spent in an office environment, in a motor vehicle, or on foot. This position includes the possibility of attack or injury, and exposure to fast moving vehicles and motor vehicle accidents.

MINIMUM QUALIFICATIONS

1. High School diploma or GED.
2. Be a citizen of the United States.
3. Be at least 21 years of age.
4. Must not have a felony conviction before selection into this process.

5. Valid Arkansas Driver's License.
6. Successfully pass background investigation, polygraph examination, credit history report, physical and mental evaluation.
7. Ability to obtain Basic Patrol officer Certificate (twelve weeks academy).
8. Ability to obtain the ACIC and the NCIC certification.
9. Must obtain various other certifications to handle specialized equipment to be used with this position.
10. Ability to become proficient in using MVR, MCT, Vehicle, Datamaster, Radar, Weapons, Tazer, Stopstix, sound meter and camera.
11. Ability to effectively operate a breach analyzer, computer, radio, and other specialized law enforcement equipment.
12. Effectively communicate with others orally and in writing.
13. Must be proficient in the use of a personal computer and other related software programs. Must be able to effectively operate standard office equipment.
14. Patrol officer must be able to exercise sound, independent judgement under stress.
15. Patrol officer must possess knowledge of modern police practices and methods, as well as the controlling laws and ordinances, particularly the laws of arrest and evidence.

PHYSICAL DEMANDS

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job.

1. While performing the functions of this job, the employee is regularly required to talk or hear.
2. The employee regularly is required to stand, walk, run, and sit; use hands to finger, handle, or feel; reach with hands and arms; climb or balance; stoop, kneel, crouch, or crawl.
3. The employee must occasionally lift and/or move up to 100 pounds.
4. The employee must regularly use close and distance vision, color vision, peripheral vision, depth perception, and ability to adjust focus.
5. The employee must possess the physical and mental stamina to fire weapons, react and move rapidly from sedentary to active conditions in response to environmental situations; assume a variety of body positions and postures necessary to employ "cover and concealment" during a deadly force encounter; respond to a physical attack and possess the ability to escape attacker, subdue attacker, and/or summon aid.
6. Must be able to react quickly and efficiently in all emergencies, natural or man-caused disasters.

POSITION TYPE AND BENEFITS

Full-time, 40+ hours per week, uniformed employees. Patrol officer is involved with regular and irregularly shift work and shift rotations necessary to provide police services 24 hours, 7 days a week, 52 weeks a year (weekends and holidays included).

DISCLAIMER

Please note this job description is not designed to cover or contain a comprehensive listing of activities, duties, or responsibilities that are required of the employee for this job. Duties, responsibilities, and activities may change at any time with or without notice.

SAMPLE

JOB DESCRIPTION

TITLE: Equipment Operator

DEPARTMENT: Street Department

SUPERVISOR: Street Superintendent

SALARY: Annual and/or expected weekly salary.

JOB SUMMARY: The equipment operator operates a variety of equipment used in construction, maintenance, and repair of roads, parking lots, and other large job sites.

ESSENTIAL JOB DUTIES

Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.

1. Provide good customer service to both internal and external customers, maintain positive and effective working relationships with other employees (especially members of his or her own team), and have regular and reliable attendance that is non-disruptive.
2. Ability to operate all street department heavy equipment, of various sizes and weights, to assist in the construction, repair, and maintenance of all streets.
3. Performs routine inspection and preventive maintenance on assigned equipment and refers defects or needed repairs to the supervisor; cleans equipment.
4. Responsible for assuring that safe procedures are followed in the operation of all street department equipment.
5. Properly follows city safety procedures and applicable laws and regulations.
6. Set grade, form, and finish concrete for sidewalks, curb and gutter, streets and trails.
7. Assists other street department employees in a variety of tasks including construction and maintenance of storm sewers, opening draining ditches, cleaning right of ways, and loading trucks.
8. Operates other tools as needed: chainsaw, chipper, compacter, and street saws.
9. Traffic control – directing and flagging of vehicles.
10. Performs related tasks as assigned.

WORKING CONDITIONS

While performing the duties of this job, the employee is frequently exposed to fumes, toxic or caustic chemicals, or airborne particles, moving mechanical parts and vibration. The employee is exposed to a

variety of extreme weather conditions at construction job sites. The noise level in the work environment and job sites is usually loud.

MINIMUM QUALIFICATIONS

1. High School Diploma or GED.
2. Experience in the operation of repair and maintenance of heavy motorized equipment.
3. Must be 18 years of age.
4. Ability to obtain valid Arkansas Driver's License – Class B CDL within 60 days of hire date.
5. Effectively communicate with others orally and in writing.
6. Knowledge of traffic ordinances governing the use of vehicles and ability to obtain proper licenses.
7. Must be proficient in the use of dump trucks, bobcat, front-end loader, milling machine, roller, paving machine, flatbed trailer, truck, backhoe, hand tools, chainsaw and street saw, preferred.
8. Ability to read and understand safety rules, operating and maintenance instruction and procedure manuals.
9. Ability to apply common sense understanding to carry out instructions furnished in written, oral, or diagram form.
10. Must be able to meet the physical demands necessary to successfully perform the essential functions of the job, with reasonable accommodations for individuals with disabilities.

PHYSICAL DEMANDS

The physical demands described here are representative of those that must be met by an employee to successfully perform the essential functions of this job.

1. While performing the functions of this job, the employee is regularly required to talk and hear for safety reasons or to operate certain equipment.
2. The employee regularly is required to stand, walk, and sit; use hands to finger, handle, or feel; reach with hands and arms; climb or balance; stoop, kneel, crouch, or crawl.
3. The employee must regularly use close and distance vision, color vision, peripheral vision, depth perception, and ability to adjust focus.
4. The employee must regularly lift and/or move up to 100 pounds.

POSITION TYPE AND BENEFITS

Full-time, 40 or more hours per week, non-uniformed employee. Days and hours of work are Monday through Friday, 7:00 a.m. to 3:00 p.m. Occasional evening and weekend work may be required as job duties demand. Eligible for all benefits offered to full-time non-uniformed employees and all full-time accruals of paid leave.

DISCLAIMER

Please note this job description is not designed to cover or contain a comprehensive listing of activities, duties, or responsibilities that are required of the employee for this job. Duties, responsibilities, and activities may change at any time with or without notice.

Job Opportunity Notice

(This form may be used to advertise vacancies)

DATE POSTED: October 12, 2016

JOB TITLE: Equipment Operator SALARY LEVEL: \$30,000-\$35,000
(Depends on qualifications)

JOB LOCATION and/or CITY DEPT: Midtown Street Department

DESCRIPTION/REQUIREMENTS: Under general supervision. May operate a variety of
heavy equipment in the construction and maintenance of all city streets.

APPLICANT MUST MEET THE FOLLOWING MINIMUM REQUIREMENTS: Experience
in operation of heavy equipment, Valid Arkansas Driver's License, High School Graduate,
must be 18 years of age.

If you wish to apply for Equipment Operator you may pick up an
application at City Hall or provide us with a resumé.

The City of Midtown is an Equal Opportunity Employer. The City of
Midtown does not discriminate on the basis of race, color, religion, sex,
national origin, marital or veteran status, disability unrelated to job requirements, genetic
information, political status or other legally protected status or exercise of constitutional rights.

Interview Questions You Might Consider Asking

The interview is an opportunity for you the employer to acquaint yourself with the perspective employee and to determine if the perspective employee will be the right fit for the position that you are trying to fill. It is very important that you decide in advance what you hope to accomplish in the interview then structure the interview in advance to achieve these goals. A written list of questions to be asked of each perspective employee should be prepared in advance so important items will not be forgotten.

Possible Interview Questions

- Tell me about yourself. What do you consider to be your greatest strengths and weakness?
- Why have you applied for this position?
- If I asked people who know you to describe you, what three words would they use?
- What are your team-player qualities? Give examples
- In your opinion do you work well under pressure?
- What motivates you?
- Do you prefer to work as an individual or in a group?
- What would you do if a co-worker wasn't pulling his/her own weight and was hurting your department?
- What three things are most important to you in a position?
- What skill sets do you think you would bring to this position?
- What have been your most satisfying and most disappointing work related experiences?
- What challenges are you looking for in working for us?
- Describe an ideal work environment or "the perfect job."
- Tell me anything else you would like us to know about you that will aid us in making our decision.

Personnel Records & FOIA in Arkansas

October 2016

David Schoen, Legal Counsel
Arkansas Municipal League

Tel: 501-978-6114

Fax: 501-537-7251

dschoen@arml.org

www.arml.org

General Rule:

- Employment Records are FOI 'able
- Examples of information you must release upon request:
 - Salary and compensation
 - Dates of hire
 - Job applications and resumes
 - Work history
 - Work e-mail address

Ark. Op. Atty. Gen. 2006-225, 93-076, 87-115.

Ark. FOI Handbook p. 31

Exempt from FOIA disclosure

- *Note: “exempt” does NOT mean you need not release the document, just that you must redact the exempt info from an otherwise releasable document.*
 - *Personal privacy*
 - *Job evaluation records (with exceptions)*

Personal privacy exemption

FOIA Handbook p. 31

- Examples
 - Non-elected employee's addresses (must verify city or county)
 - Unlisted phone numbers
 - Religious affiliation
 - Welfare payments
 - Payroll deductions
 - Social security numbers
 - Marital status
 - Details about family life

Ark. Op. Atty. Gen. 2006-225, 93-114, 88-078

Job Evaluation Records

- Generally exempt
 - Includes “disciplinary” records

Suspension/Termination Exception:

1. S/T must be *final* (all appeals exhausted or waived)
2. Records formed a basis for the S/T
3. A “compelling public interest” in disclosure exists

Employee may see his or her own records

Ark. Code Ann. 25-19-105(c)

What's “compelling?”

- Factors:
- (1) nature of the infraction that led to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved;
- (2) the existence of a public controversy related to the agency and its employees; and
- (3) the employee's position within the agency. In short, a general interest in the performance of public employees should not be considered compelling, for that concern is, at least theoretically, always present.

J. Watkins & R. Peltz, *The Arkansas Freedom of Information Act* (5th ed. 2009) (4th ed. quoted in Ark. Op. Att'y Gen. No. 2008-044).

- AG's police officer rule: public interest in police officer misconduct is almost always compelling.
- Professors Watkins and Peltz note that “[i]n some cases, ... rank is unrelated to importance” - a proposition they illustrate by noting that “[t]he public has a great interest in the performance of police officers and other law enforcement officials, and in this case the ‘cop on the beat’ is just as important as the chief of police.”

Ark. Op. Att'y Gen. No. 2006-026, (Feb. 15, 2006)

Procedure for personnel or job evaluation record requests

- Determine whether records are releasable within 24 hours
- Notify person making request and employee of decision
- If contact fails, send written notice via overnight mail to last known address
- Custodian, requester or subject may seek an AG opinion, to be issued within 3 working days
- No disclosure until AG opinion is issued.
 - Ark. Code Ann. 25-19-105(c).

Personnel

Document Retention Guidelines

David Schoen

Legal Council

Arkansas Municipal League

October 2016

General Rule In Arkansas

- Cities and towns may determine their own retention schedule for records not covered by another law. Ark. Code Ann. 14-2-203(b).
- However, as we will see, in the employment field there are many laws setting forth retention periods.

Statute of Limitations Issues

- ◎ While specific retention periods have been provided, state statute of limitations are important considerations when considering records maintenance
 - While the statute of limitations for employment discrimination is 1 year under the Arkansas Civil Rights Act, federal courts have held that employment discrimination may be a constitutional violation, which could be brought as a § 1983 claim with a limitation period of 3 years
 - Suits based on contract have a 5 year statute of limitations

- ◎ **The Lilly Ledbetter Fair Pay Act of 2009,**
42 U.S.C.A. § 2000e-5(3)(A) (West)
- ◎ Altered Title VII, the ADA, and the ADEA by renewing the statute of limitations after each new paycheck is issued rather than limiting it to 180 days after the decision to discriminate on the basis of pay was made. The rule also applies when “an individual is *affected* by application of a discriminatory compensation.”

- ◎ It is not yet clear what effect this has on record retention requirements, but at a minimum it would be advisable to keep personnel records for **as long as an employee works for you, plus five years** for breach of contract claims.
- ◎ Some commentators have suggested you should extend this period for pensioners, since each pension payment might also trigger a new filing period.
 - ◎ Why? – Because the Act applies when an “individual” – note it doesn’t say “employee” – is “affected.”

Payroll/Personnel Records

- Title VII
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Equal Pay Act/Fair Labor Standards Act
- Family and Medical Leave Act
- Other federal regulations
- Arkansas statutory law
- Department of Homeland Security
- Unemployment
- Tax Documentation
- Workers' Compensation

Title VII & Americans with Disabilities Act

- ◎ Title VII of the Civil Rights Act of 1964
 - Prohibits employment discrimination based on race, color, religion, sex, or national origin
- ◎ Americans with Disabilities Act of 1990 (ADA)
 - Prohibits employment discrimination against qualified individuals with disabilities
- ◎ Both apply to local governments with 15 or more employees
- ◎ The Equal Employment Opportunity Commission (EEOC) enforces compliance with these acts

Title VII/ADA Requirements

- **2 years** from the date of making the records or the personnel action involved, whichever occurs later
- For records regarding a person that has been involuntarily terminated, **2 years** from date of termination
- If charge is filed or action is brought, relevant records must be kept until final disposition
 - Final disposition – either expiration of statute of limitations or date on which litigation is terminated
 - Relevant records can include not only records pertaining to individual filing claim, but also records of employees in similar positions

29 C.F.R. § 1602.31 (2012).

CFR?

- Code of Federal Regulations
- <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>
- <http://tinyurl.com/32xyecv> or web search.
- *Not* in the AML Handbook!
- Read the regs: this presentation contains only *short summaries*.

EEO-4

- An EEO-4 is a state and local government information report
- It must be filed and maintained for **3 years** by:
 - Any political jurisdiction having 100 or more employees, and
 - Any political jurisdiction having 15 or more employees from whom the EEOC requests a filing of a report

29 C.F.R. § 1602.32 (2009).

Age Discrimination in Employment Act

- ◎ The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination based on age of employees age 40 or older
- ◎ Applies to local governments with 20 or more employees
- ◎ The EEOC enforces compliance with the act
- ◎ May also be enforced through litigation by employees.

ADEA – In General

- Payroll or other records containing name, address, date of birth, occupation, rate of pay, and compensation earned each week retained for **3 years**.
- If an action or charge is brought, the relevant records must be kept until **final disposition**.
- Personnel or employment records made, obtained, or used in the regular course of business kept for **1 year** from the date of the personnel action to which the records relate
 - Can include job applications, advertisements to public regarding job openings, records pertaining to hiring, firing, promotions, etc.

29 C.F.R. § 1627.3

ADEA: employee benefit plans

- Employee benefit plans (such as pension, insurance) and copies of any seniority systems and merit systems in writing must be kept for the full period the plan is in effect and for at least **1 year after its termination or final disposition of enforcement action.**
 - If the plan is not in writing, a memorandum fully outlining the plan's terms and the manner in which it has been communicated to employees must be kept for the same time period as if it were in writing.

Equal Pay Act/Fair Labor Standards Act

- ◎ The Equal Pay Act of 1963 (EPA) prohibits against sex-based wage discrimination.
- ◎ The Fair Labor Standards Act (FLSA) establishes standards regarding overtime pay and minimum wage.
- ◎ The recordkeeping requirements of the FLSA are the same as those for the EPA.

EPA/FLSA – In general

- Records made in the regular course of business pertaining to matters which describe or explain any wage differential paid to employees of the opposite sex and which may be relevant to a determination of whether the differential is based on a factor other than sex must be kept for at least **2 years**
 - These include records relating to payment of wages, job evaluations, seniority systems, etc.
 - *Note that some government employees are excluded under 29 U.S.C. § 203(e)(2)(C), such as elective officers and personal staff.
- Some specific records must be maintained for **2 years**, while others have a retention period of **3 years**.
 - 29 C.F.R. §§ 516.5, 516.6.

EPA/FLSA – Additional Requirements

- ◎ Regarding employees subject to minimum and maximum hours standards, specific records must be kept regarding personnel and payroll information
 - These include name, home address, time and day of week on which workweek begins, total premium pay for overtime hours, total additions to or deductions from wages paid each period, etc.

29 C.F.R. § 516.2 (2011)

- ◎ In addition, certain records must be kept in regard to compensatory time
 - Including number of hours compensated in cash, collective bargaining agreements, etc.

- For employees engaged in fire protection or law enforcement activities, a notation must be made on payroll records showing the work period for each employee and indicating the length and starting time of the period.

29 C.F.R. § 553.51 (2011).

Arkansas Statutory Law

- In addition to the EPA/FLSA regulations, Arkansas law stipulates that the certain information must be kept for a minimum of **3 years**: name, address, and occupation of each of the employees, the rate of pay and amount paid each pay period to each employee, job classifications, etc.

Ark. Code Ann. § 11-4-217.

- Ark. Code Ann. 14-2-204 requires that employment records, payroll sheets, time cards, and leave requests for police departments must be kept for **three years**.

Department of Homeland Security – I-9 Form

- ◎ I-9 Forms must be retained by an employer for 3 years after the date of hire or 1 year after the date the individual's employment is terminated, whichever is later.

8 C.F.R. § 274a.2 (2013)

Family and Medical Leave Act

- ◎ Employers must keep certain information for at least **3 years**, including basic payroll and identifying employee data, additions to or deductions from wages, dates FMLA leave is taken, etc.
- ◎ Any records relating to certificates, recertifications, or medical histories of employees or employees' family members must be kept as confidential medical records separate from personnel records.
- ◎ 29 C.F.R. § 825.500

Unemployment

- ◎ Under Arkansas law, an employer must retain records for a period of **5 years** from the end of the month next following the end of the calendar quarter to which the records pertain
 - Records include pay period covered by any payroll, social security number of each worker, date each worker was hired, rehired, or returned to work after temporary lay-off, number of hours spent in employment and/or the hours spent in non-subject work, etc.
 - Arkansas Dept. of Workforce Services, Regulation No. 12, *available at*
<http://www.dws.arkansas.gov/News/Regulations.htm#R12>.

Tax Documentation – 941s & other records

- ◎ Tax records must be kept for *at least 4 years from tax due or date paid, whichever is later*
 - Includes employer ID number, amounts and dates of all wage, annuity, and pension payments, amounts of tips reported, reports of allocated tips, fair market value of in-kind wages paid, etc.

FUTA

- ◎ Under the Federal Unemployment Tax Act, certain records must be kept, including, total remuneration paid during the calendar year, amount of remuneration constituting wage subject to tax, etc.

26 C.F.R. § 31.6001-4

FICA

- ◎ Under the Federal Insurance Contribution Act (FICA), other records must be maintained
 - Includes amount of employee tax collected with respect to such payment and date collected if collected at a time other than when such payment was made, reason for any inequality between total remuneration payment and the amount of taxes, etc.

26 C.F.R. § 31.6001-2

Workers' Compensation

- ◎ These records are governed by the more general procedures affecting personnel matters
- (a) Every employer shall keep a record with respect to any injury to an employee.
- (b) The record shall contain such information of disability or death with respect to the injury as the Workers' Compensation Commission may by rule or regulation require.
- (c) The record shall be available for inspection by the commission or by any state authority at such time and under such conditions as the commission may by rule or regulation prescribe.

Ark. Code Ann. § 11-9-528 (West)

- ◎ Within 10 days of receiving notice of an injury, an employer must submit information to the Commission, including name, address and business of employer and employee, cause and nature of injury or death, time and location where injury or death occurred, etc.
 - The Commission may also ask for additional reports regarding the injury and condition of employee
- Ark. Code Ann. 11-9-529.
- ◎ The statute of limitations varies depending upon the type of injury incurred

Lawsuit Records

- ◎ The Municipal League recommends keeping lawsuit records forever in electronic capacity and disposes of paper records after 7 years

Drug Testing: The AML Non-CDL Program



David C. Schoen
Legal Counsel
Arkansas Municipal League

501-978-6114
dschoen@arml.org

Why Non-CDL?



- Not required by state or Federal Law.
- Arkansas City officials requested a program to supplement CDL testing
- AML Legal staff researched and designed a program.

The Fourth Amendment to the U.S. Const.



- Prohibits “unreasonable” searches and seizures

For example, the 4th am. Applies to searches by the police of a citizen’s house, car, or person.

- US S.Ct.: a drug test= a search of a person’s body
- Note: this does not *prohibit* a drug test, but requires that it must be *reasonable*.

4th amendment (cont.)



- What's reasonable?
- Individualized suspicion *or*
- Safety-sensitive *or*
- Security-sensitive
- As part of a pre-employment physical
(according to some courts)

So, Four Types of Drug Test



- Reasonable suspicion – individualized
- Post-accident (must also give rise to reasonable suspicion)
- Random – safety or security sensitive
- Pre-employment – if already performing a physical

Reasonable Suspicion



- Observable signs of use
- 2 hour training
 - ✦ 1 hour on alcohol,
 - ✦ 1 hour on drugs)

Random Testing



- Drugs only:
 - Not for alcohol, which EEOC regards as an ADA violation
- Randomly drawn by computer
- Surprise element

Random Testing – Safety Sensitive Employees



- Safety sensitive: momentary lapse of attn may result in grave and immediate danger to the public
- Standards not set forth in legislation: drawn from court decisions from various jurisdictions.
- AML sample policy establishes these categories
- Some additions allowed if job description meets criteria and legal staff approves.

Random Testing: security sensitive workers



- applies to law enforcement officers and police department employees
- with access to confidential information
- that could jeopardize criminal investigations
- Example: an employee with knowledge of an upcoming raid on a drug lab could tip off the bad guys.

Joining the League Program



- City pays 20 cents per capita
- City Receives:
 - A'Test does all testing at no additional cost
 - Legal Defense and Inquiries (not otherwise covered by MLDP)
- Pass the model ordinance prepared by AML
 - -Decide on discipline
 - -Follow up testing
- Also see “10 Steps” Publication



Arkansas Municipal League

DO'S AND DON'TS OF DRUG TESTING AND BACKGROUND CHECKS

Jeff Sims, C-SAPA, C-SI
President, A'TEST Consultants

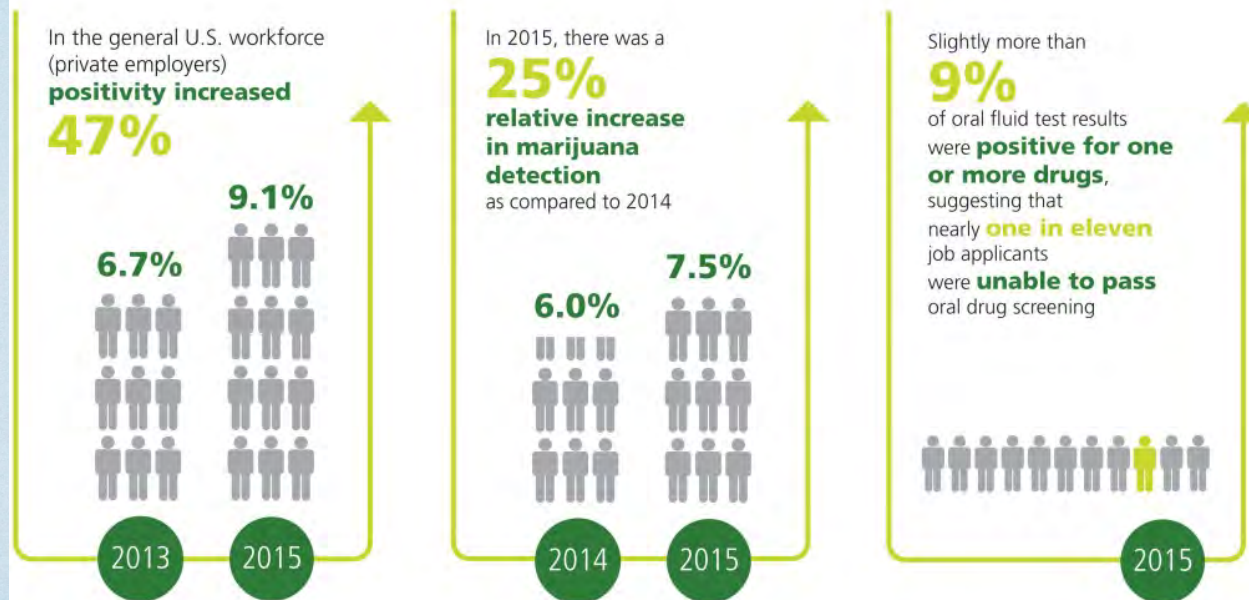
Topics for Today

A decorative graphic in the top right corner. It features a molecular structure with red, green, and blue spheres connected by white lines. To the right of this is a network diagram consisting of three circles (one grey, one orange, one olive green) connected by white lines.

- Annual Drug Testing Statistics
- Drug Testing Do's
- Drug Testing Don'ts
- Background Checks: Doing it Right
- 2016 Medical Marijuana Initiatives Overview
- Service Provided by a'TEST and Optional Elective Services

National Trends in Workplace Drug Testing

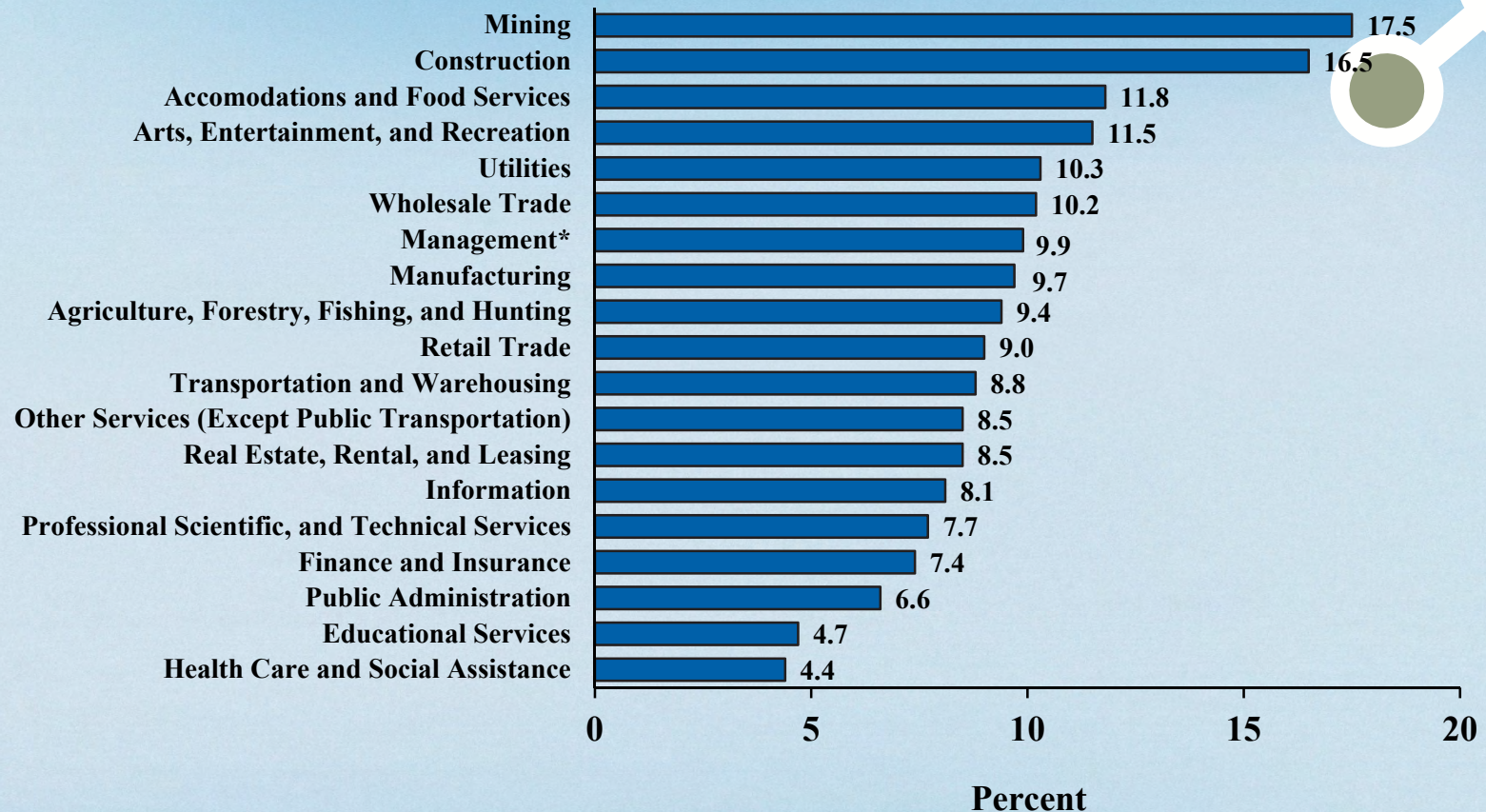
In Oral Fluid Testing, Overall Positivity Rate Surges over the Last Three Years



SOURCE: 2016 Quest Diagnostics Drug Testing Index™, based on nearly 11 million workforce drug test results.
www.QuestDiagnostics.com/DTI



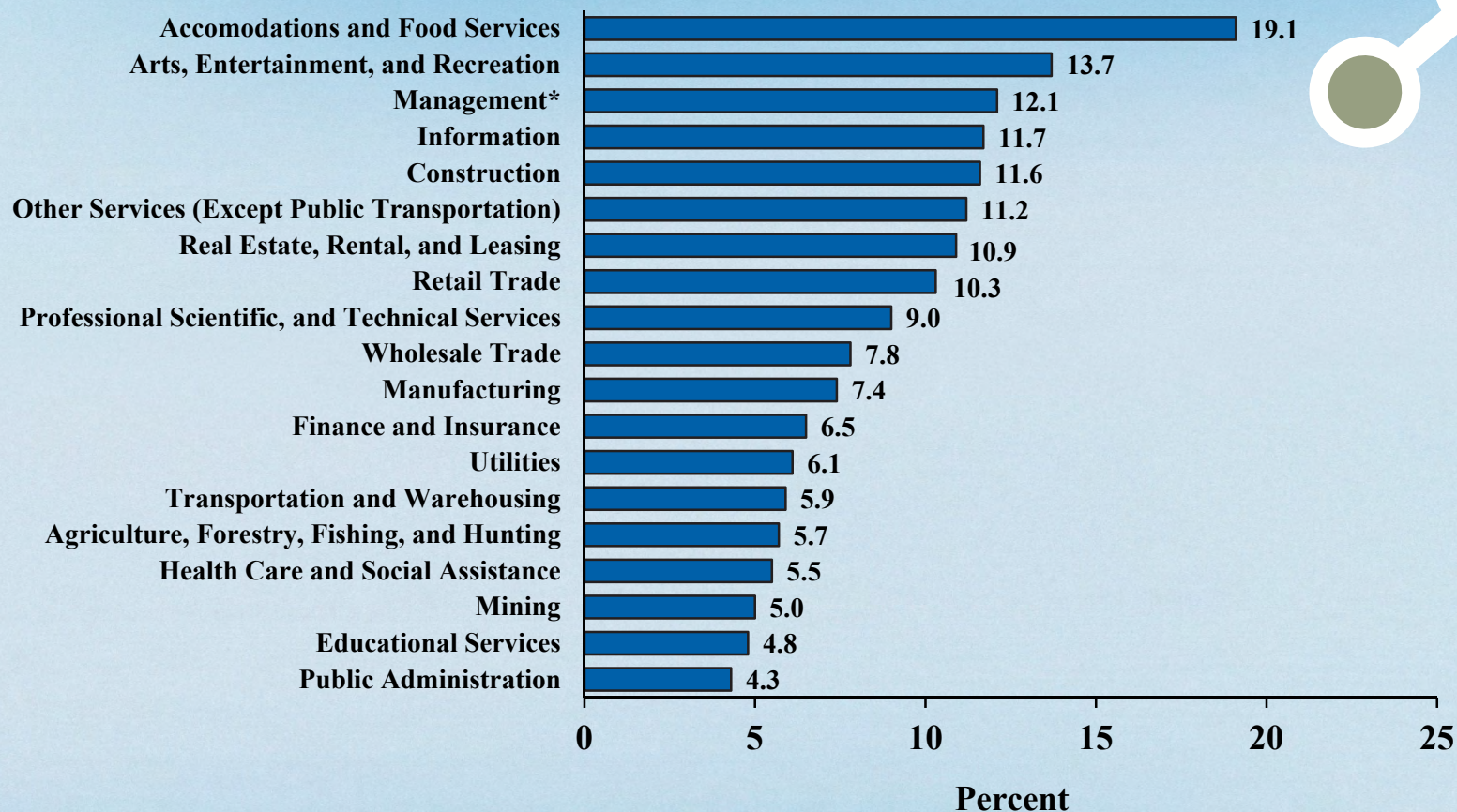
Figure 1. Past month heavy alcohol use among adults aged 18 to 64 employed full time, by industry category: combined 2008 to 2012



*The full title of this category is "Management of companies and enterprises, administration, support, waste management, and remediation services."

Source: SAMHSA, Center for Behavioral Health Statistics and Quality, National Surveys on Drug Use and Health (NSDUHs) 2008 to 2010 (revised March 2012) and 2011 to 2012.

Figure 2. Past month illicit drug use among adults aged 18 to 64 employed full time, by industry category: combined 2008 to 2012



*The full title of this category is "Management of companies and enterprises, administration, support, waste management, and remediation services."

Source: SAMHSA, Center for Behavioral Health Statistics and Quality, National Surveys on Drug Use and Health (NSDUHs) 2008 to 2010 (revised March 2012) and 2011 to 2012.

Drug Testing Do's

APPROPRIATE USE

- Follow your policy - Ordinance
- Pre Employment
- Reasonable cause
- Return to duty and follow up
- Post accident testing – DOT or non DOT definitions
- Random testing
- Educate

Drug Testing Don'ts

INAPPROPRIATE USE

- Putting someone in a safety sensitive position without a negative result
- Using a drug test for “retaliation” – New OSHA rule
- Testing when no test is required (DOT)
- Treating everyone the same - Alcohol
- Taking action on a “non negative” results prior to medical review
- Collecting your own specimen
- Perform additional test

Criminal Background Checks

MINIMUM REQUIREMENTS AS REQUIRED BY LAW

- As always, please consult with your legal counsel to make sure that you are following FCRA guidelines and reporting rules for your state and business.
- Report misdemeanor convictions for the past 7 years (use the conviction date when sentence does not include jail time; add the jail time to the conviction date to calculate 7 years when subject is sentenced to incarceration), felony convictions regardless of age
- No blanket release forms- MVR's
- Safe Harbor approval, U.S. State Department

Criminal Background Checks

CONTINUED

- In the following exception states report only felony and misdemeanor convictions for past 7 years (use the conviction date when sentence does not include jail time; add the jail time to the conviction date to calculate 7 years when subject is sentenced to incarceration): CA, KS, MA, MD, MT, NH, NM, NY, WA.
- Arkansas – can only report misdemeanors for 5 years and felonies for 10. Use jail time when calculating date; if no jail time, use disposition date

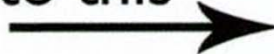
TODAY'S MARIJUANA

3% THC



from this

to this



Today's legal marijuana comes in many forms:

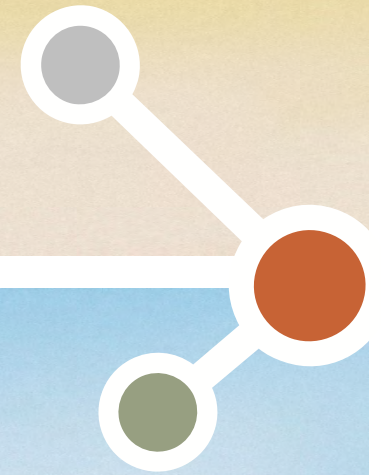
- in candy, in snacks
- in food for breakfast, lunch or dinner
- in drinks
- in waxes - inhaled - vaped - dabbed
- in drops - absorbed - inhaled
- in capsules - swallowed
- in plants - smoked

10% to 80% THC



Marijuana Harmless?
Think Again
MarijuanaHarmlessThinkAgain.org

Marijuana in the Workplace



- Arkansas employers must balance competing interests.

- ❖ Ensure workplace safety

- Employers have a duty under the Occupational Safety & Health Act (OSHA) to “maintain conditions or adopt practices reasonably necessary and appropriate to protect workers on the job.”

- ❖ Maintain employee productivity – Avoid anti-productive behaviors, such as:

- Inability to concentrate or remain focused
 - Increased drowsiness, fatigue, and lethargy
 - Decreased ability to accurately gauge lengths of time and distance
 - Impaired hearing, vision, motor skills, and short term memory
 - Apathetic, uncommitted attitude

- ❖ Protect employee rights


- ADA, Arkansas Civil Rights Act, nondiscrimination clause, lawful activity presumption, unemployment benefits, workers' compensation, health insurance, privacy laws (drug testing)

Marijuana Compliance Recommendations



1. Understand the laws on Medical Marijuana that are specific to Arkansas;
2. Adopt a pre-duty prescription medication and impairing effects substances safety policy with a third party drug testing lab;
3. Update employee job descriptions;
4. Adopt a fitness-for-duty policy;
5. Adopt an ADA compliant handbook policy on reasonable accommodations;
6. Train supervisors in reasonable-suspicion-signs-and-symptoms training;
7. Adopt a legally compliant Substance Abuse Policy and Forms which cover medical and recreational marijuana; and
8. Let employees know your stance on Medical and Recreational Marijuana use.

2016 Arkansas Medical Marijuana Initiatives



1. Understand the laws on Medical Marijuana that are specific to Arkansas

There are 2 ballot initiatives for voters to decide in November 2016.

- Arkansas Medical Cannabis Act ("Cannabis Act")
- Arkansas Medical Marijuana Amendment ("Marijuana Amendment")

Key similarities

- Legalizes the use of marijuana for qualifying medical conditions with a physician's written recommendation and a state issued license

Key differences

- Tax revenue, home growing, limits on patient card fees, organizations charged with implementation, limits on dispensaries and cultivation facilities

Overview of the U.S. DOT and Non DOT Programs

AML DRUG TESTING SERVICE COVERAGE PROVIDED

HHS Certified Laboratory Testing

This includes the specimen collection onsite at your facility by trained professionals, utilizing trained collection sites throughout the state, all shipping and handling, medical review of each test result (as required), and electronic reporting to an array of options.

Random Management

Updating covered employees subject to random selection, generating the appropriate minimum number per year, provide biannual statistics, issuing random notifications, and scheduling onsite appointments for testing.

Consulting and Training

Experts are available for regulatory guidance and policy advice. Several training services are available including mandatory the mandatory one hour of drug and one hour of alcohol recognition training as required by U.S. DOT.



Optional Services

IT DOESN'T STOP WITH DRUG TESTING

- Driver Qualification Files
- Background Checks
- MVR's



Questions?

Jeff Sims, C-SAPA

Jeff@atestinc.com

501-376-9776



Social Media in Small Town Government

What to know for public employers and employees.

Employees Rights

- There are several things to keep in mind when reviewing an employee's use of social media:
 - 1) All the time be aware of the First Amendment.
 - 2) When city equipment is involved think about the Fourth Amendment.
 - 3) Don't run afoul of various federal privacy laws.
 - 4) Get a policy!

First Amendment Basics

- The First Amendment declares that “Congress shall make no law . . . abridging the freedom of speech.”
- First Amendment does not prohibit the government from regulating speech, and historically, the First Amendment did not provide much protection for employees.
- As employers you must will have to weigh when your City’s interest in an orderly work place with employees’ First Amendment rights to say things you don’t like.

First Amendment – Rules to Know

- The Supreme Court has said public employers must balance:
- “the interests of the [employee], as a citizen, in commenting upon matters of public concern and
- the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

Factors to Keep in Mind

- The Court listed several factors to consider when engaging in the balancing test, such as whether the statements were directed toward a person with whom the speaker would “normally be in contact in the course of his daily 6 work”;
- whether maintaining “discipline by immediate supervisors or harmony among coworkers” would be threatened by the speech;
- whether working relationships requiring “personal loyalty and confidence” were at issue; and
- whether the employee's action “impeded . . . the . . . proper performance of his daily duties . . . or . . . interfered with the regular operation of the schools generally.”

More Rules - Matters of Public Concern

- Public employees have rights as a citizen, when the employee's speech as a citizen addresses a matter of private concern rather than a matter of **“political, social, or other concern to the community,”** the employee has no First Amendment protection.
- Whether speech addresses a matter of public concern is determined by considering the “content, form, and context of a given statement.”

Matter of Public Concern

- The First Amendment is less clear than other areas of Employment Law.
- When an employee speaks pursuant to his official duties, even if the speech is on a matter of public concern, the employee has no First Amendment protection.
- Generally, speech about the use of public funds touches upon a matter of public concern.
 - *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 396 (8th Cir. 1995)

Law Summary

- These are the basic rules which determine if you can limit speech, rather its in a memo or a Facebook post.
- Courts have noted that Facebook, and even “likes” on Facebook can be speech under the 1st Amendment.
- First, is the speech on a matter of public concern?
- Next, is the speech as an employee (unprotected) or as a citizen (protected)?

Scenario

- A victim coordinator for the state “likes” a Facebook post about police shooting. The status says “The victim did nothing wrong, the police aren’t trained and murdered my cousin.”
- Is the “like” protected?

Court's Conclusion

- Maybe Not.
- “The Court concludes nonetheless that the interests of defendants prevail in the Pickering balance owing to the potential adverse effect of Ms. Vincent's “like” post on the efficient discharge of the law enforcement responsibilities of the County Attorney's office.”
- *Vincent v. Story Cty., Iowa*, No. 4:12-CV-00157-RAW, 2014 WL 10007079, at *16 (S.D. Iowa Jan. 14, 2014)

Fourth Amendment – Government Equipment

- The Fourth Amendment provides that the “right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...”
- It also comes into play with employment and not just arrests!

Searches in Employment

- In instructs that courts should first determine whether, in light of the “operational realities of the workplace,” a public employee has a reasonable expectation of privacy. If not, then the Fourth Amendment would not apply.
- On a very specific set of facts following the U.S. Supreme Court held that a police officer did not have a reasonable expectation of privacy when sending messages on a government issued pager. *City of Ontario v. Quon*, 130 S.Ct.2619 (2010).
- Thus, you likely can search through messages on government owned property, but not personal property without violating the 4th amendment.

Searches in Employment

- Be careful, there isn't much guidance on this issue!
- The advisable route is to have a policy making it clear to employees that they do not have an expectation of privacy when using publicly issued equipment such as computers and cell phones.

Other Laws to Know - Stored Communications Act

- Another area of the law for municipal employers to be aware of as it relates to employees and social media, is the Stored Communications Act. 18 U.S.C. §§2701-2711.
- It prohibits the unauthorized and intentional access of stored electronic communications, including unauthorized access to third party email service and unauthorized viewing of a password protected website.

Stored Communications Act

- An exception to this prohibition is where access is authorized by the provider or by the user of the website.
- The fact that the employee uses an employer-provided computer, in and of itself, does not amount to consent or authorization.
- As such, it is advisable for public employers to adopt a clear policy providing that personal business on public equipment is prohibited and that activity on public equipment will be monitored.

Fair Credit Reporting Act

- Municipal employees seeking to monitor employees also should be aware of the Fair Credit Reporting Act.
- It imposes notice and disclosure requirements on employers who seek consumer reports from third party agencies that assemble information on a person's "credit worthiness ...character, general reputation, personal characteristics or mode of living." 15U.S.C. §1681a.
- Websites that compile personal information about individuals from public records and social media outlets may fall within the Fair Credit Reporting Act's coverage.

Employer's use of Social Media

- It is my opinion, with some support, that City websites, and City Facebook pages can be heavily regulated because they will qualify as “government speech.”
-
- “For example, if the School Board posted a message about school closings for inclement weather on Facebook or Twitter, we would have little difficulty classifying the message as government speech, even though social media is a relatively new phenomenon.” *Mech v. Sch. Bd. of Palm Beach Cty., Fla.*, 806 F.3d 1070, 1076 (11th Cir. 2015), cert. denied, (U.S. Oct. 3, 2016).

Government Social Media

Remember, you can limit who can use and post on government media accounts.

You should develop a policy stating a review process for these accounts, or designating someone in charge of the posts.

Although, keep in mind messages on these accounts are still likely subject to FOIA under Arkansas law!

Government Speech

- You need a policy and hopefully it is clear that you need to consult with a City Attorney, or other outside counsel to draft a social media policy that protects your City.
- The totality of the circumstances surrounding the social media communication must be carefully evaluated before deciding on any action under the policy.



Questions?

Model Personnel File Folder



This File, Your City Attorney and What Works for You

All cities should have a file where important personnel information about each employee is kept. Individual employee personnel files can assist cities in organizing and storing proper personnel information. However, your personnel file should never be considered a substitute for the advice of your city attorney. The *Model Personnel File* is for guidance and reference only. Simply copying the contents of this *Model Personnel File* without determining the specific applicability to your city could pose legal problems. Remember, the *Model Personnel File* is for information and education. Each city is encouraged to adopt it to its own individual needs.

Cities making significant decisions concerning legal issues and questions in employment, labor or personnel law should consult their city attorney.

Employers should be aware that the American's With Disabilities Act (ADA) requires that all information obtained concerning the medical condition of an employee must be collected and maintained on separate forms. Access to the information is permitted only: (See attached form, Employee or Applicant Confirmation of Request for Reasonable Accommodation)

- To supervisors who need to know about necessary restrictions on the employee or duties of an employee and any necessary accommodations;
 - To designated safety personnel, if the employee has a disability that might require emergency treatment or if any specific procedures are needed in case of fire or an evacuation;
 - To government officials investigating compliance with the ADA, or
 - To comply with state workers' compensation laws
-

Following is a Department of Labor's Appendix A or Reasonable Accommodation Request Form.

U.S. Department of Labor
Office of the Assistant Secretary for Administration and Management
Civil Rights Center

Appendix A
Employee or Applicant
Confirmation of request for
REASONABLE ACCOMMODATION

Executive Order 13164 dated July 26, 2000, requires that agencies track the processing of requests for reasonable accommodation and maintain the confidentiality of medical information in accordance with applicable law and regulations.

SECTION I.

1. Name: _____
Employee/Applicant (circle one)
2. Home Address: _____
3. Home Telephone: _____ 4. Work Telephone: _____
5. Agency and Agency component: _____
6. The title, occupational series and grade of the position for which reasonable accommodation is requested (vacancy number for applicant only):

7. Date of the request for reasonable accommodation: _____

SECTION II.

ACCOMMODATION REQUESTED

(Be as specific as possible, e.g., adaptive equipment, reader, interpreter, etc., or attach a description.)

SECTION III.

REASON FOR REQUEST

SECTION IV.

Signature _____ Date _____

SECTION I

This section documents the city's selection process and important separation records when that event occurs. Documents you should place in this file include, but are not limited to:

- ✓ The Job Announcement Notice with Proof of Publication
- ✓ The Job Description
- ✓ Letters of Reference (if available)
- ✓ Application for Employment
- ✓ Offer of Employment and Acceptance Letter(s)
- ✓ Employee Statement
- ✓ Acknowledgment of Receipt of Handbook
- ✓ Employee Separation Clearance Checklist
- ✓ Voluntary Resignation Letter
- ✓ Inventory of City Property

Federal law requires that certain payroll and personnel records be kept for three (3) years following the last date of entry. A reasonable file retention practice for the personnel file of separated employees is four (4) years. However, it is also a good practice to retain basic employee data such as B.E.O. and key employee data on a permanent basis.

Cities would be wise to consult with their city attorney and also review state statutes when questions concerning file retention arise.

SAMPLE

Job Opportunity Notice

(This form may be used to advertise vacancies.)

DATE POSTED: _____

JOB TITLE: _____ SALARY LEVEL: _____

JOB LOCATION and/or CITY DEPT.: _____

DESCRIPTION / REQUIREMENTS: _____

APPLICANT MUST MEET THE FOLLOWING MINIMUM REQUIREMENTS:

If you wish to apply for _____ you may pick up an application at
(job description)
_____ or provide us with a resumé.

The City of _____ is an Equal Opportunity Employer. The City of
_____ does not discriminate on the basis of race, color, religion, sex,
national origin, marital or veteran status, political status, disability status or other legally
protected status.

SAMPLE

Application for Employment

Our policy is to comply with all applicable state and federal laws prohibiting discrimination in employment based on race, age, religion, national origin, disability status, or other legally protected status.

Name: _____ Date: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Cell: _____

Are you 18 years old or older? _____ Yes _____ No

Have you ever been convicted of a felony? _____ Yes _____ No
(Conviction will not necessarily disqualify an applicant for employment.) If yes, describe conditions: _____

Do you have the legal right to work and remain in the United States? _____ Yes _____ No
If Yes, can you produce evidence of U.S. Citizenship or legal work status within three (3) days? _____ Yes _____ No

Can you perform the duties of the job for which you are applying? _____ Yes _____ No

If No, will you need any accommodations? Explain: _____

** If additional space is needed please attach additional pages.

Education	Name and Location of School	Year Graduated	Major	Diploma/Degree
High School				
College/Univ.				
College/Univ.				
Other Training Education, Including Police/Fire Academy				

POSITIONS APPLIED FOR:

1) _____

2) _____

WORK HISTORY

Most Recent Employer:	Address:	Telephone:
Date Started:	Starting Salary: \$ Per:	Starting Position:
Date Left:	Salary on Leaving: \$ Per:	Position on Leaving:
Name of Supervisor:	Title of Supervisor:	
Description of Duties:	Reason for Leaving:	

Most Recent Employer:	Address:	Telephone:
Date Started:	Starting Salary: \$ Per:	Starting Position:
Date Left:	Salary on Leaving: \$ Per:	Position on Leaving:
Name of Supervisor:	Title of Supervisor:	
Description of Duties:	Reason for Leaving:	

Most Recent Employer:		Address:	Telephone:
Date Started:	Starting Salary: \$ Per:	Starting Position:	
Date Left:	Salary on Leaving: \$ Per:	Position on Leaving:	
Name of Supervisor:		Title of Supervisor:	
Description of Duties:		Reason for Leaving:	

Do you have a current commercial driver's license? _____

In addition to your work history, what other experiences, skills or qualifications would especially qualify you for work with the City of _____? Specify office equipment, machines, computers you can operate:

Give the names and addresses of three (3) persons, other than relatives, who have knowledge of your character, experience or ability:

NAME	ADDRESS/PHONE NO.	OCCUPATION

SAMPLE OFFER/ACCEPTANCE LETTER

Dear _____
(employee name)

Date: _____
(month/day/year)

This will confirm our oral conversation regarding an offer of employment. We are very pleased that you have decided to join our city in the position of _____ (job title), starting _____ (month/day/year).

The position is located in _____ (department and city name) and will pay \$ _____ per _____ Month _____ Week _____ Hour (check one). You will report to _____.*

All of us here at the City of _____ expect a smooth transition and look forward to the contribution which you can make to our mutual success. Since there can be no guarantees however, it is understood that your employment is at-will. That is, the City of _____ may terminate your employment at any time with or without cause, and you may do the same.

I look forward to seeing you in my office at _____ a.m./p.m. on your first day to complete the necessary payroll procedures and personnel forms. We will be pleased to describe in detail our benefits to you and answer any other questions you may have.

Again, we are happy that you will be joining us. It will be a pleasure having you on the team.

Sincerely yours,

Mayor, H.R. Manager or City Manager

Please acknowledge below your acceptance of this offer and return a copy to me for our records. The other copy may be retained for your files.

Accepted: _____
(new employee's signature)

Date: _____
(month/day/year)

NOTE: Avoid quoting salaries in annual amounts, such figures have been cited as an implied contract for a full year's employment.

* If you intend to require a pre-employment physical examination, please see and discuss 42 U.S.C. § 12116(d) with your city attorney

EMPLOYEE STATEMENT

I understand that this application is not intended to create any contractual or other legal rights. It does not alter the at-will employment status nor does it create an employment contract.

I certify that I have made no willful misrepresentations in this application, nor have I withheld information in my statements and answers to questions. I am aware that the information given by me in my application will be investigated, with my full permission, and that any misrepresentations may cause my application to be rejected or my employment to be terminated.

I authorize former employers to release to the City of _____ or its authorized representative any and all employment records and other information it may have about my employment. I understand that the information will be used for the purpose of evaluating my application for employment with the city. A photocopy of this authorization shall be valid as the original.

I understand that my appointment will be at the discretion of the department head, subject to the approval of the (chief administrative officer) and that this application is the property of the City and will become a part of my file if I am accepted for employment.

Signature of Applicant: _____

Date of Signature: _____

SAMPLE RECEIPT FOR EMPLOYEE HANDBOOK

I have received a copy of the City of _____ employee handbook dated _____ (month/year).

The handbook contains policies, practices and regulations which I have read, understand and agree to comply with during my employment with the City of _____. After reading the policies, practices and regulations, I understand that I am an at-will employee, and nothing in the handbook alters that status.

I further understand that I will be responsible for complying with future changes in such policies, practices and regulations communicated to employees from time to time, whether or not I have signed an acknowledgement of such changes.

Employee Signature

Date

City Representative

Date

Please keep a copy of the Receipt for Employee Handbook for your records.

SAMPLE EMPLOYEE SEPARATION CLEARANCE CHECKLIST

Employee _____ Last Day Worked _____

Department _____ Social Security # ____ - ____ - ____

- ☐ Expense Account
- ☐ Advance Loans
- ☐ Continuation of Insurance
- ☐ Final Change of Status Notice
- ☐ Insurance Conversion Privilege
- ☐ Accrued Vacation Pay
- ☐ Retirement Benefits
- ☐ Final Paycheck
- ☐ Address Verification
- ☐ Letter of Resignation
- ☐ Notice of Termination**
- ☐ Other (specify) _____

Personnel Department Clearance: _____
Personnel Manager _____ Date _____

Supervisor Department Clearance: _____
Supervisor _____ Date _____

**** Contact your city attorney or legal counsel prior to drafting any Notice of Termination.**

SAMPLE VOLUNTARY RESIGNATION

Employee Name _____ Department _____

I voluntary resign my employment with the City of _____

Effective: _____
(month/day/year)

My reasons for leaving are:

Forwarding Address:

Employee Signature

Date

Supervisor Signature

Date

Management Signature

Date

SAMPLE INVENTORY OF CITY PROPERTY

Property	Date Received	Initials	Date Returned	Initials
Keys				
Manual				
Credit Cards				
Tools				
Safety Equipment				
Library Material				
Computer Equipment				
City Vehicle				
Employee Identification				
Return of Checklist Completed				
Other:				
Other:				
Other:				
Other:				
Other:				

_____ (Employee Name) has turned in all city property assigned to him/her and has received his/her final paycheck.

Employee Signature

Date

Supervisor Signature

Date

SECTION II

This section should include documents related to employee development such as job performance, attendance records and correspondence. Documents you should place in this file should include:

- **Employee Performance Review**
- **Disciplinary / Employment Action Notice**
- **Promotion Documents**
- **Records of Training Courses Completed**
- **Attendance Records**
- **Leave Request Forms**
- **Correspondence**
- **Disciplinary Actions and Commendations**
- **Significant Achievements**

Records and notes pertaining to disciplinary or legal investigations that are in progress should NOT be kept in this file. It is important to review this section regularly and to discard materials that are no longer relevant. Each of these documents should be copied to the employee.

- ** Allowing supervisor access to employee information that is not directly job related can potentially expose the city to complaints of discrimination.
- ** Any documents containing medical information, such as sick leave forms, and requests for accommodations should be kept in a separate medical folder.

Following is a sample *Employee Performance Review* and sample *Disciplinary Notice* form. The AML offers this as an example, not an endorsement.

- ** Please note that Employee Performance Reviews are not required by law. Should you adopt an evaluation policy then it should be administered and applied honestly and objectively.
- ** Should your city decide to adopt these forms, the need for accurate and meaningful critiques cannot be stressed enough.

SAMPLE EMPLOYEE PERFORMANCE REVIEW

(Example of Goal-Oriented Approach)

Employee _____ Department _____

Title _____ Date Began this Position _____

Hire Date _____ Appraisal Period from _____ to _____

Appraising Supervisor _____ Date _____

Reason for Appraisal ☐ Regular ☐ Special _____
(transfer, promotion, etc)

- 1) Job Description: Attach Job Description and note recommended modifications, if any.
- 2) Results Achieved (Refer to goals and objectives established at last performance review):
To what extent are goals and objectives being met? Discuss individually. Add attachment if necessary.

- 3) Summary of Performance Rating: Supervisor—Check sentence that summarizes review.
 - ☐ Results achieved were excellent and continually exceeded overall requirements in all major areas.
 - ☐ Results achieved at times exceeded overall requirements in most major areas.
 - ☐ Results achieved met overall requirements.
 - ☐ Results achieved met most requirements but will need to improve in some areas.
 - ☐ Results achieved failed to meet requirements in one or more major areas.

Comments: _____

EMPLOYEE PERFORMANCE REVIEW (continued)

- 4) Goals and Objectives Planned for Next Review Period, Ending _____
List key job performance goals and objectives, with work plan and completion dates as appropriate. If more space is needed, attach additional sheet(s).

- 5) Employee Comments: Each individual evaluated is encouraged to add comments to this review. If more space is needed, attach additional sheet(s).

Employee Signature _____ Date _____

Supervisor Signature _____ Date _____

Employee signature merely indicates receipt of appraisal and not necessarily agreement.

Management Signature _____ Date _____

**** Distribution:** One copy to the employee and supervisor; the original remains in the personnel file.

SAMPLE DISCIPLINARY/EMPLOYMENT ACTION NOTICE

Employee _____ Date _____

Department _____ Supervisor _____

Type of Action: ☐ Training Meeting
☐ Verbal Reprimand
☐ Written Reprimand
☐ Suspension
☐ Other (explanation required) _____

1) Statement of the Problem / Reason for Action (brief description including violation of rules, policies, standards, practices, need for training or unsatisfactory performance):

2) Summary of Corrective Action to be Taken (include dates and/or employee goals):

3) Employee comments (continue on reverse side if necessary): _____

Employee Signature _____ Date _____

Supervisor Signature _____ Date _____

Management Approval (if necessary) _____ Date _____

SECTION III

This section should contain selected employee data, including emergency information and information necessary for enrollment. Information such as:

- Health Insurance Information
 - Employee Pay Status Records
 - Insurance Beneficiary Information
 - Benefit Plan Enrollment
-

Family Medical Leave Act (if applicable)

- 1) Notice of Eligibility and Rights and Responsibilities
- 2) Certification of Health Care Provider for Employee's Serious Health Condition
- 3) Certification of Health Care Provider for Family Member's Serious Health Condition
- 4) Requests for Reasonable Accommodation
- 5) Insurance Premium Recovery Form

REMEMBER: Any documents containing medical information should be kept in a separate medical file.

ARKANSAS MUNICIPAL LEAGUE
(SAMPLE)
INSURANCE PREMIUM RECOVERY AUTHORIZATION FORM

To: _____ (City Clerk or City Officer)

I certify by my signature that I have read and understand the following policy:

I acknowledge the city's legal right to recover the cost of any premium paid by it to maintain my coverage in group health benefits during any period of unpaid leave under the following conditions:

- 1) I fail to return from leave at the expiration of the leave to which I am entitled; and
- 2) The reason I fail to return to work is not one of the following:
 - a) The continuation, recurrence, or onset of a serious health condition that entitles me to leave to care for a child, parent or spouse with a serious health condition, or if I am unable to perform the functions of my position due to my own serious health condition; or;
 - b) Other conditions beyond my control prevent me from returning.

Date: _____ Name (Print): _____

Employee Number: _____ Name (Sign): _____

INSURANCE PREMIUM REIMBURSEMENT AGREEMENT

I certify by my signature that I have read and agree to do the following:

If I fail to return from leave, for any reason other than 2(a) or 2(b) above, I agree to coordinate with the City to develop a mutually acceptable schedule to reimburse the City for the cost of any premium paid by it to maintain my coverage in group health benefits during any period of unpaid leave taken by me.

Date: _____ Name (Print): _____

Employee Number: _____ Name (Sign): _____

1 copy to employee; original in personnel file

SAMPLE IMPORTANT DATA REFERENCE

EMPLOYEE DATA

Employee Name		Social Security #		Hire Date		F/T <input type="checkbox"/> P/T <input type="checkbox"/> Regular <input type="checkbox"/> Temp <input type="checkbox"/>	
FLSA Status Exempt <input type="checkbox"/> Non-Exempt <input type="checkbox"/>		Department			Extension #		
Birthdate	Sex	Payroll #	Marital Status	Spouse Name		No. of Dependents	
Address:							
City			State	Zip	Phone		
In Emergency, Notify:		Relationship		Address		Phone	

INSURANCE COVERAGE RECORD

Plan	Date Eligible	Elected Coverage Y/N	Dependant Coverage Y/N	Carrier
Health				
Dental				
Life				

Employee Separation Date: _____

SAMPLE EMPLOYEE PAY STATUS RECORD

Employee Name

Social Security #

FLSA ☐ Ex.* ☐ N-Ex. ☐

[illegible]

* Exempt or Non-Exempt. To determine the status use the Department of Labor Tests as provided on the following pages.

**Following is a Notice of Eligibility and Rights and Responsibilities
(Family and Medical Leave Act)**

.** This form should be completed by the employer and delivered to the employee to notify him/her that he/she has or has not met the eligibility requirements for taking FMLA leave.

Notice of Eligibility and Rights & Responsibilities
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



OMB Control Number: 1235-0003
Expires: 5/31/2018

In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c).

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave beginning on _____ for:

- _____ The birth of a child, or placement of a child with you for adoption or foster care;
- _____ Your own serious health condition;
- _____ Because you are needed to care for your _____ spouse; _____ child; _____ parent due to his/her serious health condition.
- _____ Because of a qualifying exigency arising out of the fact that your _____ spouse; _____ son or daughter; _____ parent is on covered active duty or call to covered active duty status with the Armed Forces.
- _____ Because you are the _____ spouse; _____ son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

- _____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)
- _____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):
- _____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately _____ months towards this requirement.
- _____ You have not met the FMLA's hours of service requirement.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the
FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

- _____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request _____ is/ _____ is not enclosed.
- _____ Sufficient documentation to establish the required relationship between you and your family member.
- _____ Other information needed (such as documentation for military family leave): _____

_____ No additional information requested
Page 1

CONTINUED ON NEXT PAGE

Form WH-381 Revised February 2013

If your leave does qualify as FMLA leave you will have the following responsibilities while on FMLA leave (only checked blanks apply):

_____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

_____ You will be required to use your available paid _____ sick, _____ vacation, and/or _____ other leave during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

_____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We _____ have/_____ have not determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

_____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____.
(Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following rights while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:
 - _____ the calendar year (January – December).
 - _____ a fixed leave year based on _____.
 - _____ the 12-month period measured forward from the date of your first FMLA leave usage.
 - _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.
- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have _____ sick, _____ vacation, and/or _____ other leave run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

_____ For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

_____ Applicable conditions for use of paid leave: _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____ at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

**Following is a Sample of the Certification of Health Care Provider
for Employee's Serious Health Condition (Family and Medical Leave Act)**

****** The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertification, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies. If you choose to use this form, please complete Section I of this form before giving the form to your employee.

Certification of Health Care Provider for
Family Member's Serious Health Condition
(Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division



DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

OMB Control Number: 1235-0003

Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care: _____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth: _____

Describe care you will provide to your family member and estimate leave needed to provide care:

Employee Signature _____ Date _____

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e). Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____) _____ Fax: (_____) _____

PART A. MEDICAL FACTS

1. Approximate date condition commenced: _____

Probable duration of condition: _____

Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?

☐ No ☐ Yes. If so, dates of admission: _____

Date(s) you treated the patient for condition: _____

Was medication, other than over-the-counter medication, prescribed? ☐ No ☐ Yes.

Will the patient need to have treatment visits at least twice per year due to the condition? ☐ No ☐ Yes

Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?

☐ No ☐ Yes. If so, state the nature of such treatments and expected duration of treatment:

2. Is the medical condition pregnancy? ☐ No ☐ Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ☐ No ☐ Yes.

Estimate the beginning and ending dates for the period of incapacity: _____

During this time, will the patient need care? ☐ No ☐ Yes.

Explain the care needed by the patient and why such care is medically necessary:

5. Will the patient require follow-up treatments, including any time for recovery? ☐ No ☐ Yes.

Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

Explain the care needed by the patient, and why such care is medically necessary: _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? ☐ No ☐ Yes.

Estimate the hours the patient needs care on an intermittent basis, if any:

_____ hour(s) per day; _____ days per week from _____ through _____

Explain the care needed by the patient, and why such care is medically necessary:

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____ No ____ Yes.

Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency: ____ times per ____ week(s) ____ month(s)

Duration: ____ hours or ____ day(s) per episode

Does the patient need care during these flare-ups? ____ No ____ Yes.

Explain the care needed by the patient, and why such care is medically necessary: _____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER

Signature of Health Care Provider

Date

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.

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Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from [minimum wage](#) and [overtime pay](#) provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, [29 CFR Part 541](#).

The [FLSA](#) requires that most employees in the United States be paid at least the [federal minimum wage](#) for all hours worked and [overtime pay](#) at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both [minimum wage](#) and [overtime pay](#) for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than \$455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for [executive](#), [administrative](#), [professional](#), [computer](#) and [outside sales](#) employees, and for more information on the [salary basis](#) requirement.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a [salary](#) basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemptions

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a [salary](#) or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than \$455 per week **or**, if compensated on an hourly basis, at a rate not less than \$27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
 - 1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
 - 2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - 3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
 - 4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$100,000 or more (which must include at least \$455 per week paid on a salary or fee basis) are exempt from the

FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to [minimum wage](#) and [overtime](#) premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <http://www.wagehour.dol.gov> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
[Contact Us](#)