Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits

Arkansas Municipal League

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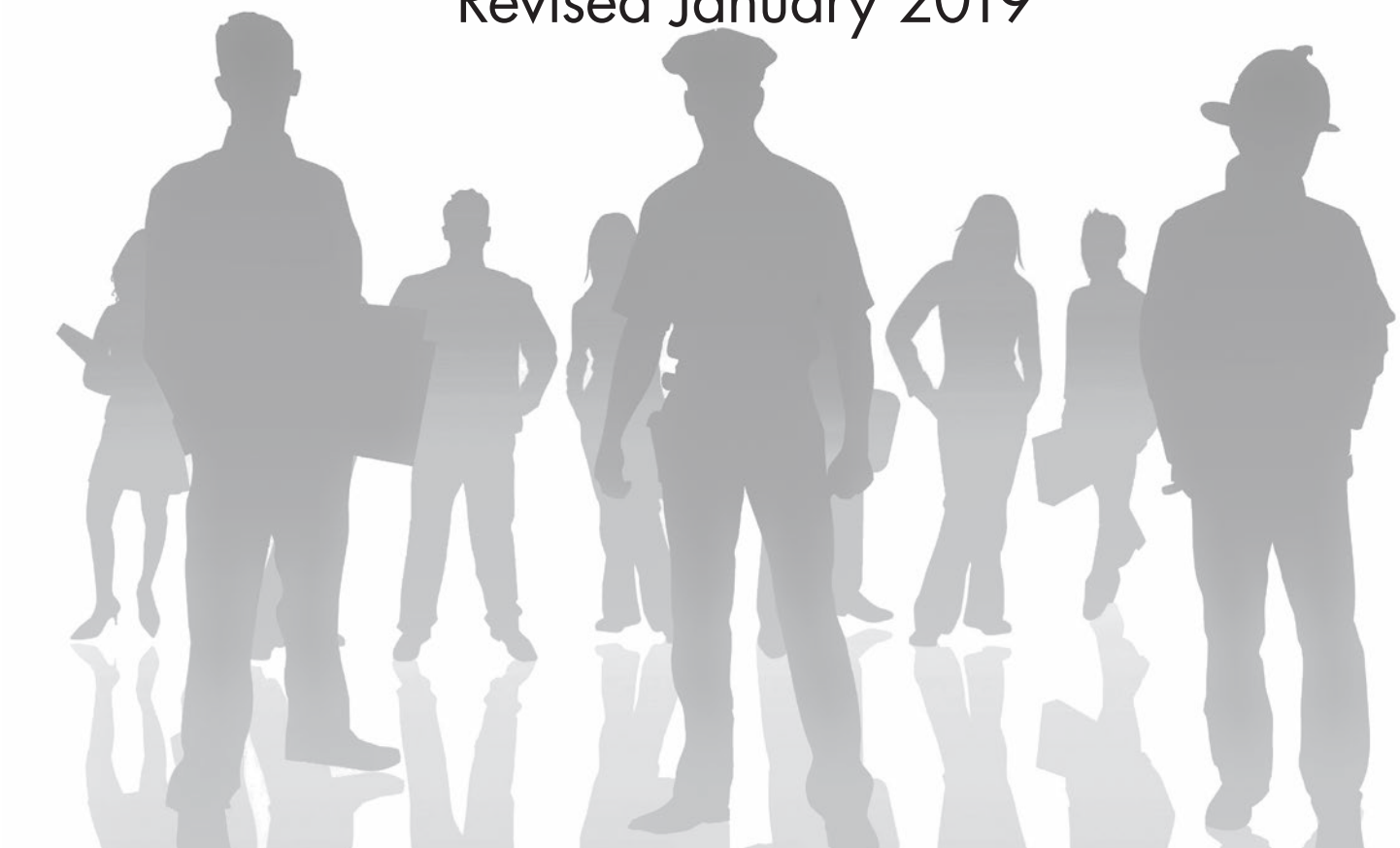

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Introduction

Today's municipal officials must know more about personnel law than ever before. New civil rights laws, regulations, and court decisions force municipal officials to remain alert to their legal responsibilities.

Understanding Personnel Law and Suggestions for Avoiding Lawsuits is designed to help you as a municipal official to better understand and effectively deal with personnel issues.

Understanding Personnel Law and Suggestions for Avoiding Lawsuits is not intended to be a substitute for continuous long-term legal advice. As with all legal matters, municipal officials facing important personnel decisions must consult with their city attorneys. Neither this document, nor any other singular document, can clarify the muddy waters of public labor law. Your city should commit the financial resources to continuously train full-time city employees in these areas and fully remunerate your city attorney to ensure your city's compliance with the law. Without such commitment no series of forms, guidelines or suggested policies will ever be enough to supplant an informed and educated staff combined with effective legal counsel.

Disclaimer

The information contained in this book is not intended as legal advice for any specific case. Readers are responsible for consulting with legal counsel when actions arise concerning the application of the law to a particular set of facts. This book is intended solely for educational and informational purposes.

Terminology Commonly Used in Personnel Law

Administrative Remedy—Non-judicial remedy provided by an agency, board, commission, or the like. In most instances, all administrative remedies must have been exhausted before a court will take jurisdiction of a case. For example, U.S. District Courts will not consider a claim of employment discrimination arising under Title VII until all proceedings before the Equal Employment Opportunity Commission (EEOC) have been exhausted.

Adverse Impact—Used to describe a substantially different rate of selection in hiring, promotion, transfer, training, or other employment decision that works to the disadvantage of members of a protected class.

Affirmative Action Plan (AAP)—Written employment program or plan required by federal statutes and regulations. Such plans are to eliminate discrimination and to create systems and procedures to prevent further discrimination. They apply to hiring, training and promotion policies that consider race, color, sex, creed, national origin, and handicap.

At-Will Employment—A traditional American policy stating that the employer may terminate an employee for any reason or for no reason at all and the employee may leave employment for any reason or for no reason at all. This principle is honored in Arkansas law.

Bona Fide Occupational Qualification (BFOQ)—"Bona fide" means genuine, honest, or in good faith. The employer who regards sex, age, religion, or other protected characteristics as a bona fide qualification for a job must demonstrate that the BFOQ is reasonably necessary to the normal operation of the enterprise. For example, being female is a BFOQ for a jail attendant for female prisoners. Sex is not a BFOQ, however, for heavy physical work, since some women are physically strong. Customer or employer preference may not be considered in determining BFOQ. There is no race BFOQ.

Business Necessity—Policies or practices essential for the safety or efficiency of an organization. If an employer's practices or policies tend to result in a disparate impact affecting members of a protected class, then the employer must demonstrate that these practices or policies are a compelling (i.e., essential for safety or efficiency) business necessity. The employer may also be required to show that no alternative, non-discriminatory practice with a lesser impact can achieve the same required business results.

Civil Case or Civil Action—A lawsuit brought by private parties to enforce or protect private rights (such as medical malpractice, divorce or breach of employment contract). A civil suit carries a lesser burden of proof than does a criminal case, in which the state or federal government charges a defendant with a public wrong or violation of criminal law, such as murder.

Class Action—A lawsuit in which one or more persons sue, or are sued, as representatives of a class. The lawsuit is brought on behalf of, or names as defendants, others in similar circumstances. Members of the class must be so numerous that it is impractical to bring them all before the court. Named representatives must fairly and adequately represent the members of the class.

Common Law—The body of principles and rules of action, relating to the government and security of persons and property, which come solely from traditional usages and customs. This "unwritten law" is recognized, affirmed and enforced by court decisions. Common law in the United States was inherited from England and enlarged and changed by our courts. The rule, "one is presumed innocent unless proven guilty beyond a reasonable doubt," is from the common law, as is the "employment-at-will doctrine."

Constructive Discharge—An end of employment caused by actions of an employer, or employer's representative, which make an employee's job so unbearable or onerous that the employee, acting prudently, has no other reasonable choice but to quit. Demotions involving a substantial reduction in compensation and status have been ruled in some jurisdictions to be constructive discharge.

Contract—An agreement for an exchange of consideration between two or more persons or entities which creates an obligation to do or not to do a particular thing. Contracts are the body of law that regulates the agreement process in business. Some kinds of contracts are:

> **Implied Contract**—An agreement that is implied by the acts or conduct of the parties, and not evidenced by express agreement. The circumstances surrounding the transaction imply that the parties understood a contract or agreement existed. In some states, courts have held that a long period of employment combined with the absence of employer criticism of employee behavior or performance gives rise to an implied contract of continued or permanent employment.
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> **Written Contract**—A contact which has the major terms and conditions set down in writing. An example is a collective bargaining agreement between a union and an employer. In many states, the employee handbook is considered a written contract.
>
> **Oral Contract**—A contract that depends on spoken words for a majority of the agreement. It can be a written contract that has later been orally amended. Offer and acceptance of employment in an interview is an example of an oral contract for which the employer can be held responsible. Similarly, representations by a manager that contradict the employee handbook may amount to the oral modification of a written contract.

Defamation—Holding up of a person to ridicule, scorn or contempt in the community; that which tends to injure the reputation. Defamation is a civil wrong and includes both libel and slander, and if the defamation occurs during the termination proceedings of an employee, it can also serve as the basis for a Fourteenth Amendment liberty violation.

> **Libel**—Defamation by means of print, writing, pictures, or signs; publication that is injurious to the reputation of another.
>
> **Slander**—The speaking of false, malicious and defamatory words harming the reputation, trade, business, or means of livelihood of another.
>
> **Fourteenth Amendment Liberty Violation**—A libel or slander committed during the termination proceedings or the events leading up to the termination of an employee.

Designated Caregiver—Employee who has agreed to assist a physically disabled qualifying patient with the medical use of marijuana, and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.

Discrimination—As generally used in personnel law, discrimination refers to the adverse treatment of an employee or group of employees, whether intentional or unintentional, based, for example, on race, color, national origin, religion, sex, mental or physical disability, age, or veteran status. The term also includes the failure to remedy the effects of past discrimination.

Disparate Impact—The same as Adverse Impact. The result of an employer's action or policy that is not unlawful on its face, but affects one or more classes of employees differently.

Disparate Treatment—Differential treatment of employees or applicants based directly on race, religion, sex, national origin, mental or physical disability, age, or veteran's status. This is usually an individual case focusing on the employer's intent or motive.

Equal Employment Opportunity Commission (EEOC)—A federal enforcement agency created by Title VII of the Civil Rights Act of 1964. The purposes of the Commission are to end discrimination based on race, color, religion, age, sex or national origin in hiring, promoting, firing, wages, testing, training, apprenticeships, and all other conditions to put equal employment opportunity into actual operation.

EEOC Guidelines—Opinions expressed by the EEOC that don't have the force of law when issued, but tend to be supported by the courts. These positions are outlined in various EEOC publications such as Discrimination Because of Sex, Discrimination Because of Religion, etc. The courts have adopted a large portion of these positions in whole or in part.

EEO I Report—The Equal Employment Opportunity Information Report, an annual report filed with the Joint Reporting Committee (composed of the Office of Federal Contracts Compliance Programs [OFCCP] and the EEOC) by employers subject to Executive Order 11246 or to Title VII of the Civil Rights Act of 1964. The EEOI report details the race, sex and ethnic composition of an employer's workforce by job category.

Exempt—A term used to describe the status of employees whose positions meet specific tests established by the Fair Labor Standards Act (FLSA). Employees who meet these certain tests or standards are not subject to (i.e., exempt from) overtime pay requirements.

Good Faith and Fair Dealing—A concept employers use that has no technical or statutory definition. Basically, it means acting on the basis of honest intentions and beliefs. Employers who are thought to act in bad faith may have a suit brought against them. In such a case, the court looks to see that the employer did not act out of malice toward the employee and that there was no attempt to defraud or seek unconscionable advantage over the employee.

Hostile Work Environment—Work environment that is offensive and abusive to a reasonable female person (if a sexual harassment suit then the standard is a reasonable female or individual of a "suspect" class) and that in the work environment there was no practical way in which to effectively work. This is most often used in sexual harassment situations, but has also been applied by courts to persons with disabilities.

Individual with a Disability—Under federal law, any person who (1) has a physical or mental impairment that substantially limits one or more of his/her major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment is considered disabled. A disability is substantially limiting if the individual is unable to perform a major life activity that the average person can perform, or is significantly restricted as to the condition, manner, or duration under which the individual can perform a particular major life activity as compared to the average person. The term Otherwise Qualified Individual with a Disability refers to a person with a disability who is capable of performing the essential functions of a particular job with or without a reasonable accommodation to his/her disability, being made by the employer.

Insubordination—Where an employee refuses to obey a reasonable directive from the employer.

Just Cause—A good and sufficient reason, related to the needs of administrative operations and supported by demonstrable fact to take employment action against the employee. Note: In Arkansas by using the term "cause" in any employment manual or documents the city vests a property right in the employee's job, thereby creating the necessity for due process before employment action is taken.

Non-Exempt—A term used to describe employees whose positions do not meet Fair Labor Standards Act (FLSA) exemption tests, hence must be paid one and one-half (1½) times their regular rate of pay for hours worked in excess of 40 hours per week. Such rates are to be computed at an hourly rate.

Protected Class—Any group or member of that group specified in, and therefore protected by, antidiscrimination laws, such as persons belonging to a minority race, or gender, age, or person with a disability.

Public Policy—Generally, this term refers to standards for behavior that the court believes are necessary to support the common good and maintain the fabric of our society in its critical dimensions. Public policy is often reflected in a statute, a constitution, case law, or, less clearly, in commonly accepted values. It is perhaps the most vague and unpredictable standard in personnel law today because the definitions of public policy change as society changes.

Punitive Damages—Punitive damages are sums of money awarded by a court to punish a party because of that party's acts of violence, oppression, malice, ill will, spite, hatred, fraud, or wanton and willful conduct. They are, in part, intended to provide solace to the wronged party. Unlike compensatory or actual out-of-pocket damages, punitive damages are based upon a different public policy consideration—that of punishing a defendant or of setting an example for similar wrongdoers. Punitive damages are usually awarded in addition to compensatory or actual damages, and generally punitive damages are not covered under the provisions of insurance policies. (Municipal governments are not liable for punitive damages; however, municipal employees are liable.) (Punitive damages are not covered within the Municipal Legal Defense Program.)

Qualifying Patient—Employee who has been diagnosed by a physician as having a qualifying medical condition and who has registered with the Department of Health under the Arkansas Medical Marijuana Amendment.

Reasonable Accommodation—Alterations, adjustments or changes in the job, the workplace and/or terms or conditions of employment that will enable an otherwise qualified individual with a disability to perform a particular job successfully, as determined on a case-by-case basis, depending on the individual's circumstances.

Systemic Discrimination—Systemic discrimination relates to a recurring discriminatory practice that is pervasive in the employer's organization rather than to an isolated act of discrimination. Intent to discriminate may or may not be involved.

Torts—The law of private wrongs, other than breach of contract, governing the behavior of persons and setting out their obligations to each other. The courts provide a remedy for these wrongs in the form of civil actions for monetary damages. Assault is an example of a tort, as is intentional infliction of emotional distress, personal injury, etc. Civil suits can be filed for such wrongs.

Validation—The study of an employer's tests or selection standards which proves that those who score high turn out to be successful on a specified job and those who score low turn out to be unsuccessful. The study requires a large sample of applicants and must include representatives of protected groups in the employer's labor market.

Chapter One

The Importance of Written Personnel Policies

The Employee Handbook

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The Importance of Written Personnel Policies

Until recently there was a trend among municipal employers not to write or formally adopt employee handbooks. Municipal officials reasoned that if a policy or procedure is in writing, then the city would be bound to adhere to the policies under all circumstances. However, because of federal legislation and recent court cases that decided in favor of employee rights, loosely written and impractical personnel policies became a fertile ground for litigation.

Therefore, it is recognized that a well-drafted personnel handbook that includes a signed disclaimer will support the city's position that employment was and is at-will. In addition, the handbook has several useful purposes. They are:

1. It is an important element in a city's defense against equal employment opportunity charges because, with proper application, it ensures consistency. When the city's policies are stated in writing, agencies investigating charges will usually give more credibility to the city's position.
2. The handbook is useful to train supervisors to carry out the policies.
3. Oral assurances as well as practices by elected officials are often held by the courts to be binding. More often than not this can be avoided by eliminating the validity of oral assurances by so stating in a handbook.
4. A personnel policy handbook will help city employees avoid any misunderstandings or false statements of policies or benefits.

Cities that adopt employee handbooks must be aware that several recent court decisions based their damage awards on the employer's failure to follow its own written policies or procedures. The best means of a city's avoiding this liability is for the city to follow its own policies. A city must not adopt a policy that it cannot or will not follow. Finally, you must ensure that these policies are well conceived and legally defensible before adoption. If not, then do not adopt the manual.

The Employee Handbook

Should you choose to reduce your personnel policies to writing, then all personnel-related ordinances, regulations and/or writings should be incorporated into a single handout for distribution to members of the city's governing body and the entire municipal workforce. Each employee should be required to sign a form acknowledging that he or she received the handout. Plans should be implemented to study, modify, adopt and redistribute the handbook on a regular basis. This will help to account for changes in the law and organizational changes as well.

Listed below is a general guide to the type of information that can be included in an employee handbook. In addition to the employee handbook, city employees should follow the rules and regulations of their respective departments after they have been adopted by the city council or city board of directors. Administrative rules need not be made part of the handbook.

Seven key organizational sections of an employee handbook follow:

1) Introduction
2) Employment policies
3) Compensation benefits
4) Leave benefits
5) Fringe benefits
6) Employee conduct
7) Employment separation

Details of the contents of an employee handbook are in the League publication *Sample Personnel Handbook for Arkansas Cities and Towns* (December 2016).

Tips on Writing Employee Handbooks

In writing an employee handbook avoid common mistakes. Follow these points to help ensure that your handbook communicates the right information in the right way.

- Limit each sentence to a single idea.
- Use 25 words or less per sentence.
- Avoid using terms your readers will not understand. Use terms familiar to everyone in every department.
- Don't use the word "permanent" to describe employees; it means enduring or forever. No one has a permanent job. Instead, when appropriate, use "regular" or "full-time."
- Avoid using mandatory wording. Only use the word "will" when you are referring to an absolute in every case.
- Don't use the term "probationary" when referring to any employee.
- Use the word "you." Writing in familiar terms reminds readers that the policy applies to them.
- Identify the city's purpose of each policy to help employees understand the reasoning behind the policies.

- Don't borrow handbooks from other cities and adopt them "whole cloth." This could be dangerous. The book may not meet your city's needs.
- Use a disclaimer stating: The handbook can be changed at any time (consider including an explanation of how employees will be notified of changes). An example of such a policy reads: "All city employees should understand that this handbook is not intended to create any contractual or other legal rights. It does not alter the city's at-will employment policy nor does it create an employment contract for any period of time."
- Only the city council has the authority to alter the handbook.
- The contents are for informational purposes only and should not be interpreted as a contract. For example: "The information contained in this handbook applies to all employees of the city. This Handbook does not represent an employment contract or any aspect of an employment contract and should not be construed as such."
- Think twice before abandoning at-will employment. This may increase your exposure to lawsuits.
- Be sure to screen your employee handbook for statements that suggest that employment guarantees are being offered to employees. Examples of language to watch for include: "An employee will be discharged only if he or she fails to properly perform the job assigned." "Good performance is your best guarantee of job security."

Common Mistakes in Employee Handbooks

Listed below are several of the most common mistakes found in employee handbooks. Cities are advised to avoid these mistakes.

1) Not having an employee handbook or never updating it.
2) Borrowed handbooks: Unique standards/rules missing and policy adopted by mistake.
3) Important terms not defined; the use of dissimilar terms.
4) Irrelevant content.
5) Impersonal, third person, "contract-like" language.
6) No verification of receipt from city employees or other mechanism to provide notice.
7) Implied promises of employment security ("permanent employee," "cause," "just cause").
8) Expresses promises of employment security ("You'll have a job here as long as you perform well.").
9) Guarantees of due process that the city may later disregard.
10) Grievance process that the city may later disregard.
11) Mandatory wording: "shall" and "will" convey a commitment; consider discretionary words, such as "may."

Suggestions for Establishing Standards of Performance and Conduct

Performance Versus Conduct—Know the Difference

Cities often make the mistake of treating performance rules the same as behavioral rules. In fact, the administration of the rule differs markedly, as does action taken with the employee when shortcomings occur. Remember: proper conduct in the workplace is important for good order and discipline. Policies regarding conduct are included in handbooks to make employees aware of the rules governing their employment with the city.

As a general rule, the city is free to establish any personnel policy or rule it deems to be within the scope of its interests. However, certain policies or rules may not be established, including those that:

- Are prohibited by statute, administrative regulations, or court decisions.
- Conflict with a contract (common example: a collective bargaining agreement).
- Would jeopardize the health and safety of employees or the public. (An employee may reasonably refuse to obey an order that he or she reasonably perceives as dangerous to health or safety.)
- Conflict with public policy.
- Are not reasonably related to the operation of city business.
- Have performance standards that are not supported with job descriptions or similar instruments.
- Have performance appraisals based on poorly written job descriptions.

Performance (knowledge, skill, ability) shortcomings can often improve. On the other hand, there is no learning curve to behavior.

It is unwise to establish a standard or rule that cannot (or will not) be enforced. The two tests to remember are: Could the city, with proper documentation, sustain the discharge of an employee? Will the city accept the consequences of the discharge of a good employee over the issue of enforcement of the rule? Cities should establish standards at the level at which they are certain to be enforced uniformly throughout the organization.

Commonly Established Standards of Employee Conduct

City employees can be expected to accept certain responsibilities and follow acceptable principles regarding matters of employee conduct. Some commonly established areas of employee responsibility are listed below.

- Maintenance of production/service standards—quality, quantity, and priorities
- Responsible use of working time for self and other employees
- Cooperation with supervisor and other employees
- Observance of safety and health rules
- Proper use and maintenance of city equipment and materials
- Respect for other employees and their property
- Attendance standards, including proper notification for absences
- Maintenance of housekeeping standards
- Personal appearance or dress

Prohibited Conduct

Cities establish rules that are not all encompassing, that if violated result in disciplinary action. Following is a list of inappropriate conduct adopted by most cities. Please note that this is not an exhaustive list.

- On-the-job use or possession of alcohol/drugs (or being under the influence of prohibited substances)
- Possession of firearms or knives with blades over three (3) inches in length
- Sexual harassment
- Insubordination
- Gambling
- Theft (or unauthorized possession)
- Smoking in restricted areas
- Falsification of records
- Discrimination based on race, religion, sex, national origin, mental or physical disability, age, or veteran status

Record Keeping

Record Retention Requirements

What is an employee personal history file? Documentation relating to records or treatment of employees in regard to terms and conditions of employment comprises an employee's personal history file. (Note: the Arkansas Municipal League has a sample personnel file that is available at the League offices.) The mere recording of events (for instance, a supervisor's log book) without the intention to use such information in a transaction is probably not a personnel file, but may be subject to disclosure via the Freedom of Information Act (FOIA) or during litigation.

Cities should consider a filing/retention policy that includes at least six (6) types of personnel records:

- Recruiting and selection
- Employee history
- Medical history (as governed by the Americans with Disabilities Act)
- Immigration act forms
- Investigations
- Job performance/evaluation

A city's record-retention policy will probably depend upon the step in the employment cycle process. These steps include:

- Recruiting and selection
- Job performance
- Separated employees

City officials often ask when they should destroy old hard-copy personnel files. There are numerous state and federal statutes applying to various types of employment records. However, a five-year retention period would comply with all of these retention laws. Given another federal law, however, it is advisable to keep records for a much longer period:

The federal Lilly Ledbetter Fair Pay Act of 2009 altered Title VII (the general federal employment discrimination law), the Americans with Disabilities Act, and the Age Discrimination in Employment Act 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. 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.* In addition, some commentators have suggested you should extend this period for pensioners, since each pension payment might also trigger a new filing period.

Where Should Employee Files Be Maintained?

It is probably best to maintain one central file in the Human Resources or Personnel Department. For cities without such departments, the city clerk's or recorder's office is ideal. The file should be strictly controlled in terms of access. "Local" files in the hands of supervisors should be limited to copies. Why?

- To help maintain control of document production.
- To help guide uniform treatment of employees.
- To help the Personnel Department spot recurring problems and training needs.
- To help accurately assess and maintain the strength of the city's position with regard to legal protection.
- To help with the consistent maintenance of those files.
- Cities can sometimes benefit from a written policy on record keeping.
- Written policies help produce internal consistency.
- Such policy could prove desirable in support of a defense that your organization has followed consistent practice.

Microfilm/microfiche, CD ROM, or other digital formats are acceptable documentation.

Helpful Observations About Government Agencies and Personnel Law

Many municipal officials mistakenly assume that governmental agencies are neutral on personnel issues. Government agencies are not paid to be neutral. Personnel laws have been passed to protect the employees. Governmental agencies are set up to enforce the law. Therefore, government agencies, such as the EEOC, are in the business of protecting employees. They are not neutral and certainly not pro-employer. With this in mind, remember that when your case goes before a governmental agency or into a court of law that:

1) The city is presumed to have kept accurate, up-to-date records.
2) An ambiguous, poorly worded, unclear personnel policy handbook, performance appraisal, employment offer letter, and other types of personnel policies or documents will generally be interpreted in the employees' favor.
3) The city and its policies should operate under the assumption that an employee **cannot** waive statutory rights.
4) More and more often employment lawsuits are being tried before juries. Juries have added a new dimension to judgments about your personnel practices. Remember, juries are often:
   - Composed of employees.
   - Upset by discrepancies, appearance of hidden motive, and lack of good faith on the part of the employer.
   - Equate "unfair" with "illegal."
5) When part of a personnel policy is governed by both federal and state law, federal law will prevail unless it provides the minimum requirement(s). Where this is the case and state standards exceed federal law, the state standard will also apply. The practical result: the employee gets the best of either law.

Chapter Two

Discrimination—What Is It?

Pre-employment Liability

Recruitment

The Application Form

Pre-employment Testing

The Interview Selection Process

Discriminatory Hiring Practices: What to Avoid

Discrimination—What Is It?

The League contends that if municipal officials understand the very basics of discrimination law, then they can assist their cities by taking action to avoid costly litigation. For over 100 years in the American workplace at-will employment status has been in effect. At-will employment means that the employer is free to dismiss an employee for any reason and that the employee is free to leave employment for any reason or for no reason at all.

The tradition of at-will employment began to fade in the 1930s when Congress passed a law exempting employees covered by a union agreement. Thus, employees still were assumed to be at-will except those with union contracts were given collective bargaining rights. In 1964 with the passage of the Civil Rights Act, a new group of employees joined the list of "protected class." These included race, religion, sex, disability, color, national origin, or pregnancy. In years to follow Congress added to this list veterans and members of the military and national guard; people over 40 (Age Discrimination Act); and more recently, with the passage of the Americans with Disabilities Act, those Americans with disabilities.

While homosexuality is not a class protected by a federal or Arkansas statute, courts have granted protection in two ways: first, on the basis of "sex" when employees are discriminated against on the basis of "stereotyping." This means, for example, that an employer or harasser thinks that a female employee is "too masculine" in some way or vice versa. Second, the courts have extended protection under the equal protection clause of the constitution, which requires that all citizens be treated equally by their government. The law has also added protections to employees because of genetic information (discussed further later in this document).

While at-will employment is still in effect, many municipal employees belong to a "protected class." What this means is that you must very carefully follow strict and consistent procedures when handling employee personnel matters. **It is against the law to violate an employee's civil rights.** Federal and state laws prohibit discrimination. It is important to understand **three** very common types of discrimination and how you might be guilty of employee discrimination. They are **disparate treatment, disparate impact and retaliation.**

Disparate Treatment is differential treatment of employees or applicants based directly on the person's protected class status. In other words, you **deliberately** treated someone adversely because the employee or applicant was a minority, woman, veteran, etc. This would be a flagrant violation of the law.

Disparate Impact does not involve intent. However, it is the result of an employee action or policy that is not unlawful on its face, but adversely affects one or more classes of employees differently than other classes of employees. Cities may have what they think is a neutral policy that was evenly applied but has a statistically significant adverse impact on a protected class. For instance, a city policy that says all police officers must be six (6) feet tall and weigh 175 pounds could be evenly applied, but it would have a statistically adverse impact on Asian Americans and women and thus be potentially discriminatory.

Defending disparate impact cases can be difficult because the burden of proof is on the employer (city) to prove that the city's actions or policies were a "business necessity" or essential for safety or efficiency. The city, in all likelihood, will have to prove that no "alternative non-discriminatory practice with a lesser impact" can achieve the same required business results.

Arkansas remains a true at-will employment state. Public employees can be terminated at any time for any reason or no reason at all. (Note: civil service employees have a series of procedural mechanisms required by state statute for any adverse employment action.) An at-will clause that clarifies the terms and conditions of employment to an employee and informs them that there is no expected or implied employment contract is one important protection that is available to cities. Therefore, it is **critical** that language that could be interpreted as granting "property interests" be eliminated from personnel manuals.

Statements of implied employment security such as "permanent employee" or "You will have a job here as long as you perform well" should not be a part of any municipal personnel handbook. Further, all statements that employment can be terminated for "cause" or "just cause," as well as employment contracts for time, must be eliminated if your city's at-will status is to remain in effect.

Do not assume that at-will employment status means that you can violate an employee's civil rights. **Discrimination is against the law.** Keep in mind that when dealing with employees in a "protected class" you must be sensitive to the issues of equality and fairness. If you intend to fire a member of a "protected class," take extra care to make sure that the reason for his or her discharge has been applied evenly and fairly to all employees. If, for example, you intend to fire a member of a "protected class" for driving a city vehicle while under the influence of alcohol, but recently gave only a warning to a white male for the same action, then chances are the discharge will be considered discriminatory.

Retaliation occurs when an employer takes adverse action against an employee for the employee's exercise of rights under the law. This often occurs when an employee complains to a federal or state agency about discrimination or some other violation (such as wage and hour issues, for example). Even if the original complaint is found to be untrue, it is still unlawful to retaliate against the employee for making it. It is not uncommon for employers to be found innocent of the discrimination but liable for retaliating.

Pre-employment Liability

One of the major tasks for every city is the recruitment and selection of qualified applicants. These areas are especially affected by anti-discrimination laws. The anti-discrimination statutes do not specifically state what type of recruitment or selection process must be used, so we must look to court decisions, policies and agency guidelines for direction. This chapter is designed to alert elected officials and supervisors to the requirements (in the selection process) of federal and state anti-discrimination laws. Many illustrations are included in this chapter to provide examples of what we consider legally viable forms.

Recruitment

The recruitment process is the preliminary step to the selection procedure.

Recruitment is a two-step process. First, the city must announce a job opening to a labor market area that contains applicants capable of responding. Second, those people capable of responding must become aware of, and be encouraged to answer, the announcement.

Recruitment procedures that list all new job openings with state employment agencies, advertisements placed in local papers, and with local radio stations that have an adequate minority, female, and disabled audience should withstand EEOC challenges. Therefore, cities are advised to advertise for all new job openings with the "protected class" audience in mind.

Sample Job Notice Forms can be found in Appendix B.

The Application Process

The application form is an important document from which hiring decisions are made. A poorly written, outdated, illegal application will present potential discrimination problems and can form the basis for damaging lawsuits. If the application form has a disparate impact upon the hiring process, then it will be considered wrongful and probably will be challenged.

Unstructured pre-employment inquiries present the greatest exposure to liability in the selection process. Unless such inquiries have a purpose, the regulatory agencies or the courts may require the city

to show that no discriminatory purpose exists. The absence of a business purpose is taken as discriminatory intent. Specific areas where questions may lead to liability include: arrests and conviction, age, height and weight, marital status, physical characteristics, race, sex, religion, disabilities, etc.

The Application Form

After your city implements a personnel system and adopts the policies and procedures in the employees' handbook, you should analyze the city's application form.

The most important element of this review is your determining whether the application form contains job-related questions. The applicant should not be requested to answer questions that are not job-related. Determine the purpose of each question and how the information will be used. If there is a discriminatory purpose for any question, then business necessity must be shown.

Sample Application Form is in Appendix B.

Pre-employment Testing

If the results of a pre-employment test adversely impact a protected class the test may be considered discriminatory even if there is no wrongful intent on your part. If you can prove that the test is job-related or show statistical proof that success on the test indicates success on the job, then the chances are that the test will not be considered discriminatory regardless of the failure rate. A good example of a valid pre-employment test is a typing test for prospective secretaries. An English language proficiency test for motor grader operator job applicants would likely be viewed as problematic and potentially discriminatory.

The Interview/Selection Process

The advent of employment lawsuits has caused changes in the selection of applicants for many organizations. The key new element is that the evaluation of the applicant must be objective. If the selection procedure is to fulfill its major objective of hiring qualified applicants, it is necessary to establish appropriate job specifications taken from well-written job descriptions. The interview questions should be structured from the job descriptions. Under anti-discrimination laws, the selection procedure is subject to the EEOC Employment Guidelines, enforcement agencies and scrutiny of the courts. Selection procedures must be modified to eliminate exposure, but still be effective in selection of the best qualified applicant.

The minimum criteria for pre-screening applicants should include: (1) completed application, (2) employment eligibility verification (as required by federal law), (3) criminal background checks, (4) post-offer medical examinations when job-related, and (5) personal interview.

As the interviewer, you should also be concerned about lawful and unlawful inquiries during the application and interview process. Some selection procedures could be alleged to cause adverse impacts such as tests, including lifting requirements, paper tests, and honesty tests, and employee referrals for hiring, high school diploma requirements, height/weight thresholds, interviews, or criminal record inquiries.

Recommended interview guidelines can be found in Appendix B.

Discriminatory Hiring Practices: What to Avoid

Listed below are some common practices that sometimes lead to trouble with EEOC and the courts.

Recruiting

- Failure to consider the local labor market area and failure to consider organizations representing a protected class when announcing and advertising a job opening.
- Failure to follow the city's own hiring and promoting guidelines.
- Failure to consider recent applicant files when consideration was promised.
- The use of sex, age, disability, and other non-job-related language ("pretty," "young," "wholesome") in job announcements and job specifications.

Application and Resumé Review

- The use of age, sex, and/or disability-related questions on the application.
- Inconsistent handling of resumés/applications (i.e., background checks for minority female applicants only).
- Failure to ask for job-related knowledge, skills, and ability functions on job application forms.

Interviewing

- Failure to train interviewers on legal interview methods and subjects. Interviews should be "structured."
- The asking of questions that are not job-related ("Do you have any children?" "Are you married?" "What does your spouse do?").
- The use of biased language ("girl," "honey," "boy") are considered offensive and could be evidence of discriminatory practice.
- Inconsistent standards among interviews. (Those in a protected class are asked questions not asked of others.)

Selection Decisions

1) Failure to objectively evaluate all applicants without regard to race, color, religion, sex, national origin, age, marital or veteran status, political affiliation, disability status, or any other protected status.
2) Failure to be flexible in offering or providing reasonable accommodations for disabled applicants.
3) Failure to screen or evaluate every applicant by the same structured criteria.

Chapter Three

The Importance of Documentation

Administering Disciplinary Action

Warnings and Suspensions

Suggestions on How to Terminate an Employee

Reducing the Risk of a **Termination** Lawsuit

Suggestions for Achieving Internal Consistency

Reducing the Risk for **Discrimination** Lawsuits

The Importance of Documentation and Discipline

Discipline in any city organization is necessary to keep the city running efficiently. Although the word discipline may bring with it many negative connotations, swift, effective, and fair discipline can be very constructive. Numerous concerns including the possibility of decreased morale and increased liability make the importance of proper discipline **imperative**. However, the most minor infraction or the most serious offense that requires any type of disciplinary action must be approached with care.

Accurate, properly maintained documentation is one of the most important aspects of discipline. Documentation consists of your writing down events in detail, then maintaining those written records, as well as updating the information as necessary. "Documentation" usually refers to a written record (most often in a memo form) of important facts in a person's employment history. It becomes part of the employee's personnel file.

One reason to document is cities may need proof of the logic and equity of their personnel decisions in order to substantiate their actions. Such proof may be necessary in the event of a complaint or legal action of bias filed under anti-discrimination laws or to avoid unwarranted unemployment insurance charges. Cities can improve the effectiveness of their documentation by following these guidelines:

- Cities should promptly follow important personnel action with documentation while memories are fresh. A good rule of thumb is, "If it's worth remembering, it's worth writing down."
- Don't postpone documentation merely because of insufficient time to create a perfect memo. Facts are more important than grammar, punctuation or sentence structure. Handwritten memos dated and signed will suffice if the facts are accurate. These are contemporaneous notes and they document the accuracy of the facts the city administration uses to support its actions.
- Ignore minor issues and focus on important incidents and behaviors that reflect significantly on employee job performance and conduct.
- Establish an internal system to check for consistency of action between supervisors of various departments. A simple idea that works: a disciplinary action log maintained by the personnel director or a regular meeting.
- Focus on job-related standards and behaviors. Stick with facts. For example, you may record chronic lateness, but don't record opinions about personal characteristics that may cause the employee to be frequently late.
- Get the employee's side of the story on record. This helps to demonstrate your concern. It also reduces risk that the employee's story will change later.
- Avoid the risk that documentation will create the impression of retaliation. Some forms of retaliation, where the employee's actions are directly or indirectly protected by statute or public policy, can lead to expensive consequences for the city. Let the memo reflect your good faith attempts to salvage the employee. Seldom does "building a case" against an employee create helpful documentation since such a process reflects a pre-determined decision to discharge the employee.
- When initiating a written documentation practice for the first time (or beginning a new practice following a period of laxity), take action to bridge past warnings. In the first written warning, make reference to past oral warnings issued.

REMEMBER: Jurors can't take a transcript of court testimony into the deliberation room, but they can take your documentation.

Get the Employee's Side of the Story

In those instances when problems develop in the performance or behavior of an employee, we advise cities to carefully listen to, and document, the employee's side of the issue. This practice has two objectives, one behavioral and one strategic.

The **behavioral objective** is to take every opportunity to understand the employee and the reasons he performed or behaved as he did. Thus, chances are improved for the city administration to help effect a positive change.

The **strategic objective** is to create an accurate historical record of the facts in the situation. This increases the likelihood that management will act on the basis of the best information available.

Additionally, such documentation greatly reduces the risk that the employee can subsequently create new "facts" in the situation to help support his position. In some cases, imaginative rethinking such as this has taken place in an attorney's office, months after a discharge took place.

Administering Disciplinary Action

As you conduct progressive discipline, the chances of reconciling the problem and improving employee performance grow fainter. Use discipline effectively: it is important to match the disciplinary action with the behavior and/or incident; some actions may require only a verbal warning, while others may necessitate suspension upon first offense.

There are **three** (3) criteria to consider in deciding where to begin the process of progressive discipline:

- The severity of the offense
- The employee's past record—both positive and negative
- The length of time the employee has spent in the city's service

With these criteria in mind, choose the disciplinary action that seems best suited to the incident, and implement the action, according to the following steps:

Step 1. Briefly describe the facts of the incident. Be careful at this stage not to use judgmental language. Instead, state the facts as you see them, emphasizing that your purpose is to solve the problem or help the employee to improve his/her performance. For example, say, "Joe, I'd like to talk to you about something that concerns me. Yesterday, I noticed you left work an hour early. What happened?"

Step 2. Listen to the employee's side of the story. Be sure to listen carefully and to paraphrase what you hear. By listening, you can show the employee that you are open to his/her perspective, and you can defuse any defensiveness he/she might feel. Make sure that you and the employee agree about the most important facts in the incident (what actually happened) before proceeding to the next step. It's also helpful to ask the employee if he/she feels it is a problem. Until he/she agrees it's a problem, you can't reach a mutual decision.

Step 3. Give your point of view about the problem. The disciplinary process can become difficult at this point, particularly if you feel that further disciplinary action is required. Listen to the employee's reaction, and try to find at least a few points on which you can agree. Tell the employee you'd like to share your point of view—why it is of concern to you. Explain how his/her performance has impacted others and why it matters. Remember not to lecture; you are sharing information and perceptions. Watch carefully for his/her defensiveness. When you see it, go back to Step 2 and paraphrase.

Step 4. Commit yourself to a problem-solving approach. Avoid judgment or blame whenever possible; instead, try to work with the employee to solve the problem at hand. You might ask, "What can we do to prevent incidents like this in the future?" Ask the employee for his/her ideas and give each idea fair consideration.

Step 5. Acquire the employee's commitment to improve performance. Once you have worked through the problem, state your expectations clearly and request the employee's cooperation, providing specific objectives and time frames. In response to your request for commitment, you may receive any one of the following:

- A promise to meet your expectations. If you acquire a promise, be sure to monitor progress toward established goals.
- A counter-offer regarding performance. You will have to negotiate with the employee to strike an agreeable compromise.
- A promise to consider your expectations and respond later. If an employee wants to think about the choices you have provided, make sure you establish a time to meet and discuss the issue again.
- A refusal to meet your expectations. In some cases, employees may say "yes" to your expectations when they actually mean "no." Be sure you understand what their real position is. If the employee's refusal is outright, acknowledge that refusal and indicate what the consequences may be.

There are a number of common problems that city administrations may encounter, and, for each situation, there are different considerations and appropriate actions.

On the following pages we discuss many common personnel problems facing municipal officials and suggest ways to deal with these problems. Two of the most common personnel problems are:

- Warnings and Suspensions (Helpful Hints)
- How to Terminate an Employee

Warnings and Suspensions

In today's legal environment, a well-documented file of written warnings may help the city avoid a wrongful discharge lawsuit. Several key points should be considered when preparing a written warning to an employee. Key points to remember include:

1) Provide detailed descriptions, dates (*i.e.,* who, what, when and where) and any other facts that will help employees precisely comprehend the problem. Be specific with examples of shortcomings and infractions.
2) Give employees the chance to explain their actions and to describe the causes, including your performance as a supervisor. Listen and make sure you take into account their version.
3) In discipline, as in every other aspect of supervision, you should deal with your employees in a mature fashion. Avoid condescension, lecturing, and scolding; and above all, do not lose your temper. Show your employees respect.
4) If you are asking for improved performance, make sure employees understand what benefits they can expect as a result of improvement and what risks they run if their performance remains unchanged. These consequences should be clear and specific.

5) Employees often need extra coaching and guidance in order to improve their performance. Be sure to offer this assistance to help employees meet expectations. Remember that you must work with employees to help them meet city expectations.

6) It is good to remember that positive reinforcement is always more effective than negative. Note all improvements in employee performance and encourage continued efforts to meet expectations.

7) One-time performance problems can disappear for good if you deal with them in a positive manner and leave them behind. Be careful you do not hold a grudge against an employee simply because he/she has demonstrated a performance problem in the past. As much as possible, start with a "clean slate" after corrective action has been initiated.

Suspensions

There are usually two types of suspensions: investigative and disciplinary.

1) Investigative—Allows you to remove the employee from the workplace (with pay) for a given period of time (usually no more than five days) in order to investigate the circumstances surrounding a given incident.

2) Disciplinary Suspension—Allows you to remove the employee from the workplace (without pay) as a punishment for a given action or behavior.

Suggestions on How to Terminate an Employee

Discharging an employee is a last resort measure. Caution is urged to avoid "wrongful discharge" lawsuits. City employees should ask themselves if any of the following factors influenced their decision to discharge the employee:

- Race, color, sex, national origin, genetic background
- Religion
- Pregnancy
- Age (above 40)
- Physical or mental disability
- Military or national guard duty and veteran status
- Political activity or opinion
- Involvement with workers' compensation proceedings
- Whistle blowing (reporting violations of law to a government agency)
- Retaliation
- Speaking on matters of public concern or other exercise of constitutional or legal rights.
- Unequal treatment under the law without a rational basis

Terminating an employee for any of the previous reasons or being influenced by the previous reasons will likely guarantee a successful wrongful termination lawsuit. Please remember to limit your decision to terminate an employee only to business-related reasons (*i.e.,* absenteeism, rule violations, insubordination, safety violations, etc.).

If the employee is a member of a protected class (minority, female, disabled, over 40, etc.), take extra care to make sure the reason for his/her discharge has been applied evenly and fairly to all employees.

Be Cautious in These Areas:

- Obtain advice of your city attorney when the possibility of a discharge looms. The discussion should cover reasons, record, uniform treatment and separation terms and should be held before a decision is made.
- Assume that the employee being discharged has probably seen a lawyer.
- The way you handle the discharge must be just as defensible as the reasons for the discharge. Give thought to ways in which you can guard against unnecessary emotional conflict and bolster the humanistic elements of the episode.
- On-the-spot discharges are extremely dangerous. Prohibit them in your policy and substitute "suspension-pending investigation."
- Transferring employees from department to department who manifest behavioral problems to give the employee "another chance." This seldom works.

Before the Discharge Interview: Be certain you've checked every possible angle. Be certain you'll encounter no surprises. Are you certain you have heard the employee's entire side of the issue?

The Discharge Interview—Two Parts

Part One: The Discharge Statement

Come directly to the point.

Don't argue.

Give all the **real** reasons, but don't throw in each and every shortcoming that comes to mind (a tendency among ill-prepared managers). Provide only the reasons you can defend. If you're not honest when you tell the employee, it will be difficult to convince a jury you're being honest.

Part Two: Future Events

This includes such things as unemployment insurance, out-placement services (if provided), Consolidated Omnibus Budget Reconciliation Act (COBRA) rights, office support (if provided), etc.

Following the Discharge

What to tell other employees. Limit communications about the event to that which is absolutely necessary to meet reasonable business purposes. Never attempt to make an "example" out of the discharged employee.

Give the person an exit interview. The discharged employee should be given an opportunity to "vent" with a management person of rank. Management's attitude should be understanding but **not** apologetic.

A sample form of a mayor/manager's termination checklist is in Appendix B.

Reducing the Risk of a Termination Lawsuit

Discuss these ideas with your city attorney, in order to build the best policy guidelines. Remember:

1) Employees should be given the opportunity to avail themselves of personnel policies created for their benefit.
2) Audit and update job descriptions describing essential job functions and ensure that attendance requirements are included.
3) Establish clear, written behavioral standards. Every employee must know that infractions can lead to discipline and discharge.
4) If discipline is necessary, deal with the worst cases first.
5) Use a disciplinary system, including warnings, chances to be heard, and possibly disciplinary suspensions.
6) Document each step of the disciplinary process.
7) Investigate the facts before you act. Give the employee an opportunity to explain his/her side of the issue.
8) Be consistent. Like cases should be treated alike.
9) Before taking action, review the employee's personnel file. Ask yourself if it would look like "fair dealing" to a regulatory official, jury, or labor arbitrator.
10) If you must fire someone, consult your city attorney at the earliest opportunity.
11) Conduct discharge interviews and exit procedures in a sensitive, humane, and considerate manner.
12) Restrict knowledge of the reasons for discharge to those with a clear business need to know.
13) Adopt a policy of simply confirming information when you are asked for references.
14) Conduct exit interviews upon all resignations or discharges.
15) Develop and implement a strong anti-retaliation policy and promptly investigate all claims of retaliation.
16) Consider pursuing all unjustified unemployment insurance claims with the assistance of legal counsel.
17) Obtain the employee's signature on an "at-will" agreement on occasion of significant transactions in the employee's history, where employment status is being redefined.
18) If the employee is not at-will, you must take the appropriate steps to comply with federal due process requirements. Consult the city attorney before taking any action.

Suggestions for Achieving Internal Consistency

Consistent action in addressing employee personnel matters is very important.

1) It decreases the likelihood of a charge of disparate treatment.
2) It strengthens the administration's will to act when tough decisions are called for:
   a. The administration often becomes extra sensitive in dealing with an individual from a protected class when internal consistency is absent. A past record of internal consistency enables the city to act, even though timing may not be perfect.
   b. Helps avoid retaliation charges.

Internal Consistency Helps to:

- Avoid compromises to the employer's defense against future charges. Failure to achieve internal consistency in personnel decisions is tantamount to building a case against yourself.

Internal Consistency Is Measured in Three Dimensions

1) From manager to manager.
2) Over the course of time.
3) In the execution of announced policy, the city should carry out policies consistent with its publication (oral or written). Where published standards have been allowed to slip, the city cannot rely upon published policy.

What Are the Reasons That a Lack of Internal Consistency is Not Easily Remedied?

1) Failure of human resources management to make a coherent case.
2) Old habits.
3) Department heads are often granted "local autonomy" over established personnel decisions.
4) Favoritism.
5) The employer's fear of bureaucracy.

Three Exceptions to an Absolute Requirement of Internal Consistency

1) Reasonable accommodation required by disability and religion protection.
2) Consistency blind to compelling need for exception on behalf of employee or employer.
3) Change in policy to meet future business.

How to Achieve Internal Consistency

1) Reduce your policies to writing only if you intend to follow them. Keep them simple.
2) Conduct management meetings/training.
3) Use a disciplinary action log to track past administrative practices.
4) Provide for advance notice of specified actions.
5) Use this employee performance appraisal criterion for supervisors: "Carries out company policies as required, including employee performance appraisal and employee disciplinary action."

Reducing the Risks for Discrimination Lawsuits

To help make sure that your city government does not knowingly discriminate against employees, take the following precautionary measures:

- Consult your city attorney prior to any action you take that might result in legal action.
- Any changes you make to the Employee Handbook must be approved by the city council and communicated to the employees. You should require your employees to sign a form acknowledging they understand new changes.
- Job advertisements should be worded very carefully to avoid any references to sex, physical ability, age or race. For example, an advertisement stating "young men needed for physical labor" could be evidence of gender or age discrimination.
- Indicate on the application that the job is an employment-at-will position and at every other step of the hiring process where it is practical. Courts have ruled that an implied contract exists unless documents and subsequent action clearly inform the employee that a property interest does not exist and that the position is subject to termination.
- Anything said during a job interview, even in casual conversation, may be taken as an implied contract. If an interview makes unrealistic promises to an applicant who is hired, then the applicant discovers that the promises will not be kept, a court may order that the promise be kept.
- During an interview, do not ask any questions related to age, disability, marital status, or religious affiliation, even casually. Although such questions probably have no bearing on whether the person is hired, they could be used as a basis for a lawsuit if the person is not hired.
- When making a job offer, either orally or in writing, do not mention job duration unless the position is definitely temporary, such as a lifeguard job during the summer. Even references to "permanent employment" could be construed as an implied contract.
- If your city government has an employee handbook or policy manual, make sure that all elected and appointed officials follow the rules, especially sections that define discipline and termination procedures. A manual can consist of two pages of rules stapled together, but it can cause problems if you do not follow it.

- Job descriptions should be used to establish minimum performance standards for each position. If employees do not meet the standards, the job description can be used to support dismissal. However, if the standard is met, it will be difficult to fire an employee for poor performance. Written employee evaluations can be your best defense, or worst enemy. A regular evaluation procedure is effective for judging job performance, but make sure the evaluations are fair and accurate. You may not be able to justify firing a worker for poor performance if all his or her evaluations have been excellent.
- Good documentation is crucial. Make sure that elected or appointed officials write down all disciplinary actions and examples of poor performance. This includes all verbal reprimands, instructions and criticism. Good performance should be documented also.
- Ask your city attorney to review all application forms, employee handbooks, and policy manuals to detect any discriminatory wording.

Chapter Four

Unlawful Harassment

Sexual Harassment

Insubordination

Absenteeism and Tardiness

Negligence/Carelessness

The Drug-Free Workplace Act

Drugs, Drug Testing, and Alcohol

A Checklist for Implementing a Drug and Alcohol Policy

Dealing with an Intoxicated Employee

Complying with the ADA

Family Medical Leave Act

Unlawful Harassment

Harassment is any annoying, unwanted persistent act or actions that single out an employee, over that employee's objection to his or her detriment, because of that person's membership in a protected class such as race, sex, religion, national origin, age (over 40), or disability. Harassment may include, but is not limited to the following actions:

1) Verbal abuse or ridicule;
2) Interference with an employee's work;
3) Displaying or distributing sexually offensive, racist, or other derogatory materials;
4) Discriminating against any employee in work assignments or job-related training because of one of the above-referenced bases;
5) Intentional physical contact with either gender specific portions of a person's body or that person's private parts;
6) Making offensive sexual, racial, or other derogatory hints or impressions; and/or
7) Demanding favors (sexual or otherwise), explicitly, as a condition of employment, promotion, transfer, or any other term or condition of employment.

It is every employee's and official's responsibility to ensure that his or her conduct does not include or imply harassment in any form. If, however, harassment or suspected harassment has or is taking place:

1) An employee should report harassment or suspected harassment immediately to the department head. If the department head is the alleged harasser, then the complaint should be reported to the supervisor in the chain of command. This complaint should be made in writing.
2) Anytime an employee has knowledge of harassment the employee should inform the department head in writing.
3) Each complaint must be fully investigated, and a determination of the facts and an appropriate response made on a case-by-case basis.

Sexual Harassment

A workplace free from the effects of sex discrimination is a right guaranteed by law to American workers. Sexual harassment can occur in two separate ways, both of which are recognized within the EEOC guidelines. One form is *quid pro quo* in which an employee claims that sexual advances have been made and rejected and she has suffered some employment consequences (e.g., she has been fired, not promoted, demoted or lost her job). The other form is hostile work environment, where the sexual conduct falls short of causing the employee a tangible job detriment, but still creates an intimidating or hostile or offensive work environment, judged from the perspective of a reasonable person. Pay inequity or refusing to promote someone because of his or her sex are forms of sex discrimination. While victims of sexual harassment are typically women, nearly 15 percent of men will be sexually harassed in their careers. Though significant, this percentage appears slight, however, when compared to the number of women who are affected. Between 42 and 90 percent of women have experienced sexual harassment in the workplace.

Sexual harassment is debilitating, intimidating, and demoralizing for its victims, regardless of whether they are men or women. The problems which victims experience as a result of sexual harassment affect their personal lives, their interpersonal relationships and their ability to perform their jobs. Studies have shown that the personal effects on victims of sexual harassment include interference with clear

thinking, problem-solving ability, and judgment. Some victims develop a confused mental condition and the inability to concentrate. Others experience extreme mood swings, eating disorders, and sleep disturbances; sexual harassment can also produce depression and even self-destructive behavior. Additionally, the workplace effects for victims of sexual harassment include increased absenteeism and tardiness, as well as uncooperative attitudes. Some victims become accident-prone. Others exhibit marked decreases in productivity and sometimes dramatic changes in behavior.

The law provides stiff penalties and a growing willingness to make employees who sexually harass others answer for their behavior in a court of law. An employer will always be responsible for harassment by a supervisor, if that harassment culminated in a tangible employment action. According to the EEOC, a "tangible employment action" means "a significant change in employment action" such as hiring, firing, reassignment, etc. If the harassment does not result in a tangible employment action, then the employer can be found not liable, if they prove they (a) exercised "reasonable care" to prevent the harassment, and (b) the employee unreasonably failed to complain to management or to avoid harm otherwise. Courts are now likely to make managers and employees, rather than the city, pay for their own misdeeds.

Sexual harassment, simply stated, is any unwelcome sexual advances, requests for sexual favors or verbal or physical conduct of a sexual nature. These varying forms of sexual harassment are not always evident or intentional and can include:

- Comments of a sexual nature in the workplace.
- Dirty or vulgar jokes told in mixed company.
- Wall calendars, magazines, or other materials depicting full or partial nudity.
- Repeated requests for dates when it is clear the other person does not wish to be asked.
- Unwanted touching.

EEOC Guidelines

After the courts held sexual harassment to be a violation of Title VII, the Equal Employment Opportunity Commission (EEOC) issued guidelines on sexual harassment. These guidelines apply on a case-by-case basis to sexual advances made inside or outside of the working environment during social or business occasions.

The EEOC's Guidelines are:

- Harassment on the basis of sex is a violation of Title VII, Section 703 of the Civil Rights Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
    a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
    b. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or
    c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.
- In determining whether alleged conduct constitutes sexual harassment, the EEOC will look at the totality of the circumstances—such as the nature of the sexual advances and the content in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

- The city is responsible for its acts and those of its supervisory, managerial, and executive employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the city and regardless of whether the city knew or should have known of their occurrence. The EEOC will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
- With respect to conduct between fellow employees, a city is responsible for acts of sexual harassment in the workplace where the city (or its supervisory, managerial and executive employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.
- The city may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the city (or its supervisory, managerial and executive employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the EEOC will consider the extent of the city's control and any other legal responsibility that the city may have with respect to the conduct of such non-employees.
- Prevention is the best tool for the elimination of sexual harassment. The city should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, developing methods to sensitize all concerned, and having a written harassment policy.
- Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's requests for sexual favors, the city may be held liable for unlawful sex discrimination against other persons who were qualified for but denied the employment opportunity or benefit.

What the Courts Have Said

Since 1980 when the EEOC issued its guidelines on sexual harassment, hundreds of cases involving these problems have been tried nationwide and they have provided us with important and helpful guidance on the subject. The outcomes of these cases tell us what our ever-changing society thinks sexual harassment is.

Requests for sexual favors bring to mind requests for sexual intercourse in return for some work-related benefit. The idea of the casting couch fits here. But the cases tell us that sexual favors include requests for sexual contact other than intercourse. They include, for example, repeated requests for dates or other social events.

The cases tell us that verbal conduct of a sexual nature includes such acts as comments about a woman's body or physical appearance; her clothing or sex life; wolf whistles, and sexual jokes and sexual innuendos. They also include comments about the perpetrator's sex life and sexual remarks about women (not necessarily the victim).

Physical conduct of a sexual nature includes exposing oneself, leering, gestures of a sexual nature, attempting to look down a woman's dress or blouse, displays of nude pictures, touching or adjusting the victim's clothes, unwanted kisses and hugs.

Investigating Claims of Sexual Harassment

When an employee tells you that he or she has been harassed sexually by another employee, you have a legal duty to investigate the complaint. Failure to investigate the incident and to take prompt and effective action against the harasser could exacerbate your liability for the harassment by making it appear that the city sanctions or ignores such activity. On the other hand, an overzealous or mishandled investigation may expose the city to further liability for libel, slander, invasion of privacy, and wrongful discharge.

- Courts agree that certain rules apply to every sexual harassment investigation. They are:
- Act promptly—Don't assume "time will heal all wounds." By failing to act with dispatch, you may give up the defense that you vigorously enforced your sexual harassment policies.
- Take all complaints seriously—Embarrassment or fear of reprisal often causes a complainant to understate the incident.
- Document the investigation—Attempt to record or memorialize all interviews. Cities have successfully used evidence gathered during their investigation to support their action or inaction against the accused.
- Conduct interviews in private—If bystanders overhear, parties may claim you negligently publicized the incident and invaded their privacy.
- Maintain confidentiality—you may face liability if you over-publicize.
- Allow the accused the opportunity to rebut the charges—Tell him or her the allegations and the results of your investigation, and let him or her respond on his or her own behalf.

To assess the credibility of the complainant, consider the following:

- How did complainant react to the incident? If he or she was not too upset, the complaint may be trivial. But the apparent mildness of his or her reaction may be attributable to embarrassment or fear.
- Did complainant willingly participate in the incident? Courts often discount harassment claims where there is evidence that the victim willingly participated in the horseplay or banter to which he or she now objects.
- What is the character of the accused? If the accused is a womanizer, or has been the subject of prior complaints, it bolsters this complainant's credibility.

Managing sexual harassment problems after they occur requires sensitivity, courage, and common sense. A proper investigation may serve to dissuade a complainant from bringing suit and may, in addition, discourage future harassment in your workplace.

A sample harassment policy that should be adopted by all cities can be found in Appendix B.

Handling Insubordination

As a general rule, the employee is obligated to follow business and job-related instructions of the city. Outright refusal or excessive delay in his/her carrying out instructions may be considered insubordination. Insubordination could include flagrant lack of cooperation or willful refusal to work at a reasonable pace.

If a case of insubordination arises, make sure that:

- The supervisor's instructions or orders were clear.
- The supervisor or other individual was authorized to give "orders," "directions" or "instructions" and the employee understood that this individual was so authorized.
- The employee understood that the order was not just a mere suggestion or request.
- That there was a clear refusal to perform the task, not just a protest, discussion or disrespectful attitude manifested.

Other points to consider:

- Were other employees present when the incident transpired?
- Did the "order" require the employee to commit an unlawful act or place the employee in immediate danger?
- Was it unusual or unnecessary for this employee to be assigned this particular task?

If the employee offered justification for his or her action, was it reasonable (i.e., conflicting orders) and was it investigated? Generally, the city has a right to control on-the-job speech where intemperate speech causes:

- A detrimental effect on workforce morale, or a
- Loss of management (supervisory) control.

However, federal and some state laws and court cases provide certain exceptions:

- Under many circumstances, employees have a right to engage in social conversations in any language. Requiring proficiency in English, or "English Only," in the workplace may violate Title VII's national origin discrimination prohibition.
- Employees also have a right to complain about conditions of employment in which employees have rights (i.e., safety, sexual harassment, etc.).

Be sure to maintain well-publicized channels for employee complaints to be registered. The city can require employees to follow designated channels rather than select their own methods of complaint.

Reducing Absenteeism and Lateness

Here are several useful ideas to reduce attendance problems:

Establish and maintain standards. Enforce the standard at the exact level established. There should be a policy outlining your city's standards on attendance and punctuality. This policy should be in your Employee Handbook.

Separate sick leave from attendance standards. Sick leave is an employee benefit, the sole purpose of which is to help employees deal financially with transient disabilities. Sick leave allowance is not a useful tool in measuring absences.

There should be a progressive counseling policy for violation of standards. Absenteeism and lateness must be dealt with as the occasion demands. Discipline must be applied uniformly and without discrimination.

Publicize your interest in good attendance and punctuality.

Strive for consistency:

- Over a period of time
- Within a department
- Between departments

Formulas for calculating disciplinary action for absence and lateness are often used. They usually don't work. The reason? They are too rigid to take into account variables such as length of service, interval since last warning or related problems.

Consider providing incentives for employees to be at work on time. For example, give annual awards to the employees with the best records, etc.

Negligence / Carelessness

Consider these questions before disciplining a negligent employee:

- Was there a negligent act? (By what standards was the act considered to be negligent?)
- Were safety rules posted?
- Were employees instructed in the proper use of equipment?
- Did the employee have a past record of carelessness? (Were past infractions recorded and disciplined?)
- Was the negligence attributable solely to this employee or were other factors or employees involved?
- What was the result of the careless act? (Was anyone hurt? Seriously? Was property damaged?)
- Were there any other mitigating factors? (Was the employee ill? Had the employee worked a great deal of overtime?)
- Were employee's excuses or justifications investigated?

Drug-free Workplace Act of 1988

The Drug-free Workplace Act (DFWA) of 1988 was enacted by Congress as part of the Drug Initiative Act of 1988. This act does apply to city government. The DFWA requires grantees of federal funds to develop and distribute policies that address drugs in the workplace.

The DFWA requires employers to inform employees that "the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited" in the workplace. Employers are further required to develop "drug-free awareness" programs. These programs are intended to educated employees on the dangers of drug abuse in the workplace, the employer's policy concerning drugs, the availability of counseling and the penalties that apply for violations of the policy.

An example for a model of what a DFWA compliance policy should include to meet the "drug-free awareness" program requirement is in Appendix B.

The Omnibus Transportation Employee Testing Act of 1991

The Omnibus Transportation Employee Testing Act of 1991 requires alcohol and drug testing of safety-sensitive employees in the aviation, motor carrier, railroad and mass transit industries.

The Act applies to every person (driver) who operates a commercial motor vehicle (CMV) in interstate or intrastate commerce and is subject to the commercial driver's license (CDL) requirements. A driver is any person who operates a commercial motor vehicle (CMV). This could include:

- Full-time regularly employed drivers;
- Casual, intermittent or occasional drivers;
- Leased and independent drivers; and
- Owners/operators.

A driver is considered your employee if your city has the ability to directly hire or terminate this person.

All city employees with a CDL fall under the requirements of this Act. The Act requires pre-employment drug testing, post-accident drug and alcohol testing, reasonable suspicion testing, random and return-to-duty and follow-up testing.

Employees must be properly notified and educated about the provisions of the Act. The city must provide employees with a written policy explaining the cities' policies and procedures with regard to methods of complying with the Act. Municipalities must provide information on drug use and treatment resources to all their employees in safety-sensitive positions. All supervisors and officials of local government departments with safety-sensitive employees must attend at least two (2) hours of training on the signs and symptoms of drug and alcohol abuse.

"Ten steps to Compliance with the Omnibus Transportation Act of 1991" can be found in Appendix B.

The League's Legal Defense Program acts as the Administrator of a statewide municipal consortium. This will allow Arkansas municipalities to pool resources, personnel and expenses. This should be of significant benefit to Arkansas municipalities who may lack the financial and organizational capabilities necessary to meet all of the requirements.

The Municipal Legal Defense Program contracts for laboratory testing services, training programs, specimen collection services and medical review of officer services. Furthermore, as the Administrator

of the statewide municipal consortium, the League will assist you with compliance by preparing sample personnel policies and a compliance resolution establishing your drug and alcohol testing requirements. The League will always be available to provide information, advice, and recommendations on compliance policies and procedures.

Drug Testing for Non-CDL Employees

As a result of the Omnibus Transportation Employee Testing Act of 1991 that requires drug and alcohol testing for all city employees with a commercial driver's license, many cities feel compelled to test all their employees. However, the Fourth Amendment of the U.S. Constitution forbids random drug testing of certain employees who do not hold safety- or security-sensitive jobs. Further information may be obtained from the League's drug testing publication available on the League's website www.arml.org.

Don't Wait Until an Incident Occurs to Decide City Policy with Respect to Drug and Alcohol Testing

If the city is going to engage in drug and alcohol testing, develop a policy and plan well in advance of any incident. The policy should be carefully developed, reviewed by the city attorney, and communicated to employees. Employees should consent both in advance and at the time of the incident to any testing. "Spur of the moment" decisions to subject an employee to drug or alcohol testing may expose the city to serious liability.

If the city does implement a testing policy, the city should work hard to make the testing policies as fair as possible. Once the policy is implemented, communicate the policy to employees, explaining the reasons for the policy's implementation and the city's emphasis on fairness. Explain what will happen if an employee is tested, and be open to answer any questions he/she has. Employees who feel that the city is trying to be fair are less likely to bring a lawsuit against the city.

Dealing with an Intoxicated Employee

The best advice for dealing with the intoxicated employee at work, as in the case of most employment situations, is for the city to keep in mind how their actions will appear to a jury if litigation is initiated. Cities will want their actions to appear reasonable; those actions should demonstrate both concern for workers' safety and for the suspected individual. While it is impossible to anticipate every factual situation, the following tips will go a long way toward putting the employer in a good light if litigation ensues.

Deal with the Situation in Private

Do not confront the employee in the presence of his or her co-workers. Instead, calmly approach the employee and say something like, "I need to talk to you about something. Could you come with me, please?" If the employee refuses this reasonable request, such aberrant behavior may be evidence of intoxication and will justify an inquiry in front of others.

Whether the employee accompanies you to a private area or insists upon a public confrontation, do not accuse the employee of intoxication. Instead, ask the employee if he has been drinking or is under the influence of some drug. If the employee is in fact intoxicated, you will be surprised that he or she will, because of lowered inhibitions, often admit that fact. If the employee denies having consumed alcohol or drugs, describe the symptoms that led you to ask the question and ask the employee if there is any explanation for these symptoms. Assuming no satisfactory answer, advise the employee that you cannot permit him or her to continue working that day, and that he or she should report to the office the following day to discuss the matter further. Defer any decision on discipline.

Do Not Let the Employee Drive

If the employee is intoxicated, the city may have a duty to take all steps that are reasonable and prudent to prevent the employee from driving. Advise the employee that the city will drive him or her home, and insist that he or she not drive. Alternately, you may offer to pay for a taxicab or to call a relative or friend. If the employee insists on driving despite these offers, advise him or her that because of your concern for his well-being and that of others, you will have no choice except to call the authorities if he or she attempts to drive.

Physically restraining the employee may result in assault and false imprisonment claims by the employee. Accordingly, it is preferable to report this matter to the authorities. Any report should be factual.

The Medical Marijuana Amendment of 2016

Arkansas voters passed the Medical Marijuana Amendment which makes the regulated medical use of marijuana legal under Arkansas state law, while recognizing the drug remains illegal under federal law. The amendment establishes a system for growing, acquiring and distributing marijuana for medical purposes.

The amendment provides protection for qualified patients, caregivers, growers, providers and doctors from arrest, prosecution, penalty or discrimination under Arkansas law. It does not offer protection from federal law.

The amendment does not permit a person to possess, smoke, or otherwise engage in the use of marijuana in a public place. Act 593 of 2017 allows employers to establish and implement a drug-free workplace policy and allows employers to prevent employees from working under the influence of marijuana on employer premises or during employment hours.

Complying with the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was signed by President George H.W. Bush on July 26, 1990. On September 25, 2008, President George W. Bush signed the ADA Amendments Act (ADAAA) as a response to a number of decisions by the Supreme Court. In basic terms the ADA will prohibit discrimination—in employment and in access to public services—based upon disability, much as Title VII forbids discrimination based upon race, color, religion, sex, and national origin.

The Act contains five (5) titles.

TITLE I deals with Employment and Hiring Practices. Cities of all sizes are prohibited from using any qualification standards, employment tests or other selection criteria that would screen out individuals with disabilities, unless the criteria are job related. Identifying essential job functions is critical for complying with the ADA because an individual's disability may be taken into consideration when making employment decision only if, even with reasonable accommodations, it prohibits performing essential job functions. Written job descriptions proposed prior to advertising or interviewing applicants will be accepted as evidence of which job skills are essential. Written job descriptions will play a significant role in determining whether an individual can perform the position held or desired with or without "reasonable accommodations." Employment tests will also be considered discriminatory under ADA if they are designed and administered in a manner that prevents persons with disabilities from taking them.

The ADA does allow the city to require a medical examination, but only after a job offer has been made although it may be prior to the date the applicant is to begin work. The position may be offered to an applicant with the understanding that the job offer is predicted on the outcome of the medical test.

Such medical examinations may be required; only if all applicants for that job, regardless of disability, must take and pass them. Employees with disabilities must be offered the same insurance coverage offered to other employees.

TITLE II prohibits state and local governments from excluding a person with a disability from participating in public programs or denying benefits of public service. Individuals with disabilities have the same rights and privileges as all other members of the public with regard to recreation, youth or senior citizen programs, libraries, museums, voting, permits and licenses, utilities, public meetings, public celebrations, public transit, etc. This could require providing communication assistance for the hearing or visually impaired. In addition, the U.S. Court of Appeals for the 8th Circuit, which includes Arkansas, has held that Title II applies to disabled persons who are arrested. *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998). Thus, the police must have adequate facilities, for example, to transport a person who is confined to a wheelchair.

For more information see the League's *Americans with Disability Act Title II Compliance Guide* available at www.arml.org/services/publications/publications-for-free.

TITLE III primarily addresses public accommodations offered by the private sector. However, subpart F of Title III establishes procedures for the certification of state and local building ordinances that meet or exceed the new construction and alteration requirements of the ADA. Certification will be made by the Assistant Attorney General Civil Rights (Department of Justice) upon application of a state or local government. Title III also mandates that cities and other public entities remove structural, architectural, and communication barriers in existing vehicles used for transportation if such removal is "readily available." Alternative methods of providing the same service must be provided if removal of the barrier is not feasible.

TITLE IV guarantees that speech and hearing-impaired citizens will be provided with telephone services functionally equivalent to those offered to hearing individuals. This part of the act primarily affects the telecommunication industry.

TITLE V contains miscellaneous provisions which clarify several issues about the operation of the ADA in specific circumstances.

The provisions of the ADA will be clarified through regulations and through test cases in courts. It is important to note that the ADA made important changes to the definition of the term "disability" by rejecting the holding of several Supreme Court decisions in order to broaden the class of people who fall under the ADA's protection. Persons claiming employment discrimination under the ADA may follow the same procedures and may receive the same remedies found in Title VII of the 1964 Civil Rights Act.

Avoiding ADA Litigation

Cities may reduce the likelihood of employment ADA litigation by taking the following steps:

1. Update your Job Descriptions, Application Forms, and Interview Methods

The courts will consider job descriptions as evidence of "essential functions." Job descriptions should precisely and accurately describe the essential functions of each job that each city employee performs. The ADA says you may not discriminate against a person with a disability in hiring if the person is otherwise qualified for the job. Job applications should ask only questions that are job related.

An interviewer may ask about an applicant's ability to perform a job, but the interviewer cannot inquire about disabilities or conduct tests that screen out people with difficulties. You may not ask questions about an applicant's medical history or about addiction to alcohol or drugs.

2. Actively Participate in the Interactive Process

The Interactive Process is the process through which an employer and employee with a disability identify any reasonable accommodations that may be necessary. Both parties must work together in good faith. Through direct communication you should identify the essential functions of the job, determine what limitations interfere with the employee's ability to adequately perform the essential functions of the job, and identify any accommodations and the reasonableness of those accommodations. Unreasonable job accommodations are those accommodations that would cause an undue hardship.

For more information on the interactive process, see *Equal Employment Opportunity Commission's Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act* available at www.eeoc.gov/policy/docs/accommodation.html.

3. Separate Medical Records from Personnel Records

Collect and maintain all medical information obtained from medical examinations and inquiries on separate forms, in separate medical files and treat the information as confidential. The medical information cannot be kept in an employee's general personnel file. Rather, a separate medical file must be maintained for all employees. Pre-employment medical examinations are prohibited under ADA, although a medical examination may be required once a conditional job offer has been extended. However, an employer may not refuse to hire the person based on the medical exam, except for a job-related reason that is justified by a business necessity.

4. Designate an ADA Coordinator

The coordinator should be a responsible employee who coordinates the city's ADA compliance effort and investigates complaints. The name, office address, and telephone number of the ADA coordinators are public information. The U.S. Department of Justice requires cities with 50 or more employees to designate an ADA coordinator. The Arkansas Municipal League strongly recommends that all cities, regardless of size, designate coordinators.

5. Post Public Notices

All cities and towns must distribute information about their compliance efforts. Equal employment opportunity notices should be posted in conspicuous places and provided to employment agencies that assist sight-impaired and other disabled people. Publish nondiscrimination clauses on all employment-related documents, applications, and statements.

6. Prepare a Self-Evaluation Plan

The League recommends that each mayor appoint a self-evaluations committee to work with the ADA coordinator to propose a self-evaluation plan. All cities should have conducted a self-evaluation plan by January 26, 1993. A city's plan should evaluate a city's programs and services in light of equal opportunity and equal access. You should ask, do people with disabilities have the opportunity to enjoy the services and participate in programs that your city offers? The plan must be distributed for public comment, then retained for a year for cities with fewer than 50 employees and three years for cities with 50 or more employees. The League recommends that the evaluation be kept as a permanent record in the event it is needed to defend the city in litigation.

7. Prepare a Transition Plan

Mayors should appoint a committee to work with the ADA coordinator to prepare a transition plan. This is a must for cities with at least 50 employees. Committees should include individuals with disabilities. The plan was to be finalized by July 26, 1992. It identifies all structural changes needed in public facilities such as city hall, public playgrounds, swimming pools, library, walkways and public restrooms.

The transition plan should describe in detail methods and dates that will make the facilities accessible. The person responsible for implementing the plan must be named.

8. Adopt a Formal Grievance/Complaint Procedure

This is a must for cities with at least 50 employees. The procedure must provide prompt and equitable methods for resolving complaints alleging ADA violations. Each city's grievance procedure must be adopted and published as soon as possible.

9. Purchase Tele-Typewriter telephones (TTYs) for Emergency Services

Cities must equip emergency systems to receive calls from TTYs and computer modems. The Justice Department encourages cities to provide TTYs where telephones are a major function of the department, such as city hall, city utility offices, and the public library.

10. Adopt a Compliance Resolution

After cities name their ADA coordinators, post public notices, start the self-evaluation, and transition plans, they should adopt a compliance resolution stating the city has reviewed all its employment policies, conducted a self-evaluation and transition plan, invited public comments, and established a grievance procedure.

11. Document Your Efforts

Documenting efforts demonstrates a city's good faith effort to comply with the law and your concern for disabled people.

12. Equip Your Police Department to Handle Arrestees with Disabilities

13. Obtain Copies of the ADA Technical Assistance Manual from the Equal Employment Opportunity Commission (EEOC)

For more information, see the League's *Americans with Disability Act Compliance Guide*.

The Family and Medical Leave Act of 1993

This section provides a basic overview of the FMLA. For a more thorough review, see the League's *Family Medical Leave Act Guide*.

FMLA requires cities to provide up to 12 weeks of unpaid, job-protected leave to "eligible" employees for certain family and medical reasons. The FMLA also allows an employee who is the nearest blood relative of an injured Armed Services member to take the 12 weeks of unpaid leave plus an additional 14 weeks, for a total of 26 weeks. Employees are eligible if they have worked for a covered employer for at least one year, and for 1,250 hours over the previous 12 months and if there are at least 50 employees within 75 miles.

Cities with fewer than 50 employees are technically "covered employers" under the Act. As odd as it sounds, however, their employees are not eligible for family medical leave. The only practical is that even cities with fewer than 50 employees must post an FMLA notice explaining eligibility under the Act. There is a potential $110 fine for failing to post the notice.

REASONS FOR TAKING LEAVE: Unpaid leave must be granted for any of the following reasons:

- 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;
- For a serious health condition that makes the employee unable to perform the employee's job;
- For nearest blood relative to care for an injured service member that is seriously injured or ill in the line of active duty, up to 26 weeks; or
- For any qualifying exigency when the employee's spouse, child or parent is on active duty or is notified of a call to active duty.

At the employee's or employer's option, certain kinds of paid leave may be substituted for unpaid leave.

ADVANCE NOTICE AND MEDICAL CERTIFICATION: The employee may be required to provide advance leave notice and medical certification. Taking of leave may be denied if requirements are not met.

- The employee ordinarily must provide 30 days' advance notice when the leave is "foreseeable."
- An employer may require medical certification to support a request for leave because of a serious health condition, and may require second or third opinions (at the employer's expense) and a fitness for duty report to return to work.

JOB BENEFITS AND PROTECTION:

- For the duration of FMLA leave, the employer must maintain the employee's health coverage under any "group health plan."
- Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.
- The use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

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; or
- 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:

- The U.S. Department of Labor is authorized to investigate and resolve complaints of violations.
- An eligible employee may bring a civil action against an employer for violations.

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.

On January 16, 2009, the Department of Labor amended the FMLA for the first time. Highlights of this amendment include:

- Changes to the military family leave, allowing for military caregiver leave and qualifying exigency leave;
- Clarification that an employee being placed on a "light duty" assignment does not mean the employee is on FMLA leave;
- Clarification on how to determine when something qualifies as a "serious health condition";
- Changes to notice requirements, holding that employees needing FMLA leave must now follow the employer's usual and customary call-in procedures for reporting an absence, absent unusual circumstances;
- Changes to the medical certification process, stating that an employee's direct supervisor may *never* be the individual to call the health care representative for information on the employee's serious health condition;
- Changes to the medical certification process allowing employers to require a new medical certification for each year, if an employee's medical condition lasts longer than one year; and
- Changes to the fitness-for-duty certification process, allowing employers to require that a fitness-for-duty certification expressly address the employee's ability to perform the essential functions of the job. Additionally, employers may now also require fitness-for-duty certification prior to an employee returning to work, in cases where reasonable safety concerns exist.

The Fair Labor Standards Act
"21 Things You Should Know"

All Employees

1. The minimum wage in Arkansas is $8.50 per hour for the year 2018. "Beginning January 1, 2019, every employer shall pay each of his or her employees wages at the rate of not less than nine dollars and twenty-five cents ($9.25) per hour, beginning January 1, 2020 the rate of not less than ten dollars ($10.00) per hour and beginning January 1, 2021 the rate of not less than eleven dollars ($11.00) per hour except as otherwise provided in this subchapter." (A.C.A. § 11-4-210(a)(2)).

   Note: The federal minimum wage for covered, non-exempt employees is $7.25 per hour. However, states are entitled to set a higher minimum wage. Accordingly, the higher Arkansas wage rates are applicable.

2. Overtime or compensatory time must be paid at time and one-half of the employee's regularly hourly rate (29 U.S.C. § 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 (29 C.F.R. § 533.31(a)). 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." (29 C.F.R. § 533.31(b)).

   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 (see 29 C.F.R. § 533.31). 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 (29 C.F.R. § 785.17). 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 the same public agency 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, www.dol.gov/whd/FOH/FOH_ch10.pdf.

9. Executive, administrative, and professional white-collar 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 salary rate was scheduled to increase from $455 per week to $913 per week, effective December 1, 2016. However, due to a court challenge and the change in administrations, as of this writing the existing salary rate of $455 is still in effect. The US Department of Labor is considering changes, which will likely occur in 2019. Please consult with your city attorney or League legal staff for updates.

a. Executive employees

(1) The employee must be compensated on a salary basis at a rate not less than $455 per week;

(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 (29 C.F.R. § 541.100).

b. Administrative employee

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities;

(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 (29 C.F.R. § 541.200).

c. Professional employee

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging, or other facilities; 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 (29 C.F.R. § 541.300).

d. Computer Employee Exemption

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The (a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week exclusive of board, lodging or other facilities, and the (a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. 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 (29 C.F.R. § 541.400).

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 plain clothed 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 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. § 203(y); see also 29 C.F.R. § 553.210(a)).

    You must be sure your paid firefighters (four or fewer) receive minimum wage for all hours on duty during the work period (see 29 U.S.C. § 213(b)(20); A.C.A. § 11-4-210(a)(2)).

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 (29 C.F.R. § 553.230). 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.		
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 workweek 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 (see 29 C.F.R. §§ 553.210(b), 553.211(e)).

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(o)(3)(B)).

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, Texas, 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 29 U.S.C. § 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 (see 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).

The Uniformed Services Employment and Reemployment Rights Act

Certain rights to re-employment after service in the uniformed services, as well as provisions relating to the pension and health benefits are established in the Uniformed Services Employment and Re-employment Rights Act of 1994, 38 U.S.C. 4301 et seq. and in A.C.A. § 21-4-102.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), prohibits discrimination against persons because of their service in the military. USERRA prohibits an employer from denying any benefit of employment on the basis of an individual's membership, application for membership, performance of service, application for service, or obligation for service in the uniformed services. USERRA also protects the right of veterans, reservists, National Guard members, and certain other members of the uniformed services to reclaim their civilian employment after being absent due to military service or training.

As an employer, the city shall provide to persons entitled to rights and benefits under USERRA a notice of the rights, benefits, and obligations of such persons and such employers under USERRA. A summary of rights afforded by the USERRA is contained in a poster developed by the U.S. Department of Labor and is available at www.esgr.org or in Appendix A of the Arkansas Municipal League's *Sample Personnel Handbook for Arkansas City and Towns*.

In addition, under A.C.A. § 21-4-102, employees who are members of a military service organization or National Guard unit shall be entitled to military leave of fifteen (15) days with pay plus necessary travel time.

The Genetic Information Nondiscrimination Act of 2008

The Genetic Information Nondiscrimination Act (GINA) was signed by President George W. Bush on May 21, 2008. GINA applies to employers with fifteen or more employees for each working day in each of twenty or more calendar weeks. GINA was instituted to prevent the misuse of genetic information to discriminate in employment, among other things, and prohibits employers from using genetic information in making employment decisions. It also prohibits employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

For the purposes of GINA, "Genetic Information" means an individual's (i) genetic tests, (ii) the genetic tests of family members of such individual, and (iii) the manifestation of a disease or disorder in family members of such individual, but it does not include any information about the sex or age of an individual.

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. It is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Furthermore, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

In addition, an employer shall not request or require genetic information from an individual or family member, except as specifically allowed by the Act. In making any request for medical information, the employer is strongly advised to include the following language in the requesting form:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

For more information on GINA and its exceptions, please go to www.eeoc.gov/laws/types/genetic.cfm.

Summary

Personnel management and law operate in an unstable and constantly changing environment. Not every personnel law that might affect municipal officials can possibly be anticipated and addressed in this booklet. The primary purpose of this booklet is to help you as a municipal official better understand and effectively deal with some major municipal personnel issues. This guideline is an educational tool, and you will need legal counsel when you begin to implement these suggested changes or for any other employment matter. Municipal officials should seek the counsel of their city attorney and should not rely solely on the recommendations in this booklet.

For more information, see the League's *Family Medical Leave Act Guide* and the *Sample Personnel Handbook for Arkansas Cities and Towns.*

Appendix A

A. Summary of Personnel Laws

1. Fair Labor Standards Act
2. Title VII of the Civil Rights Act; 42 USC §2000e et. seq.
3. Equal Pay Act of 1963
4. The Immigration Reform and Control Act
5. Age Discrimination in Employment Act (ADEA)
6. Pregnancy Discrimination Act
7. The Drug-free Workplace Act
8. The 1991 Civil Rights Act
9. 42 USC §1981, Civil Rights Act of 1866
10. 42 USC §1983, Ku Klux Klan Act of 1871
11. 42 USC §1988, Proceedings in Vindication of Civil Rights

The Fair Labor Standards Act

(Federal Law)

The Fair Labor Standards Act (FLSA) is a federal law that governs wages, hours, and working conditions. Important points about this law follow.

Enforcement Agency

U.S. Department of Labor; Wage & Hour & Public Contracts Division

Summary

The employer must pay minimum wage.* Overtime must be paid after 40 hour/week at the rage of time-and-one-half the employee's basic rate. Executive, administrative, professional, computer, and outside sales employees are exempt from overtime provisions. Child labor protection is also provided by the law. Special rules exist for police and fire departments. The FLSA provides the minimum protection that must exist, but state law or employer action may provide greater overtime compensation or more favorable benefits or protection for employees.

Coverage

The FLSA affects employers who are engaged in interstate commerce, which includes most employers. Public employers are also covered with regard to overtime pay requirements. The following individuals are NOT covered by the FLSA: elected officials and their personal staffs; political appointees; legal advisors; bona fide volunteers; independent contractors; and certain trainees.

Exceptions

There are many specific exemptions from one or more provisions of this Act. Contact your local office of the Department of Labor, Wage & Hour Division with questions.

Posting Requirement

The poster titled "Your Rights Under the Fair Labor Standards Act" is required in work locations. The poster can be found online at www.dol.gov/whd/regs/compliance/posters/flsa.html.

Record Retention Requirement

Employers must maintain employee data, including name, address, zip code, payroll records (including hours worked), pay rates, total wages and deductions, and collective bargaining contracts for at least three years.

Records that must be retained for at least two years include time cards, wage rate tables, work-time schedules, and records explaining basis for wage differentials paid to employees of opposite sex in the same establishment.

Statute of Limitations

Claims must be filed no later than two years after cause of action; three years for willful violation.

Penalties

Employer must pay an amount equal to underpayments to employees, plus an equal amount in liquidated damages, plus reasonable attorney's fees and costs. For willful violation, a fine of up to $10,000, imprisonment up to six months, or both, may be imposed.

The distinction between exempt and non-exempt can be very difficult to discern in certain cases. If you have any doubt, consult the U.S. Department of Labor or your attorney.

Title VII of the Civil Rights Act

(Federal Law; 42 U.S.C. § 2000(e) *et seq.*)

Enforcement Agency

Equal Employment Opportunity Commission (EEOC)

Summary

Prohibits discrimination in employment by employers with 15 or more employees in hiring, firing, compensation and terms, conditions or privilege of employment on the basis of race, color, religion, sex, pregnancy, or national origin.

Exemptions

- Religious organizations (for religious discrimination only)
- Bona fide, tax-exempt private clubs
- Aliens working for American companies outside the United States
- Indian tribes

Exceptions

Bona Fide Occupational Qualifications (BFOQ) permits employers to discriminate on the basis of sex, religion or national origin where such a factor is "reasonably necessary to the normal operation" of the employer's business. Race cannot be a BFOQ (See definition on page 5).

Posting Requirement

The poster titled "Equal Employment Opportunity is the Law" is required in work locations. The poster can be found online at www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

Statute of Limitations

- A charge must be filed within 180 days of the alleged discrimination.
- A lawsuit must be filed within 90 days after receipt of the notice of right-to-sue letter.

Penalties:

- Back pay
- Fringe benefits
- Reinstatement
- Reasonable attorney's fees
- Compensatory damages
- Punitive damages

Equal Pay Act of 1963

(Federal Law)

Enforcement Agency

Equal Employment Opportunity Commission (EEOC)

Summary

This act prohibits pay differentials on the basis of sex. It requires that there be equal pay for equal work regardless of sex. "Equal work" means equal use of skill and effort, equal responsibility and equal working conditions.

Coverage

Employers engaged in interstate commerce are covered and subject to the Equal Pay Act.

Exceptions

Pay differences are permitted under some seniority and merit pay systems that measure earnings on the basis of quantity or quality of production. Differences are also permitted if based on reasonable factors other than sex.

The Immigration Reform and Control Act

(Federal Law)

The Immigration Reform and Control Act of 1986 (IRCA) affects all employers ranging from the individual hiring domestic help to large corporations. The law prohibits the hiring of illegal aliens after November 6, 1986, and imposes sanctions on employers who fail to comply.

Employers Must Follow These Procedures:

- Hire only citizens and aliens lawfully authorized to work in the United States.
- Advise all job applicants of the employer's policy to such effect.
- Within three (3) business days of first work day, require new employees to complete and sign Form I-9 (Employment Eligibility Verification) to certify that they are eligible for employment.
- Examine documentation presented by new employees, record information about the documents on Form I-9, and sign the form.
- Retain the form for at least three (3) years or for at least one (1) year past the end of employment of the individual, whichever is longer.
- If requested, present Form I-9 for inspection by the Immigration Naturalization Service (INS) or Department of Labor officers. No reporting is required.

Under IRCA, there are certain documents which can be used to establish both proof of identity and work authorization. The most common combination of documents is a driver's license plus a social security card.

Failure to ask a new employee for verification of work status will subject employers to civil penalties which range from $100-$1,000 per violation, even if the person hired is a United States citizen. Employers are required to sign Form I-9 verifying that they asked for and were shown the necessary work authorization documents. In addition, each person hired must sign the same form verifying his or her eligibility to work in the United States.

It is an unfair immigration-related employment practice for an employer to intimidate or retaliate against an individual exercising his or her rights under IRCA.

Penalties:

IRCA applies only to illegal aliens hired after November 6, 1986. An employer found by the INS to have violated the Act is subject to an injunction against the illegal activity and to civil or criminal penalties. A first violation on or after June 1, 1989, will subject the violator to civil fines ranging from $250 to $2,000 for each unauthorized alien involved in the violation. Penalties for second violations can run up to $5,000 per unauthorized alien, while subsequent violations can bring penalties up to $10,000 for each illegal worker involved.

In addition, the INS regulations specify that "pattern and practice" violations are punishable by criminal fines of up to $3,000 for each violation, imprisonment of up to six (6) months, or both.

Age Discrimination in Employment Act (ADEA)

(Federal Law)

Enforcement Agency

Equal Employment Opportunity Commission (EEOC)

Summary

- It is unlawful for an employer to fail to or refuse to hire, to discharge, or otherwise discriminate against individuals 40 years of age or older with respect to compensation, terms, conditions, or privileges of employment because of age.
- It is unlawful to forcibly retire an employee.
- It is unlawful to give preference because of age to one person over another within the protected age group. (Example: It is unlawful to give preference to a 42-year-old job applicant over a 61-year-old applicant solely because of age.)

Coverage

Employers engaged in interstate commerce with 20 employees or more.

Exceptions

- Bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of a particular business.
- Differentiation's based on reasonable factors other than age. (Example: Use of physical examinations where stringent physical requirements are necessary to perform the work.)
- Differentiation's based on the terms of a bona fide seniority system (except for retirement).

Penalties

- Back pay (double back pay if the violation is found to be willful)
- Reinstatement
- Fringe benefits
- Reasonable attorney's fees

Statute of Limitations

- A charge must be filed within 180 days of the alleged discriminatory act.
- A lawsuit must be filed within 90 days after the receipt of the right-to-sue letter.

Older Workers Benefit Protection Act of 1990

The Older Workers Act took effect October 16, 1990, and amends the Age Discrimination in Employment Act. The Act is not retroactive.

Principal features of the Act include:

- Prohibiting all waivers of ADEA rights unless the waiver is knowing and voluntary (specific conditions must be met for the waiver to be legal).
- Extending coverage of ADEA to all employee benefits.

- Codifying the "equal benefit or equal cost principle" which holds that the only justification for age discrimination in employee benefits is the increased cost to the employer in providing the benefits.
- Permitting the following programs (with restrictions):
  - Early retirement incentive plans
  - Subsidized early retirement
  - Social Security bridge payments
- Generally prohibiting an employer from using an employee's vested pension benefits as a basis to offset or deny any other benefits, such as severance or disability.
- Existing plans must be brought into compliance by mid-April 1991, and new benefits or plans must immediately comply.

Pregnancy Discrimination Act

(Federal Law)

Summary

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964 that prohibits, among other things, discrimination in employment on the basis of sex. The Pregnancy Discrimination Act prohibits discrimination "because of or on the basis of pregnancy, childbirth or related-medical conditions." Therefore, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is, therefore, protected against such practices as being fired, or being refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to return to work, so are women who have been unable to work because of pregnancy. If non-pregnant workers have been offered accommodations, then an employee who is pregnant should also be eligible for such accommodations.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to the same disability benefits or sick leave as employees unable to work for other medical reasons. Also, health insurance must cover expenses for pregnancy-related conditions on the same basis as expenses for other coverage. Coverage for conditions arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

The Drug-Free Workplace Act

(Federal Law)

On October 21, 1988, the Drug-Free Workplace Act was passed as Title V of the Omnibus Drug Bill. The Act's effective date was March 18, 1989.

The Act requires every federal contractor, with an individual procurement contract for at least $25,000, to certify that it is providing a drug-free place of work. Only procurement contracts, including purchase orders, awarded pursuant to provisions of the Federal Acquisition Regulation are subject to the Act. The Act also covers recipients of federal agency grants and individuals who enter into a contract with a federal agency.

Where a procurement contract is to be performed both inside and outside the United States, the Act applies only to that portion performed inside the United States. The Act also applies where an existing contract is modified on or after March 18, 1989, in such a manner that the contract must be considered a new commitment.

The Employer's Responsibilities

For covered contracts, the contractor must certify it will provide a drug-free workplace by:

- Publishing a "statement" notifying employees that the unlawful manufacture, distribution, dispensation, possession or use of controlled substances is prohibited in the workplace.
- Establishing a "drug-free awareness program" to inform employees about (a) the dangers of drug abuse; (b) the contractor's drug-free policy; (c) "available" drug counseling, rehabilitation, and assistance programs, and (d) penalties for drug abuse violations. Contractors need only inform employees about available counseling, rehabilitation, etc.—contractors do not have to establish such programs.
- Requiring that each employee "engaged in performance of the contract" be given a copy of the "statement."
- Notifying employees that as a condition of employment, each must (a) abide by the terms of the statement, and (b) notify the employer of any criminal drug conviction for a violation occurring in the workplace no later than five (5) days after such conviction. A conviction is defined as a finding of guilt (including a plea of nolo contendere) or imposition of sentence.
- Notifying the contracting agency within ten (10) days after receiving notice of an employee's workplace-related criminal drug conviction.
- Within thirty (30) days after receiving notice of conviction, imposing an "appropriate personnel action" on, or requiring the "satisfactory participation" in an employee-assistance program by the convicted employee.
- Making a "good faith effort" to maintain a drug-free workplace by implementing the previous six (6) requirements.

If an employer violates the Act, its contract may be suspended or terminated, or the contractor may be barred for a period of up to five (5) years. Discretion to impose a penalty lies with the contracting officer. A penalty may be waived by the agency head if such waiver is in the public interest. Because both the imposition and waiver of penalties is undertaken on an agency-to-agency basis, inconsistent treatment of violators across agency lines is likely to occur.

Employers who contract with the Department of Defense should also be aware of the Department's "drug-free workplace" requirements. These requirements are separate from those contained in the Drug-Free Workplace Act.

Whether your organization tests or not, you should have a written drug and alcohol abuse policy.

Civil Rights Act of 1991

(Federal Law)

Enforcement Agency

Equal Employment Opportunity Agency (EEOC)

Summary

The Civil Rights Act of 1991 (CRA '91) amends Title VII of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866, by reversing several 1989 and 1991 U.S. Supreme Court decisions that narrowed the scope of Title VII and Section 1981. CRA '91 also amends Title I of the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). A brief discussion of CRA '91 follows.

The Civil Rights Act of 1991 (CRA '91) was enacted for two major reasons: First, to overrule recent Supreme Court decisions viewed by the Act's sponsors as unduly restricting employees' causes of action under Title VII and ADEA; and second, to expand the range of damages available to victims of job discrimination. CRA '91 expressly overruled *Wards Cove Packaging Co. v. Antonio* [490 US 642 (1989)], a Supreme Court decision that had made it almost impossible for plaintiffs to prove job discrimination based on statistical evidence. Further, CRA '91 permits Title VII plaintiffs to demand jury trials and permits juries to award compensatory and punitive damages in addition to back wages.

The Act also expands the rights of federal employees under federal anti-discrimination acts, and extends their jurisdiction to employees of Congress under a special set of procedures.

CRA '91 requires plaintiffs to demonstrate that each challenged employment practice causes a disparate impact, unless the plaintiff shows that the decision-making process in question cannot be separated for analysis. For example, when an employer relies on a test, an interview, and an applicant's grade point average in making an employment decision, but reviews these three factors without assigning a particular weight to each, the process may be treated as a single employment practice under CRA '91.

Damages for Intentional Discrimination

Historically, under Title VII, courts have been limited to "make-whole" or other types of job-specific relief (e.g., hiring, promotion, reinstatement). Compensatory and punitive damages were available only to victims of intentional discrimination based on race or ethnicity under Section 1981.

CRA '91 adds new remedies of compensatory and punitive damages for victims of intentional discrimination under Title VII and the ADA based on sex, religion and disability, as well as race and national origin. It sets the following caps on the recovery of such damages.

- $50,000 in the case of an employer with 15 to 100 employees;
- $100,000 in the case of an employer with 101 to 200 employees;
- $200,000 in the case of an employer with more than 500 employees.

In addition, CRA '91 provides that punitive damages are recoverable in actions under Title VII and the ADA when the plaintiff demonstrates that the employer acted "with malice or with reckless indifference to the [plaintiff's] federally protected rights."

In cases where the discriminatory practice involves providing (or ultimately not providing) a "reasonable accommodation" under the ADA or Section 501 of the Rehabilitation Act of 1973 (which applies to recipients of federal financial assistance and government contractors), the employer can avoid liability for compensatory or punitive damages if it demonstrates "good faith efforts" to accommodate

the individual's disability. Good faith must include consultation with the disabled individual seeking the accommodation.

Demand for a Jury Trial

CRA '91 permits parties to seek a jury trial in cases where the plaintiff alleges intentional discrimination and seeks compensatory or punitive damages. This represents considerable increased risk for employers, because they face the prospect of having a jury decide whether these damages are warranted and, if so, in what amounts. Employers also risk having jurors determine that CRA '91's caps on damages constitute a congressionally established benchmark to use to set the appropriate level of damage for intentional discrimination (42 U.S.C. § 1981, 1983, and 1988).

42 U.S.C. § 1981 and 1983 are two of the most significant federal civil rights statutes affecting municipal personnel decisions. Equally, they are two of the most complex areas of the public civil rights law. Because of their complexity they will be given limited attention in the guidebook. As a city official, it is incumbent upon you to gain legal advice as to the applicability of these statutes regarding any employment action you take.

42 U.S.C. § 1981

§ 1981, as amended, was originally enacted as the Civil Rights Act of 1866. It guarantees all persons the same right to make and enforce contracts (i.e., employment). There are no statutory requirements as to the number of employees a city must have for § 1981 to be applicable. In short it applies to all cities that are employers. The statute covers intentional racial discrimination only. Section 1981 was amended by Civil Rights Act of 1991, and now covers all terms and conditions of public employment. Discriminatory intent is required for a successful § 1981 cause of action. There are no governmental agency (i.e., EEOC) filing requirements, and thus § 1981 cases may be immediately filed without any "pre-filing" with an enforcement agency.

42 U.S.C. § 1983

§ 1983, as amended, was originally enacted by the 2nd Congress in 1871 pursuant to Section 5 of the Fourteenth Amendment for the protection of certain rights guaranteed by the "Constitution and Laws." It was part and parcel of the Ku Klux Klan Act of April 20, 1871. Additionally, protection under the Act was extended to cover federal laws beyond the immediate purview of the Constitution. In the municipal employment context § 1983 causes of action center around an act by the employer alleged to have violated a specific constitutional right(s) of an employee. A goodly portion of these cases focus on an employee's First Amendment rights to free speech and association, Fourth Amendment rights to be free from warrantless search and seizure, and Fourteenth Amendment rights to procedural and substantive due process regarding a particular employment action. In short, § 1983 is a mechanism to bring cities, their employees and officials into court to be held accountable for their employment actions pursuant to the civil rights guarantees of the Constitution. Like § 1981, there are no administrative filing requirements or number of employee prerequisites for a suit to commence.

42 U.S.C. § 1988

§ 1988 provides that if a plaintiff (employee, ex-employee) is the prevailing party in civil rights litigation, that the defendant (city, city employee, and/or city official) must then pay the plaintiff's attorney's fees and costs. Section 1988 is applicable to virtually every federal civil rights law. It is the proverbial "carrot at the end of the stick" encouraging attorneys to file civil rights employment causes of action.

Appendix B

SAMPLE FORMS

1. Job Opportunity Notice
2. Application
3. Unlawful Harassment Policy
4. Drug-free Workplace Policy
5. Ten Steps to Compliance with the Omnibus Transportation Act of 1991

SAMPLE GUIDELINES

1. Mayor's/Manager's Termination Checklist
2. Interview Guidelines

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 the position you may pick up an application at _____
_____

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

The City of _____ 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 of exercise of constitutional rights.

Name _____Date_____

Address _____

Telephone number where you can be reached or a message left for you_____

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

Can you perform the duties of the job which you are applying with or without reasonable accommodations? _____Yes _____No

If Yes, can you produce evidence of U.S. citizenship or legal work status within three (3) days?

_____Yes _____No

Education	Name & Location of School	Year Graduated	Major	Diploma/Degree
High School			NA	
College / University				
College / University				
Other Training				

Position applied for:

1.____ 2.____

Wage or salary desired? $____________________ When can you start?__________________________

Work History

Most recent employer:	Address:	Telephone:
Date Stated:	Starting Salary: $ Per:	Starting Position:
Date Ended:	Ending Salary: $ Per:	Ending Position:
Name of Supervisor:		Title of Supervisor:
Description of Duties:		Reason for Leaving:

Most recent employer:	Address:	Telephone:
Date Stated:	Starting Salary: $ Per:	Starting Position:
Date Ended:	Ending Salary: $ Per:	Ending Position:
Name of Supervisor:		Title of Supervisor:
Description of Duties:		Reason for Leaving:

Most recent employer:	Address:	Telephone:
Date Stated:	Starting Salary: $ Per:	Starting Position:
Date Ended:	Ending Salary: $ Per:	Ending Position:
Name of Supervisor:		Title of Supervisor:
Description of Duties:		Reason for Leaving:

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

Applicant Information for Record Keeping Requirements

(Answer All Questions and Please Print)

The City of _____ is an Equal Opportunity Employer. We request that you voluntarily provide the following information which will be used to study recruitment and employment patterns and to provide, as requested, statistical data to certain federal compliance agencies. This information WILL NOT be used in the employment process; and failure to provide the information WILL NOT jeopardize your opportunity for employment with the City of _____.

NAME _____ TODAY'S DATE _____

Sex and race/ethnic identification

SEX: ☐Male ☐Female (Check One)

RACE/ETHNIC: For the purpose of Equal Opportunity, race/ethnic categories are identified as follows: Please check the category which identifies your race/ethnic background.

☐ WHITE:
(Not of Hispanic origin) All persons having origin in any of the original peoples of Europe, North America or the Middle East.

☐ BLACK:
(Not of Hispanic origin) All persons having origin in any of the black racial groups of Africa.

☐ HISPANIC:
All persons of Mexican, Puerto Rican, Cuban, Central or South America or other Spanish culture or origin, regardless of race.

☐ ASIAN OR PACIFIC ISLANDERS:
All persons having origins in any of the original peoples of the Far East, Southeast Asia, the Subcontinent or the Pacific Islands (Ex: China, Japan, Korea, the Philippine Islands and Samoa).

☐ OTHER:

I understand that I am protected by various laws prohibiting discrimination on the basis of race, color, national origin, sex, religion, age and, in some circumstances, disability or veteran status. I further understand that the information contained in this form is to be used solely in equal employment record keeping, reporting and other legal requirements. I also understand that this information will be kept in the strictest of confidence and will not be disclosed to others except for the above stated purpose and then only if necessary.

Signed: _____ Date: _____

NOTE: THE information provided on this form will be kept separate from the employment application form such as in Section III of this file.

Sample

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 as 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: _____

(Also see *Sample Personnel Handbook for Arkansas Cities and Towns*)

Sample

Unlawful Harassment Policy

The City of _____ expressly prohibits its officials or employees from engaging in any form of unlawful harassment or discrimination, whether due to race, color, religion, sex, national origin, age, genetic information, political status, marital status, or status as a veteran or special disabled veteran or the presence of any physical, mental, or sensory handicap. Harassment or discrimination of any employee is a serious violation of city policy and will not be tolerated. Neither will workplace retaliation against someone for having complained of harassment.

For the purposes of this policy, "harassment" refers to an annoying, persistent act or actions that singles out an employee to that employee's objection or detriment, because of the employee's membership in any legally protected class or for some other trait the employee was born with (i.e., race, color, religion, sex, national origin, age, genetic Information, political status, marital status, or status as a veteran or special disabled veteran or the presence of any physical, mental, or sensory handicap). Harassment may be considered a violation of federal and/or state law.

Discrimination or harassment can take many forms and can include slurs, comments, jokes, innuendoes, unwelcome compliments, pictures, cartoons, pranks, or other verbal or physical conduct, including but not limited to the following actions:

- Verbal abuse or ridicule. This includes epithets, derogatory comments, slurs or unwanted sexual advances, unwanted sexual invitations, or negative comments because of the employee's protected class membership;
- Interference with an employee's work. This includes physical contact such as assault, blocking normal movement, or interferences with the work directed at an individual because of his/her protected status;
- Displaying or distributing offensive materials based upon protected status of some other reason. This includes derogatory or sexual posters, cartoons, e-mails, calendars, magazines, drawings, or gestures;
- Discriminating against any employee in work assignments or job-related training because of one of the above-referenced bases;
- Unwanted, intentional physical contact, whether it be of a sexual or other nature;
- Making protected status innuendos;
- Requesting favors (sexual or otherwise), explicitly or implicitly, as a condition of employment, promotion, transfer, or any other term or condition of employment;
- Gender based harassment, including sexual harassment and harassment based on pregnancy, childbirth, or related medical conditions; and/or
- Retaliation for having reported harassment.

Discrimination or harassment based upon a person's protected status, is prohibited by federal and state anti-discrimination laws and violates city policy where it:

- Has the purpose of effect of creating an intimidating, hostile, or offensive working environment
- Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- Otherwise unreasonably affects an individual employment opportunity.

Sample

It is every employee's and official's responsibility to ensure that his or her conduct does not include or imply harassment in any form. If, however, harassment or suspected harassment has or is taking place, the following will apply:

A. An employee should report harassment or suspected harassment to one of the employees designated to take these types of complaints. This complaint should, where practical, be made in writing.

B. Each complaint shall be fully investigated and a determination of the facts and an appropriate response will be made on a case-by-case basis.

The City of _____ will not tolerate harassment or any form of retaliation against an employee who has either instigated or cooperated in the Investigation of alleged harassment. Disciplinary action will be taken against offenders.

Drug-Free Workplace Policy

It is the policy of the City of _____ to create a drug-free workplace in keeping with the spirit and intent of the Drug-Free Workplace Act of 1988 and its amendments. The use of controlled substances is inconsistent with the behavior expected of employees, subjects all employees and visitors to city facilities to unacceptable safety risks and undermines the city's ability to operate effectively and efficiently. Therefore, the unlawful manufacture, distribution, dispensation, possession, sale, or use of a controlled substance in the workplace or while engaged in city business for the City of _____ or on the city's premises is strictly prohibited. Such conduct is also prohibited during non-working hours to the extent that, in the opinion of the city, it impairs an employee's ability to perform on the job or threatens the reputation or integrity of the city.

To educate employees on the danger of drug abuse, the city has established a drug-free awareness program. Periodically, employees will be required to attend training sessions at which the dangers of drug abuse, the city's policy regarding drugs, the availability of counseling, and the city's employee-assistance program will be discussed. Employees convicted of controlled substances-related violations in the workplace must inform the city within five (5) days of such conviction or plea. Employees who violate any aspect of these rules are subject to penalty up to and including termination. At its discretion, the city may require employees who violate this policy to successfully complete a drug abuse-assistance or rehabilitation program as a condition of continued employment.

Ten Steps to Compliance with the Omnibus Transportation Act of 1991

(Drug and Alcohol Testing)

By Ken Wasson, League Staff

*According to the Federal Highway Administration (FHWA) rules, all municipalities that have employees with a **Commercial Driver's License (CDL)** must comply with the Omnibus Transportation Employee Testing Act of 1991. The Act mandates that beginning January 1, 1996, municipalities test their CDL employees for alcohol and controlled substances. Additionally, the League suggests the following steps for municipalities to comply with this act.*

Step 1

Participate in the **Arkansas Municipal League Defense Program.** Member cities that participate in the Legal Defense Program are automatically eligible to participate in the **Arkansas Municipal League Drug/Alcohol Compliance Testing Program.** The League will act as the administrator of a statewide municipal consortium. The League will assist you with complying with the new act. There will be no direct costs or fees for cities that participate in the Municipal Legal Defense Program.

Step 2

Adopt a set of **policies and procedures** that clearly set out the requirements of the Department of Transportation (DOT) drug and alcohol testing programs. This policy should be part of and in addition to existing personnel policies. These policies and procedures should clearly explain the city's requirements and the requirements and responsibilities of each city employee who holds a CDL. The city should require that each CDL employee sign a receipt indicating that he or she has been provided a copy of the city's policies on drug and alcohol testing. (A sample policy and sample acknowledgment receipt form is available through the League.)

Step 3

Adopt a **resolution** stating the city's intent to fully comply with the requirements for drug and alcohol testing as mandated by the U.S. Department of Transportation (DOT) and other federal laws and regulations. This resolution should clearly state the penalty for a positive drug and alcohol test and the penalty for refusing to take a mandated test. (A sample resolution is available through the League.)

Step 4

Designate one city employee as the **"contact person"** who will answer employees' questions concerning drug and alcohol testing. The contact person will be responsible for receiving and handling all correspondence concerning the city's drug and alcohol policies and procedures, test results and testing times in a confidential manner. The contact person would also serve as the city's representative to receive information from the League drug/alcohol testing program administrator.

Step 5

Take steps to ensure that a CDL supervisor with authority to determine reasonable suspicion receives at least **60 minutes** of training on alcohol misuse and at least **an additional 60 minutes** of training on controlled substance abuse (for information on training programs contact the League).

Step 6

The city contact person should send to the League a list of city employees with CDLs. The list should include the **name, social security number,** and **city department** of each CDL employee. This list will be added to lists from other cities and will comprise the League consortium list for random drug/alcohol testing.

Step 7

Set up a **separate filing system** in which all records and information concerning employee drug and alcohol testing are kept. All records should be kept secure to prevent disclosure of information to unauthorized individuals. Remember, employee drug/alcohol testing records are confidential!

Step 8

Compile a **resource list of information and assistance** about drug and alcohol abuse. Each city government is required to advise CDL employees who engage in conduct prohibited under the rules of the available resources for evaluation and treatment of alcohol and drug problems. (A listing of resources and information on alcohol and drug abuse treatment centers are available through the League.)

Step 9

Arkansas municipalities should be prepared to submit **annual reports** summarizing the results of their alcohol and controlled substance testing programs. Arkansas municipalities are responsible for ensuring the accuracy and timeliness of each report. (The League will be available to provide assistance in submitting this report.)

Step 10

Document, document, document! Placing your actions and efforts in written form demonstrates your city's good faith effort to be fair and reasonable with all your employees.

Family Medical Leave Act

The Family Medical Leave Act (FMLA) of 1993 requires cities with fifty (50) or more employees to offer up to twelve (12) weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons. Eligible city employees may take up to twelve (12) weeks of unpaid leave for the following reasons:

- The birth and care of the employee's child;
- The placement of a child into an employee's family by adoption or by foster-care arrangement;
- The care of an immediate family member (spouse, child, or parent) who has a serious health condition; and
- The inability of a city employee to work because of a serious health condition which renders the employee unable to perform the essential functions of his or her job.

Cities with fewer than 50 employees are technically "covered employers" under the Act. However, their employees are not eligible for family medical leave. The only practical result is that even cities with fewer than 50 employees must post an FMLA notice explaining eligibility under the Act. There is a potential $100 fine for failing to post the notice. This makes little sense, but it is that way Congress wrote—and the Department of Labor interprets—the law.

The Act requires that the city maintain the employee's health coverage under any group plan during the time the employee is on FMLA leave. To be eligible for the FMLA benefits employees must:

- Be employed by the city for at least one year;
- Have worked 1,250 hours over the previous twelve (12) months preceding the leave request.

An employee on a sick leave or family care leave of absence (must/or may choose to) use all accrued personal, vacation and sick days while on leave. An employee on a parental leave of absence (must /or may choose to) use all accrued personal and vacation days while on leave. (The city should decide whether it will require the use of accrued leave as indicated. If it does not so require, the employee has the option of doing so.)

City employees must use vacation or accrued leave before FMLA leave will be granted. City employees are required to provide advance leave notice in writing, to the employee's supervisor (at least 30 days) when leave is foreseeable (such as childbirth, adoption or planned medical treatment, or as early as possible if the leave taken is not foreseeable 30 days' in advance). Depending on each individual situation, the city may require a medical certification to support a request for FMLA leave because of a serious health condition and require a fitness for duty report to return to work.

The city understands that upon return from FMLA leave, most employees must be restored to their original or equivalent position with equivalent pay, benefits and other employment terms. Furthermore, the use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Additional information and forms may be obtained from the city clerk.

See also other League publications, *Sample Personnel Handbook for Arkansas Cities and Towns*, and the *Family Medical Leave Act Guide* for more information.

Sample

Mayor's/Manager's Termination Checklist

Employee _____ Date _____

Department _____ Manager _____

1.	Do I have ALL the facts recorded accurately?	Yes	No
2.	Have I documented all facts and action?	Yes	No
3.	Have I assembled all the records? • Performance (production) records (Keep examples of unsatisfactory work production that have been discussed with the employee). • Attendance records • Performance review records, reflecting candid appraisals. • Discipline and warning records • Special Action records.	Yes	No
4.	Is my decision based on facts, not inference, suspicion, or emotion?	Yes	No
5.	Has the employee fully understood the job requirements and behavior standards?	Yes	No
6.	Does the employee know exactly where he/she has fallen short in job performance or behavior standards?	Yes	No
7.	Has the employee received at least one warning of possible dismissal? (Unless the conduct is serious enough to warrant dismissal).	Yes	No
8.	Has the employee has sufficient time and opportunity to correct the condition that led me to take this action?	Yes	No
9.	Have I considered the employee's point of view?	Yes	No
10.	Have personal difficulties or special mitigating circumstances been taken into account?	Yes	No
11.	Am I sure that discharge will come as no surprise to the employee?	Yes	No
12.	Is dismissal in this case consistent with best practices?	Yes	No
13.	Would the city be able to justify treatment of this employee if he/she claims discrimination, harassment, or retaliation?	Yes	No
14.	Would a jury conclude that our treatment of this employee was unquestionably fair?	Yes	No
15.	Has this decision been discussed with and approved by appropriate levels of higher management (i.e., contacting the city attorney)?	Yes	No
16.	Am I prepared to handle this dismissal tactfully and objectively?	Yes	No
17.	Have I scheduled the dismissal interview at a time that will eliminate or minimize the employee's personal contact with other employees before he/she leaves the premises?	Yes	No
18.	Have I made arrangements to notify the employee in private?	Yes	No
19.	Have I arranged for the final pay check and am I prepared to explain the amount?	Yes	No
20.	Do I know what group insurance the employee has and am I able to explain what will happen to it after dismissal?	Yes	No
21.	Have I decided what restricted statements will be made to other employees concerning this person's discharge?	Yes	No
22.	Have I ensured there will be no impermissible search of the employee's desk or private work area?	Yes	No

Sample

Guidelines for Interviews

Subject	You may	You may NOT
Name and Address	Ask a job application his/her name. Ask a job application whose name has been changed what his/her original name was only if you legally need to know.	Ask an application whose name has been changed what his/her original name was.
Birth Place		Inquire into the birthplace of an applicant's spouse, parents, or other close relatives if outside the United States.
Age	Ask an applicant his/her age only if the information is a bona fide occupational qualification. Or if the applicant's date of birth is needed to comply with a state or federal law.	Ask an applicant his/her age where it is not relevant to the job.
Sex		"Sex" may not be a question on the application unless it constitutes a bona fide qualification for the job (i.e., washroom attendant, jail guard).
Marital Status		Ask if the application is married, single, divorced or engaged, or whether the applicant has children at home, what their ages are or whether the applicant has future plans for children.
Religion	Ask an applicant if he/she can work after hours or on Saturday or Sunday if such work and inquire regarding reasonable accommodations.	Ask an applicant his/her religion, the name of his/her church, or religious holidays observed.
Race or Color		Ask about an applicant's color or race or require an applicant to submit a photograph with the application.
Citizenship	Ask an applicant, if hired, if he/she could produce evidence of U.S. citizenship or legal work status within three (3) days.	Inquire whether an applicant, spouse, or parents were naturalized or native-born citizens--or ask for the dates when they became citizens.
Job-Related Education	Ask an applicant about schooling.	
Work Experience	Inquire into an applicant's work experience.	
Physical Characteristics	Explain manual labor, lifting, or other requirements of the job or show how it is performed. You may require a physical exam of a person to whom you have made an offer of employment.	Ask height and weight if it is not related to the performance of the job.
Residence	Ask how applicant can be reached is he/she has no phone.	
Disability	Describe job tasks and ask applicant to demonstrate and/or describe how he/she would perform tasks with reasonable accommodations.	Ask about medical conditions or disability including Workers' Compensation claims.

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Understanding Municipal Personnel Law and Suggestions for Avoiding Lawsuits