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**FIFTEEN WAYS TO BE A BETTER BOSS
THAN DONALD TRUMP**

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HANDOUT NOTES

Comp Time

“Comp time” is the idea of allowing an employee to “bank” what otherwise would be overtime during one particular week to use to take off an equal amount of time in some following week. More informally, some employers tend to just think it all evens out in the end. If Suzie leaves early for her son’s soccer game today, she will stay a few hours late next week when we have to get a big project out.

Unfortunately, it is only available for government employees. Employers must pay non-exempt employees overtime for all hours worked over 40 during the company’s designated work week. For hourly employees, this calculation usually is not difficult. The problem usually arises, however, with salaried non-exempt employees who don’t even keep a time sheet. Employers beginning to truly enforce this rule often suddenly feel put upon when they have to pay the overtime, but are still paying full salary when the employee takes off early. Unfortunately, that is the consequence of having a salary employee who is not exempt from overtime.

Though it is of little solace, employers can adjust during a week. An employer can send an employee home during the week or make them take a longer lunch break (assuming they can use that time on their own away from the office) to avoid the overtime.

Employee Handbooks and Enforcing Rules

“Let your policies reflect your practices.”

- MCK.

Employee handbooks are not required by law. When written properly, they can be a benefit to employers by helping employees understand the “rules”, clarifying which “policies” floating around among your staff are actually the rule or just a myth, and hedge against various types of claims. When written poorly, they can make a claim for an employee even better. Two examples illustrate the point:

1. Female, disabled, Buddhist, x-military (you get the picture) employee is fired on the spot for some violation of company policy or on the whim of a supervisor. This employee then makes a claim for discrimination. As “Exhibit A” in her claim, the employee provides the EEOC a copy of the company employee handbook which provides a “three strikes and you’re out” disciplinary procedure. The employee is aware of at least two other occasions where the

employer followed this policy with male, not-disabled, Baptist, non-military employees. Now, the employer looks like a discriminator because he didn't follow his policy.

2. Employee quits and demands to be paid accrued but unused vacation pay and the employee handbook, which the employer copied off the internet, says the employee is entitled even though the employer is not otherwise under a legal obligation to pay it and has never done so in the past. The Texas Workforce Commission will enforce this requirement.

Every employee handbook needs to be different because every employer is different. If you copy a handbook off the internet and it does not reflect your *actual practices* you are going to end up in trouble. Of course, employers don't know what they can and cannot do under the law so they really should seek the advice of someone knowledgeable.

Enforcing Rules

In a whole lot of ways, employees are like children. Here are two examples:

1. There must be consequences for bad acts, otherwise employees will come to understand the absence of consequences or only threatened but never carried out consequences, and there will be pandemonium.

2. You can't be their friend and their boss. Sorry. It is just a universal law. When it comes time to be hard and enforce the consequences, bosses that are friends will fail every time because they can't do it or the employee reacts like they cannot believe their friend would treat them that way.

As illustrated by the example of the discrimination claim above, inconsistent application of rules can help an employee make a claim against you. It also creates dissension in the ranks.

Discrimination

Everybody knows that you are not supposed to discriminate. That said it is flat amazing how much it still goes on. So . . . what exactly is discrimination? As you might imagine, I can go on for hours about this subject, but in a nutshell:

Employers, supervisors, and co-workers are prohibited from treating a person in a "protected class" differently in any aspect of employment, including but not limited to: hiring, firing, pay, job assignments, promotions, layoff, training, and fringe benefits.

Protected classes include: race, color, age, disability, genetic information, national origin, pregnancy, religion, sex, or military status.

As you can see, the prohibition against discrimination is basically all encompassing. If you can think of a way that a person in a protected class might feel mistreated at work, they probably have a claim. Now, discrimination can even be unintentional so you have to be careful.

If you have a racist supervisor who gives blacks consistently lower scores on evaluations, and as the business owner who ultimately makes a decision about terminating a black person based on those evaluations, you have discriminated even though you didn't know it or have the intent to discriminate. You've got to be clear with your employees from top to bottom that discrimination is not alright.

I cover this subject not to give you the full breadth, but to tell you the basic law about which many employers only have a vague sense.

As a side note, most discrimination laws do not apply to employers who have less than 15 employees (some are 20), but there is at least one law pertaining to discrimination based on race that applies to all employers. This is not a free pass, but at least a little cushion for small employers.

Harassment

What is it exactly? How is it different from discrimination? We all think we know what harassment is, but has anybody ever laid it out for you?

1. Quid-pro-quo harassment:

- Unwelcome advances or requests for favors by an employee in a position to control some aspect of the victim's employment; and
- Submission to the request is an express or implied condition of receiving an employment benefit OR that employee's refusal results in a significant change in employment status, such as hiring, firing, failing to promote, significant reassignment, or other significant change in benefits.

2. Hostile work environment harassment:

- Unwelcome harassment of any kind whether in a single incident or accumulating over time;
- The harassment affects a term, condition, or privilege of employment; and

- The harassment is severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment. To be severe or pervasive, the harassment must be offensive such that both the victim and a reasonable person would perceive the harassment as hostile and abusive.

Document, Document, Document

It happens at least twice a month. I get a call from an employer who is finally fed up and ready to let an employee go. They call me to get the final blessing – expecting it right away. My first question usually is: What is in the file?

Many times, the answer is that the last couple of performance appraisals reflect adequate performance with a call to improve. Either the owner or supervisor fails to understand my rules about enforcing the company's policies. They soft-pedaled the failings of the employee in an effort to make the review go more smoothly for *them* (not the employee). Thinking about it in hindsight, the process all makes sense. The employer should have documented the failings in a way that would support termination so that the employee has less of a chance for a claim against the employer. Oops. Lesson learned – hopefully.

Just as often, there are no disciplinary reports in the file despite the requirements in the employee handbook regarding a multi-step disciplinary process. Oops, again. Hindsight is 20/20. Of course now, you've been warned.

Exempt\Non-Exempt

Salary and commission employees are not necessarily exempt. Let me say it again, *salary and commission employees are not always exempt*. All employees who are not "exempt" from overtime must keep timesheets.

What is this "exempt" and "non-exempt" business? The answer merits more of a discussion than what is here, but suffice it to say, employees who meet certain criteria can be exempt from overtime. The most common types of exemptions are: administrative, executive, highly-compensated, outside sales, learned\creative professional exemption, and computer experts. Note, the test is not *your idea* of which people fall into these categories; there are very specific and significant requirements to meet any one of the exemptions. You should seek counsel before determining on your own whether employees fall into these categories and, if you are trying to establish employees in these categories, you should write job descriptions that line up with the exemption to support you, in case the Department of Labor comes in to audit your business for overtime.

Firing

I'm sure you've all heard that Texas is an "at-will" state. Most of you probably understand this means that an employee or an employer can terminate their relationship "at-will" and without any warning. Even knowing this is the case, I am constantly amazed at the employers who are afraid to fire someone. Repeat after me, my termination mantra: Employers can fire an employee for good reason, bad reason, or no reason. You should officially now feel empowered!

Just know if it is a bad reason, or if the terminated employee *thinks* it is a bad reason, you may get sued. So, what are bad reasons? They come in two varieties, legal and illegal. The legal variety: Johnny comes in wearing a Dallas Maverick's Polo on casual Friday and your Spurs just suffered a humiliating loss to the Mavericks so you let him go. The illegal variety: Johnny, a black, gay employee pushes your buttons because of his race and sexual preferences and you let him go because of it.

Bad reasons include: discrimination or retaliation based on a protected characteristic such as race, color, national origin, an employee's refusal to participate in an illegal activity, mistreatment under a federal law like the Family Medical Leave Act, or otherwise violating a law. Avoid these, and the appearance of these, at all costs.

If you do fire someone, and you want to minimize your risk of being sued, you should get a release of claims. My clients surprise me all the time by saying they want to pay "2 weeks" severance or something like that, without getting anything in return. When you fire someone you don't have to give them *anything*! If you're going to give them something, whether to ease your conscience or otherwise, at least get a release in return.

How You Fire

Just as important, in some cases, as the motivation and analysis before firing, is the manner in which you fire someone. Follow these rules for safe termination:

1. Always have two people in the room. Two recounts of what happened are better than a he-said-she-said fight between a former employee and the employer in a later lawsuit.
2. Always have a person of the same sex, and if possible, race, religion, etc, as the employee in the room. A jury will like that person's perspective better than the black male boss in a lawsuit against a former white female employee.
3. Do not make the employee do the walk of shame. Studies show that a former employee's desire to sue is somewhat related to how they felt about the termination. If you humiliate the person, they will have a stronger motivation to get revenge. Fire at the edge of

business hours when there are few people around and allow the employee to leave after the meeting to return later for their belongings, which you can box up, if they prefer.

4. No access to computers after the meeting. An angry employee might do damage. Cut them off and terminate any remote access before the meeting.

5. Ask them to bring in any computer equipment or other hardware they possess for the meeting. Come up with an excuse. Do something. Getting it back later can be an absolute pain in the behind.

6. Get an agreement, in writing, to collect any unpaid payroll deductions from the last check.

7. Do not give a reason. This is the hardest one for clients to follow. There is a strong urge to treat termination like a high-school break up with the “it’s not you, it’s me” excuse or some other excuse made to help the terminated employee feel better about their separation and ease the conscience of the terminating employer. For later defending some type of claim, employment lawyers are then hedged in a polite excuse, rather than the real reason which is likely that the employee was no good. To preserve a clean slate for the employment lawyer to use, don’t give a reason.

8. If you are going to offer severance to get a release, don’t shove it down the employee’s throat during the meeting expecting a signature. For certain employees you have to offer more time for consideration by law. For the rest, you don’t want anyone arguing they were coerced. Put it in an envelope and tell them they can look at it later and consider it so long as they return it timely. DO NOT tie receipt of a final check to signing off on a severance agreement.

9. Pay the final paycheck within 6 days after termination. It is the law.

Covenants Not to Compete

A promise by an employee not to compete with your business after they leave can be a valuable tool to keep your business thriving. If done right, you can prevent an employee from opening up a competing business next door or trying to solicit your former customers. Contrary to what used to be the myth, they are enforceable if done right. Seek the assistance of someone with a lot of knowledge in this area to prepare one that is enforceable.

Independent Contractor vs. Employee

Employers can’t just conveniently decide to have everyone be an independent contractor so they can avoid payroll taxes. There are rules. They center around control. If an employer

controls where the person does their work, the hours during which they do the work, provides the materials for that work, instructs the person in the work rather than just providing a goal and instructing the person to arrive there by a path they choose, they are more likely than not an employee.

The consequences for mischaracterizing someone as an independent contractor when they should be an employee can be significant. The “employer” can be made to pay both halves of the appropriate federal payroll taxes, federal withholding for the mischaracterized person, penalties, and interest. In a worst case scenario, that looks like about 45% of the money paid to the “contractor”.

Social Media

In some ways, life is no different than it was 20 years ago when people went to the bar and complained about their work, their pay, and their bosses. Garth Brooks even wrote the song “American Honky-Tonk Bar Association” about it. It wasn’t too much of a problem then because the only people who heard the complaints were close friends in a one-time rant. The problem now is younger people have those conversations on the internet where they display their whole lives for the world to see. Employers are getting mighty angry watching their dirty laundry aired on the internet. They’ve started firing employees left, right, and center for it. In the process they have awoken the National Labor Relations Board.

What? That is only for unions, right? No. Complaining about your boss, your wages, or your working conditions is considered possible pre-union activity and the NLRB is throwing its muscle around against businesses all over the country for getting in the way.

You also need to be careful about what your employees are doing on the internet for other reasons:

1. If they send personal emails using your company account with your company name in the address, i.e. mkelsheimer@lrmlaw.com, they are reflecting on your business. So, if you don’t want a racy picture, racist joke, or some other tactless video link forwarded from your account, you need to straighten your employees out.
2. If they are on the internet for work, you need to monitor. What if they pass on a company secret in a blog, or on their LinkedIn account?
3. Your clients may see your employee’s Facebook page. If your employee posts pictures of a 3 day drunken bender, your image will suffer. I recommend a decorum policy and discipline or termination for employees who don’t follow by posting bad things on the internet.

Interestingly, the internet is a place where your employee's personal conduct can get them fired, but their gripes about work can't.

4. If your employee blogs for their personal life they should not use their company email address or discuss company activity.

5. Make sure employees understand not to disclose company secrets on the internet whether posting for work or personal business.

Breaks

Breaks are simple. I cover it only to correct the persistent myth that employees are *entitled* to breaks. As a general rule employees are NOT entitled to breaks – lunch breaks, smoke breaks, or a break every 4 hours. That said there are certain rules that are cropping up about breaks. Nursing mothers must be given breaks and a quiet place (other than a locked employee bathroom) to express milk if they choose to. In Austin, a local ordinance was passed last year that construction workers had to be given a water break once every 4 hours. Watch out for these, but otherwise – pass the word dispelling this myth.

Privacy

Trying to boil down a complicated topic into a couple of paragraphs is difficult. Here are the basics:

1. You can listen to your employee's calls in the office if you have a signed consent, but you must hang up as soon as you determine the call is personal in nature.

2. Practically speaking, there is no way to listen to your employee's cell phone calls, but you can listen to voicemails on a company phone or personal reimbursed phone only with a written consent. Yes, I know you pay for it, and I agree with you, but I don't write the law.

3. You may read your employee's work email without warning them, but I truly recommend telling them in advance and asking them to use a webmail account for their personal dealings. You can't read an employee's private or webmail emails unless you have a consent.

4. You can use video cameras – but don't be stupid – not in the bathrooms or locker rooms. Again, I recommend letting employees know in advance.

5. Except in the most special circumstances, and definitely with the assistance of a competent lawyer, you cannot use a polygraph with an employee.

6. You can inspect employee's desks, lockers, etc, without warning and without consent, but I strongly recommend having a written posted policy (or in an employee handbook) that employees have no expectation of privacy. That done, do not allow employees to have their own private lock that you don't have a key to for any space. If you do, there is a chance that space will become off limits to you.

7. Cars in a parking lot may be open to search – this is a touchy one – if you *own* the parking lot.

8. Wages are NOT secret. You can't discipline an employee for sharing.

9. If an employee refuses a search you can fire them. Of course, you could fire them anyway, right, because Texas is an at-will state.

Interviewing

Employers get out of sorts sometimes about conducting interviews because they are afraid they will ask a question wrong. Personally, I hate interviews. Not because I am nervous about asking the wrong question, but because I think people will tell you whatever you want to hear when they want a job. If you know how to get around that, give me a call, I would love to hear.

So, back to the “wrong” questions. There are NO illegal questions. Some lawyers will tell their clients to keep things simple, that it is “illegal” to ask about race, religion, national origin, etc. That's not true. Here is the deal – if you ask a female candidate if she is pregnant, she says yes, and you don't give her the job, she will have a basis to make a claim to the EEOC that you didn't hire her because she was pregnant – even if the reason you asked was just to understand the big bulge in her belly. For the most part, we don't want clients giving an interviewee this type of fodder for a claim, so employers ought to consider staying away from questions that would raise one of the same issues they have to be sensitive about with their employees.

Be careful asking about issues related to these protected classes: Race, National Origin, Color (it may be obvious but there are some you wouldn't be sure about), Religion, Sex (including sexual orientation which *might* not be obvious), Age (over 40), Disability, Military Status, genetic status, or Pregnancy. I'm not saying you can't touch on these issues, but there are risks associated with doing so. Don't say you weren't warned.

Don't skip on getting an application, either. If they fill out an application listing their education, former employers, etc., and some of it later turns out to be untrue, you will have concrete evidence to support your termination instead of a he-said-she-said fight over what they told you originally. Also, be careful regarding background checks and the like. You need a consent for a pre-employment drug screen, criminal history check, credit check, and I even

have clients get one for a background check by an investigator, and for release of information by a former employer. Sometimes former employers will come out of hiding a little better to tell you what the employee was really like if you send them a signed release by the applicant.

Don't forget that you also have to provide the applicant a release of worker's comp insurance within a few days after hiring, so you might get that signed at the time they fill out an application.

Conclusion

I hope you enjoyed the presentation and this handout. I know this only scratches the surface of issues you face as a business owner, but it's a start. If you would like something more substantial, you are welcome to sign up for The Employer Handbook, my complimentary monthly guide to employment topics. We offer it either in a custom notebook with monthly additions mailed out for you to add or via email. I try to be practical and concise. It won't get you an HR certification or make you an employment lawyer, but it will hopefully open your eyes to issues you may not have thought about and at least give you a basic insight on all of the laws that employers must contend with – just in their relationship with employees.

If you just can't get enough of me, you can also visit my website: www.texasemployerhandbook.com, where I offer discussion on employment current topics – like whether “ugly” should be a protected class, answers to quick questions – like whether you can carry a gun to work, and my handbook entries.