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## 2011 TEXAS CHILD CARE ADMINISTRATORS CONFERENCE

### EMPLOYMENT LAW

#### FAIR LABOR STANDARDS ACT (and Texas Payday Law)

- I. FLSA: Establishes standards for minimum wage, overtime, child labor and recordkeeping. First issue is always coverage - To whom does the law apply? Two forms of coverage:
  - A. Individual Coverage – applies employee by employee, week to week
    - 1. “Engaged in commerce” – interstate telephone calls, mailing letters, etc.
    - 2. “Production of goods for commerce” – any goods or information sent out of state: reports, even compiling data for reports (financial, clinical, etc.)
    - 3. This means all office staff virtually always covered
    - 4. Houseparents may or may not be covered: receipt of mail, LD telephone calls, use of internet, etc., may generate individual coverage
  - B. Enterprise Coverage - all employees of a covered enterprise are covered
    - 1. Definition
      - a. Related activities
      - b. Unified operation or common control
      - c. Common business purpose
        - (1) Non-profit educational, religious and eleemosynary (i.e., charitable) activities of a not-for-profit enterprise are not deemed to be performed for a "business purpose", so no enterprise coverage
      - d. BUT - **schools, hospitals and residential care facilities** are "deemed to be" for a business purpose, and are covered. Specifically, coverage extends to agencies which are:
        - (1) "...engaged in the operation of a **hospital**;
        - (2) an institution primarily engaged in the **care of the sick, the aged, the mentally ill or defective\*** who **reside on the premises** of such institution; (\*language in the Act)
        - (3) a **school for the mentally** or physically **handicapped** or gifted children, an **elementary or secondary school**, or an institution of higher education;
        - (4) regardless of whether or not such hospital, institution or school is public or private, or operated for profit or not-for-profit"
      - e. All public sector (state or local government) institutions are covered.
      - f. Definitions:
        - (1) Hospital - Establishment which is primarily engaged in the offering of medical and surgical services to patients who generally remain at the establishments either overnight, several days, or for extended periods.

- (2) Institution primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises - Such an institution is primarily engaged (i.e., more than 50% of income is attributable to) providing domiciliary care to individuals who reside on the premises and who, if suffering from physical or mental infirmity or sickness of any kind, will require only general treatment or observation of a less critical nature than that provided by a hospital.
- (3) Institution for the residential care of emotionally disturbed persons - More than 50% of its residents have been admitted by a qualified physician, psychiatrist, or psychologist. “For purposes of the 50% test, the term "admitted" includes evaluations of mental or emotional disturbance by a qualified physician, psychiatrist, or psychologist either subsequent to admission to the institution or preceding admission and being the cause for referral.” (from Wage & Hour FOH) Note the ambiguity in language—evaluations done subsequent to admission can hardly be the cause for referral—but presumable the perceived or suspected condition can.
- (4) Institutions for neglected and dependent children.  
Private nonprofit institutions providing care for neglected and dependent children are not covered by the enterprise provisions of the FLSA provided that such institution is not operated in conjunction with a hospital, covered institution, or school within the meaning of Sets 3(r) and 3(s) of the Act. However, there may be employees who are covered on an “individual” basis.

## II. Minimum Wage - \$7.25

- A. Workweek basis of enforcement
  - 2. Earnings - even if have bad week must earn minimum wage
  - 3. Deduction - Can't bring employee below minimum wage in any workweek
    - g. Deductions for employer's benefit are restricted by FLSA
      - (1) Cash shortages, damage to property, etc.
    - h. Deductions which are not restricted by FLSA:
      - (1) Legal deductions
      - (2) Advance of wages
      - (3) Advance of vacation
      - (4) Arm's-length purchases
    - i. Texas Payday Law (all Texas employers covered) -
      - (1) Permission in writing required for any deductions from wages
      - (2) Last paycheck due on regular payday if termination is voluntary; within 6 calendar days if involuntary
      - (3) Vacation, sick, severance due on termination if required under written plan or policy of the employer
- B. Credits toward minimum wage
  - 1. Food—actual cost or fair value of food provided to employee
  - 2. Lodging
    - a. Must be primarily for employee's benefit (generally not true in group

- home/houseparent situations)
- b. Only actual cost to employer, or fair value, whichever is less

III. Overtime

A. Workweek Basis

1. No daily overtime [except 7(j), or "8/80" plan]
2. Can't average workweeks
3. Overtime paid after 40 hours worked, not paid (e.g., no overtime on holiday, vacation, sick pay if not worked)
4. No comp time in private sector
5. Public sector can pay comp under certain rules:
  - a. Employee agreement
  - b. 1½ : 1
  - c. Maximum 240 hour accrual
  - d. Take off when requested unless "unduly disrupt" agency
  - e. Cash out at termination

B. Regular Rate

1. Includes almost all payments - bonuses, shift pay, on-call pay, etc. In other words, must pay overtime on all compensation, not just base rate. Examples:

-Hourly employee - if an employee is paid only an hourly rate, that hourly rate is the regular rate:

Assume \$10/hr, 40 hours worked:

$$\text{Regular Rate} = \frac{(40 \times \$10)}{40} = \frac{\$400}{40} = \$10$$

-Hourly employee who receives a bonus:

Assume \$10/hr, \$80.00 bonus, 40 hours worked:

$$\text{Regular Rate} = \frac{(40 \times \$10) + \$80}{40} = \frac{\$480}{40} = \$12.00$$

2. Calculation of Overtime

-Calculating OT for employee paid only by the hour who makes \$10 per hour and works 50 hours:

$$\begin{aligned} 40 \times \$10.00 &= \$400.00; & \$10 \times 1.5 &= \$15 \\ 10 \times \$15 &= \underline{\$150.00} \\ & \$550.00 \end{aligned}$$

Actually, OT is not the full time and a half. Rather, the true OT premium is the additional half-time. So it is better to think of OT as:

$$\begin{array}{r}
 50 \times \$10.00 = \$500.00 \\
 10 \times \$5.00 = \underline{\$50.00} \\
 \hline
 \$550.00
 \end{array}$$

The actual OT premium is the \$50 in half-time.

-Hourly plus bonus or other “extra” compensation:

Assume \$10.00/hr, \$100 bonus, worked 50 hours:

$$\text{Reg. Rate} = \frac{(50 \times \$10.00) + \$100}{50} = \frac{\$600}{50} = \$12.00$$

Since the employee has received straight-time pay at a regular rate of \$12.00/hour for all 50 hours, only the additional half-time is due:

$$\frac{\$12.00}{2} = \$6.00; \$6.00 \times 10 = \$60.00$$

#### IV. Record Keeping

- A. Basic business information (3 years)
- B. Daily/weekly totals of hours worked (retain source document 2 years)
- C. Payroll records (retain 3 years)
- D. No specific form required
- E. Time Clocks
  - 2. Early/late punch
  - 3. Rounding

#### V. Hours Worked

- A. Definition
  - 1. All time required to be on employer's premises
  - 2. All time required to be at prescribed worksite
  - 3. All time which benefits employer
- B. Management Responsibility
- C. Sleep Time
  - 1. Under 24 hour shift - no sleep time
  - 2. 24 hours or more - up to 8 hours of sleep (minimum of 5 hours of sleep)
- D. Residing on premises (THIS IS CRITICAL ENFORCEMENT ISSUE)
  - 1. Must be permanent or for "extended period of time" - 5 days or more
  - 2. Can enter into "reasonable agreement" about work time
  - 3. Special policy on “group homes”
    - a. Private quarters
    - b. Homelike environment
    - c. 5 twenty-four hour periods or more in each week
      - i. Relief workers can be treated the same as regular 5-day
- E. Meals

1. Duration - usually 30 minutes or more
  2. Uninterrupted
  3. Relieved from duty (watch where eat with residents)
  4. Not required by Fair Labor Standards Act (but watch State laws)
- F. Breaks
1. Not required
  2. Must be paid
- G. On-call time - not hours worked unless on-call conditions too restrictive
1. Beeper
  2. Short report time
  3. Not on employer premises
- H. Travel time
1. Home to work - not compensable
  2. Between job sites - compensable

VI. Employment Relationship—is a worker an “employee,” or something else?

- A. Seven Criteria—for typical “independent contractor” or “contract labor” situation
1. Extent to which the services in question are an integral part of the alleged employer’s services
  2. Amount of investment by alleged independent contractor in facilities and equipment
  3. Permanency of the relationship
  4. Nature and degree of control by the principal
  5. Opportunity for profit and loss
  6. Amount of initiative, judgment and foresight in open market competition with others required for the success of the claimed independent enterprise
  7. The degree of independent business organization and operation.
- B. “Volunteers”
1. Nothing in FLSA precludes employment relationship with religious, charitable or non-profit organization.
  2. “In many cases the nature of religious, charitable and similar nonprofit organizations, and schools, is such that individuals may volunteer their services in one capacity or another, usually on a part-time basis, not as employees or in contemplation of pay for the services rendered.” (FOH)
- C. Therapeutic Foster Parents
1. Dept. of Labor position remains that foster parents are not employees
    - a. Have taken different position when foster parent is also employee of same facility
- D. Texas uses common law control test—TWC has 20 factor test similar to old IRS SS-8 20 factor test. Texas might be more likely to find independent contractor status than feds.

**SALARIED EXEMPT EMPLOYEES**

I. Structure of the Exemption

- A. Merely paying employees on salary does not exempt them, nor does giving them fancy titles
- B. There are elaborate regulations (29 CFR 541) defining "executive", "administrative", "professional" and "outside salesperson". Only those employees who clearly meet the tests

are exempt - when in doubt, don't.

- C. Exemption generally requires two things:
  - 1. Salary basis of payment
  - 2. Meeting general "duties tests."
- D. State Laws May Differ: Currently most states with OT laws track FLSA Sec.13(a)(1), but some states now follow some version of pre-8/23/04 29 CFR 541. Also, California has its own unique rules.

## II. Salary Test

- A. Amount of Money Required
  - 1. Minimum Salary for Exemption--\$455/wk, \$23,660/year
- B. "Bright Line" Test—employees (almost) "automatically" exempt if:
  - 1. Total annual compensation is \$100,000 (pro rated if ee works less than a year)
  - 2. At least \$455/wk of total compensation is paid in form of guaranteed salary
- C. "Guaranteed salary" under Reg. 541:
  - 1. An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

Note: One of the big collective action litigation issues is improper deductions from salaries

## III. Duties Tests—General (following duties test elements are applicable to all four exempt classifications)

- A. "Primary duty" for all classifications of exempt employees is employees' most important duty. Factors to consider when determining what employees' most important duty is include
  - a. relative importance of exempt duties to other duties
  - b. amount of time spent performing exempt work (if over 50%, will be presumed to be employees' primary duty)
  - c. relative freedom from supervision of employees in question
  - d. relationship between salary of exempt employee and wages paid to other employees for type of non-exempt work performed by employee in question.

## IV. Duties Tests: Executives - This category includes managers, supervisors, etc., all employees who direct the work of others. The tests are:

- A. Primary Duty Test - The primary duty of an executive must be management of the enterprise as a whole or a recognized department or subdivision
- B. Two Employee Test - The employee must supervise two full-time employees or the equivalent in part-time employees.
- C. Power to hire/fire, or recommend hiring, firing, promotion or other change of status
- D. 20% owner who participates in management is automatically exempt
- E. Supervisors can supervise and do other work at the same time—e.g., fast food manager cooks, but also supervises other employees

- V. Duties Tests: Administrative - These are non-supervisory, non-professional office employees. This is the hardest test to apply.
- A. Primary duty is:
1. Office or non-manual work
  2. “Directly related to the management or general business operations of the employer or the employer’s customers”—means work directly related to assisting with the running or servicing of the business as opposed to working on a manufacturing production line or making retail sales
  3. Primary duty includes the exercise of **discretion and independent judgment** with respect to **matters of significance**
  4. Examples:
    - i. Case managers not considered exempt
    - ii. Activities directors not considered exempt
- VI. Professional

- A. There are three alternative primary duty tests because three types of employees can be exempt as professionals.
1. Learned professionals
    - a. Primary duty is work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study
    - b. Degree is best prima facie evidence of professional knowledge, but degree not required—employees can be exempt with any combination of education and experience which together give employees same level of knowledge as degreed persons and permits them to perform substantially the same work as degreed persons
    - c. “Work requiring advanced knowledge” is work which is:
      - i. predominantly intellectual in character, and
      - ii. includes some work requiring consistent exercise of discretion and independent judgment
    - d. “Field of science or learning”—includes the traditional professions, and similar occupations which have achieved recognized professional status
    - a. Examples:
      - i. Social workers at BSW/MSW typically can be exempt
  2. Creative artists
    - a. Primary duty
      - i. work requiring invention, imagination, originality or talent
      - ii. in a recognized field of artistic or creative endeavor (e.g., music, writing, acting, graphic arts)
  3. Teachers in educational institutions
- B. Exercise of discretion and independent judgment

VII. Data Processing Professionals

- A. Computer professionals are exempt if:

1. Primary duty falls into one of these categories:
  - a. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
  - b. The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs.
  - c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems.
  - d. Combination of the above.
2. Compensation:
  - a. If hourly at \$27.63/hour or more (i.e., 6.5 times minimum wage at the time the regs were issued), "salary basis of payment" test waived
  - b. If salaried, need only be **\$455/wk** or more like other exempt employees

## DISCRIMINATION AND HARASSMENT

### III. LEGAL ENVIRONMENT

- A. No discrimination because of race, color, religion, sex, national origin, age, or disability (some states - marital status, sexual preference)
- B. Applies to employers with 15 or more employees (state laws often cover more)
- C. Race, etc.
  1. Direct evidence of discrimination
  2. No direct evidence
    - a. Disparate treatment - Model for almost all claims of discrimination
      - (1) Plaintiff's initial burden - "prima facie case"
        - (a) Member of protected groups
        - (b) Suffers an adverse action
        - (c) Qualified for the job
        - (d) Replaced (or someone else hired, etc.)
      - (2) Defendant's obligation
        - (a) "Articulate" a legitimate non-discriminatory reason for the adverse action
        - (b) Consistency—with employer's policies, and with what employer has done in similar situations in the past
        - (c) Documentation
          - formal is better, but anything in writing is better than nothing
      - (3) Disparate impact
- D. Pregnancy
  1. Must be treated like any other temporary disability, including
    - a. Health insurance and income maintenance benefits
    - b. Seniority of female on maternity leave continues
    - c. Exception (BFOQ) very narrowly interpreted
- E. Sexual harassment
  1. "Quid Pro Quo"
    - a. Exchange of job favors for sexual favors.

- b. Done by Supervisor/Agent
  - c. Company is responsible.
  - d. Anti-harassment policy no help - but keep for deterrent value.
2. Hostile or Offensive Environment
- a. "Unwelcome" sexual advances.
    - (1) Consensual relationship not "unwelcome".
      - (a) Break-up
      - (b) Supervisor/subordinate dating - danger of quid pro quo - consider prohibiting.
        - Also danger of other employees' perception of favoritism.
      - (c) Co-Workers
        - Privacy right - probably can't forbid
        - Can apply nepotism rules.
  - b. "Unwelcome" Physical or Verbal Conduct of a Sexual Nature
    - (1) "Unwelcome" - both objectively and subjectively
    - (2) Must be serious or pervasive, not isolated or incidental
    - (3) Physical conduct - touching, etc. - even one incident may be enough.
    - (4) Verbal
      - (a) Comments on body, clothing, appearance; jokes;
      - (b) Jokes
      - (c) Description/questions on love life
    - (5) Third Parties—employers must protect employees from harassment by third parties.
  - c. Company Liability—If hostile environment created by co-worker or third party, company is not liable if:
    - (1) Company did not know of conduct.
    - (2) Company had no way to know.
    - (3) Anti-harassment policy/complaint mechanism
      - (a) Meritor Bank
  - d. Position on hostile or offensive environment if supervisor does it:
    - (1) If supervisor does it, and a tangible job detriment occurs (e.g., demotion, discharge), employer is strictly liable
    - (2) If supervisor does it, and no tangible job detriment occurs, company is liable but can raise affirmative defense
  - e. Affirmative Defense
    - (1) Company has widely disseminated and effective internal complaint process (c.f. Boca Raton, where first level supervisor did nothing about harassment, and city was liable even though prompt action taken when upper management learned of harassment).
    - (2) Employee does not take advantage of internal complaint process
3. Same-sex harassment—Oncale v. Sundowner.
- a. Same-sex harassment is prohibited by Title VII (5<sup>th</sup> Cir. overruled)
  - b. Conduct must be “severe”, not mere horseplay—football player v.

secretary

F. Employees with Disabilities

1. Federal contractors - affirmative action
2. Americans with Disabilities Act (ADA)
  - a. Definition of "disability"
    - (1) any physical or mental condition which substantially limits one or more of an individual's major life activities; or
    - (2) a record of such impairment; or
    - (3) being regarded as having such an impairment
  - b. Qualified individual with disability
    - (1) meets basic qualifications (education, experience, etc.)
    - (2) can, with or without reasonable accommodation, perform essential functions of job
  - c. Requires "reasonable accommodation" unless "undue hardship" - tough definition of undue hardship
  - d. Forbids any pre-offer inquiries about health/disability
  - e. Recent changes: Major life activities have been expanded to include "functions of the immune system, normal cell growth, bowel, bladder, neurological, brain, respiratory, endocrine, and reproductive functions";
    - (1). Overrules Supreme Court cases to say that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a disability
    - (2). Establishes that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active
    - (3). changes the definition of "regarded as" so that it no longer requires a showing that the employer perceived the individual to be substantially limited in a major life activity, and instead says that an applicant or employee is "regarded as" disabled if he or she is subject to an action prohibited by the ADA (e.g., failure to hire or termination) based on an impairment that is not transitory and minor

digestive,  
circulatory,

G. AGE

1. Protected group is age 40 & up
2. Fundamental impact is no mandatory retirement
3. "Comparable" need not be under 40 (e.g. 41 year old replaces 59 year old)
4. RIF's, layoffs - modified prima facie case
  - a. RIF criteria applied uniformly
  - b. statistics

H. RELIGION

1. Reasonable accommodation, unless more than de minimus cost

I. GENETIC TESTING

1. Cannot base employment decision on genetic test results.

## II. HIRING EMPLOYEES

- A. Applications and Interviews
  - 1. If you need to know, ask; if not, don't:
    - a. Age, date of birth - child labor only
    - b. Race, religion, national origin - NO! (not even a photo)
    - c. Disability, etc.
      - (1) Have job description listing essential functions
      - (2) Ask only if can perform essential function
      - (3) If applicant initiates it, discuss reasonable accommodations
    - d. Education - only if relevant
    - e. Sex, marital status, family, etc. - don't ask
    - f. Arrest, conviction, deferred adjudication - you may ask about convictions only - have disclaimer
    - g. Garnishment - No
    - h. Bankruptcy - No
    - i. Citizenship - No. Say that the company, in compliance with IRCA, requires proof of identity and eligibility to work. (I-9)
  - 2. Application Form
    - a. EEO statement
    - b. Authorization for pre-employment testing
    - c. Misleading, inaccurate information or omissions grounds for termination
    - d. Authorization for previous employers, schools, etc. to provide or confirm information. Release these from liability.
    - e. Statement of at-will status (cannot be varied by anyone except --)
- B. Pre-employment inquiry guide – lists acceptable and unacceptable questions – most states with anti-discrimination laws have them—get one!
- C. Retain all applications or resumes (required to retain for 1 year)
- D. Lie detector tests completely prohibited
- E. Some tests OK
  - 1. Psychological testing (personality profiles - watch ADA)
  - 2. Credit reports
- F. Pre-employment substance screening

## III. APPRAISALS AND PROMOTIONS

- A. Be aware that promotions could result in charges of discrimination
- B. Performance appraisals
  - 1. Based on what employee is expected to do
  - 2. List principal strengths and weaknesses
  - 3. Train supervisors on how to evaluate
  - 4. Tell the truth
  - 5. Avoid giving passing grades to marginal or worse employees
  - 6. Appraisal and warning form recommended
  - 7. Give employees chance to review, comment, sign
- C. Post all new job openings and minimum qualifications
  - 1. Employees have specified periods to apply
  - 2. Qualification requirements avoid arguments

#### IV. INVESTIGATION OF MISCONDUCT

- A. Due Process - not required in private sector, but always a good idea - fairness
- B. Investigation
  - 1. Listen to the whole story.
  - 2. Act - do something, even if you doubt the story.
  - 3. Interview complainant.
    - a. Get all the facts:
      - i. What happened
      - ii. Witnesses
      - iii. Others with knowledge
      - iv. Written and signed narrative
  - 4. Interview Witnesses—written and signed narrative
  - 5. Interview Accused
    - a. Give time to get mad
    - b. Get all the facts.
  - 4. Other facts - e.g. previous history, corroboration, etc.
- C. Credibility Determinations
  - 1. Courts do this every day.
  - 2. If you believe, act.
  - 3. If not enough either way, at least warn.
- D. Advise complainant of results.

#### V. TERMINATIONS

- A. Employment "at will" doctrine
  - 1. Definition
  - 2. U.S. Law
  - 3. State Laws
  - 4. Contract Exceptions
    - a. Implied covenant of good faith and fair dealing
    - b. "Accidental" Contracts
      - (1) employee manuals—don't use terms like "permanent" employee status
        - (a) disclaimers emphasizing that employment is at will are usually effective in Texas
        - (b) supervisor comments
        - (c) in Texas, employee must prove a "clear and unequivocal" employer promise of job security
    - c. Retaliatory discharge per FLSA, NLRB and Title VII, etc.
- B. Methods and Documents in Termination
  - 1. Do a risk profile:
    - a. Warning and chance to improve (unless must fire ASAP)
    - b. Adequate documentation
    - c. Consistent with own policy
    - d. Consistent with previous actions in similar situations
    - e. Age
    - f. Sex (pregnant?)

- g. Effect on EEO profile
  - h. Replacement
  - i. Seniority
  - j. Detrimental reliance - recently recruited
  - k. Recently on medical/workers comp leave
2. Termination Interview
- a. Rehearse
  - b. Employer witness (who takes notes)
  - c. Choose time and place to minimize discomfort, embarrassment, humiliation—also, avoid escort by security, etc., unless necessary
  - d. Quickly
  - e. Brief and clean - not too specific
  - f. Don't argue
  - g. Don't let them down too easily
  - h. Explain any benefits
  - i. Allow opportunity to vent (he may even agree - good at trial!)
  - j. No improper comments, and don't be trapped into making them
  - k. Detailed narrative later - signed by both

## **FAMILY MEDICAL LEAVE ACT**

### **I. Basic Standards**

- A. Covered employers: 50 employees (all public sector employers covered)
- B. Eligible employees:
  - 1. 12 months employed by employer
  - 2. 1,250 hours worked in 12 months preceding leave
  - 3. Works at location where employer has 50 employees within 75 miles
- B. Up to 12 weeks per year of unpaid, job protected leave when needed because of
  - 1. the serious health condition of employees, or their parents, children, or spouses
  - 2. birth, or placement for adoption or foster care, of children.

### **II. Two very significant changes have recently occurred regarding FMLA.**

- A. Military Caregiver Leave:
  - 1. A “spouse, son, daughter, parent, or next of kin” of member of Armed Forces
  - 2. Can take up to 26 workweeks of leave to care for a “member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.”
- B. Qualifying Military Exigency: Eligible employees may take FMLA leave while the employee’s spouse, son, daughter, or parent is on active duty or call to active duty status for one or more of the following qualifying exigencies:
  - a. Short-notice deployment.
  - b. Military events and related activities
  - c. Childcare and school activities.
  - d. Financial and legal arrangements.
  - e. Counseling.
  - f. Rest and recuperation.

- g. Post-deployment activities.
- h. Additional activities.

## COMMON LAW CLAIMS

Employment Torts: Torts are "civil wrongs" - actions which the law has said are wrong and for which the law will provide a remedy. Contract violations rarely result in punitive damages - typically the winner receives only "make whole" relief. By contrast, torts are typically punished by both compensatory damages - damages to compensate for the injury, including pain, embarrassment, etc. - and punitive damages, to punish and to deter such conduct in the future.

- A. Defamation - Libel (written) & Slander (oral) statements must be false.
  - 1. Elements of Defamation
    - a. Statement must be defamatory
      - (1) Injures person's reputation
      - (2) Exposes person to public ridicule, hatred or contempt
      - (3) Financial injury
    - b. Normally, defamatory statements must cause actual, measurable damages, or no lawsuit
    - c. Some statements can be actionable even if no damages proved:
      - (1) Accuse of a crime,
      - (2) Accuse of fraud or indirect dealing
      - (3) Incapacity (e.g., mental illness)
      - (4) Injure person in occupation, profession or business.
    - d. What type of statement is defamatory?
      - (1) Describe, don't characterize -  
"John's cash drawer was short 3 times" versus "John is a thief".
      - (2) Neutral reference - not defamatory
      - (3) "Would not rehire" - is definitely negative, but may or may not be defamatory. Test is what construction would be placed on the language by the general public ("reasonable man"). This uncertainty is why you should avoid "would not rehire".
  - 2. Publication
    - a. Statement must be "published" by and the speaker and subject. Employers calls employee a "thief" in private meeting - not published
  - 3. Privilege - There is qualified privilege to publish a false defamatory statement if:
    - a. Statement is made in good faith (i.e., believed it was true, and that belief was reasonable)
    - b. The speaker/author has an interest or duty on the subject, and the hearer has a corresponding duty.
    - c. Privilege is lost if the statement was made "maliciously".
  - 4. References may get greater protection in Texas than general defamation privilege because malice must be proved by clear and convincing evidence, not just preponderance of evidence.
- B. Intentional Infliction of Emotional Distress - many states recognize this.
  - 1. Words or actions must be intentional or reckless. Mere carelessness is not enough.
  - 2. Conduct must be "outrageous" - so bad that no civilized society would have to put

- up with it.
- 3. Must cause severe emotional distress to the employee.
- 4. What is outrageous? (examples)
  - a. Stuffing checks into an employee's purse and then accusing her of theft
  - b. Sexual harassment (if really bad)
  - c. Wilson v. Monarch - demotion and effort to humiliate employee into quitting
- 5. What is not outrageous? (examples)
  - a. Calling employee a "mother f\_\_\_\_\_ " - employees not protected from mere insult
  - b. Termination, even if discriminatory
- 6. To avoid, simply treat all employees with dignity and respect.
- C. Privacy Torts
  - 1. Invasion of privacy - searches of desks, lockers; monitor phone calls; drug tests; read e-mail, etc.
    - a. Key is to eliminate any "reasonable expectations of privacy" - advance notice of what is subject to search; don't allow private locks or private passwords
    - b. Drug tests - balance between privacy and employer's interest in drug-free workplace - states vary (some have statutes)
    - c. Watch areas where we all have expectation of privacy - e.g., don't put a video camera in the ladies locker room
  - 2. Publication of private information - employer may legitimately know of certain private facts - e.g., drug problems, sexually transmitted diseases, divorces, etc.
    - a. Limit information to those with need and right to know
    - b. Publication of such data, even if true, may be unlawful
    - c. Would reasonable person have considered such information private?
- D. Public Policy - From time to time employees will sue claiming that their termination was against the public policy of the state.
  - 1. Sources of public policy - varies widely from state to state - can be State Constitution or laws, or just common sense.
  - 2. Most common public policy tort - cannot fire an employee who refuses to perform an illegal act. Examples:
- E. Whistleblowers - protection for employees who report illegal activity.
  - 1. Statutes - there are many state (and even federal) laws that protect specific types of whistleblowing
    - a. Environmental (Clean Air Act, Safe Drinking Water Act, etc.)
    - b. Nuclear power plant safety
    - c. Nursing home violations
  - 2. Common law - relatively few states protect the "general" whistleblower.
  - 3. Texas has a whistleblower act which protects government workers who report violation of law to proper authorities (usually law enforcement). Other state protections for whistleblowers regarding children, nursing home patients, etc.
- F. Battery - could be added to a sexual harassment case for physical contact. Allows for punitive damages, and also personal liability on part of supervisor