

Rembolt | Ludtke

We *find*  
the way®

*Managing Human Resources:  
Ensuring Compliance with  
Federal and State Workplace Laws*

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*September 28, 2001*

# *Managing Human Resources*

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## *Overview*

*I. The Employment Relationship*

*II. Dealing with Our Wage & Hour Laws*

*III. Avoiding Claims of Workplace Retaliation*

*IV. Documentation, Discipline and Discharge*

*V. Employee Review and Performance Appraisals*

# Pop Quiz

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## True or False

- P Employment at will @ means that the employer and the employee can terminate the employment relationship at any time.*
- P All salaried employees are exempt from overtime.*
- P 16 year olds can operate a motor vehicle on-the-job if they have a valid drivers license.*
- P Nebraska law requires an employer to pay a terminated employee all wages owed within 7 days of the date of termination.*
- P An employer may decline to hire a job applicant if it discovers that the applicant has filed a discrimination claim against his former employer.*

# *The Employment Relationship*

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# *The Employment Relationship*

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*PContract Employees*

*PTemporary Employees*

*PIndependent Contractors*

*PLeased Employees*

*PEmployees at Will*

# *Employment at Will*

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*Absent a contractual or legal restriction, both the employer and employee are free to terminate the employment relationship at any time for any reason whatsoever without incurring liability.*

# *Employment at Will*

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- P Most states recognize A employment at will. @*
- P Nebraska is an A at will @ employment state.*
- P Chief is an A at will @ employer.*

# *Employment at Will*

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## *Exceptions*

**P** *Statutory*

*< Title VII*

**P** *Contractual*

*< Implied in Fact*

**P** *Tort*

*< Public policy*

**B** *Refusal to commit unlawful act*

**B** *Fulfilling public obligation*

**B** *Exercising right or privilege*

# *Employment at Will*

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## *Supervisors*

*PSome courts permit terminated employees to sue their employer and their supervisor for wrongful discharge.*

*PSupervisors can be required to hire their own attorneys and pay any damages awarded out of their own pocket.*

*PSupervisors have the primary responsibility for complying with state and federal employment laws.*

# *The Employment Relationship*

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## *Recap*

- P Variety of employment relationships*
- P Employment at will is most common*
- P Being an Aat will @ employer*
- P Lots of exceptions to employment at will*
- P Supervisors are the front line defense*

*Dealing with Our  
Wage & Hour Laws*

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# *Wage & Hour*

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*Fair Labor Standards Act of 1938*

**P***Adopted in 1938*

**P***Addresses:*

*< Minimum Wages*

*< Overtime Pay*

*< Child Labor*

*< Recordkeeping*

**P***Does Not Require:*

*< Vacation and Holiday Pay*

*< Severance Pay*

*< Premium Pay for Weekends or Holidays*

*< Meal or Rest Periods*

# *Wage & Hour*

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## *Minimum Wage*

*P Since September 1997, has been \$5.15/hour*

*P Today violations are rare*

*P Potential pitfalls:*

*< Failure to pay for training time*

*< Employer deductions for benefit of employer:*

*B Uniforms*

*B Tools*

*B Cash Shortages*

# *Wage & Hour*

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## *Overtime*

*P Requires nonexempt employees to be paid:*

*< 1 1/2 times*

*< A regular rate of pay @*

*< for all A hours worked @ over 40*

*< in a A workweek @*

# *Wage & Hour*

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## *Overtime*

### *PARegular Rate of Pay @*

*<All remuneration paid to, or on behalf of, an employee*

*<Easy to calculate for hourly employees*

*<More difficult to calculate for employees paid on a:*

*B Piece rate*

*B Salary*

*B Commission*

# *Wage & Hour*

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## *Overtime*

### *PA Hours Worked @*

*<All hours employer Asuffers or permits @employee to work.*

*<Preparatory activities?*

*<On-call time?*

*<Lunch break?*

# *Wage & Hour*

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## *Overtime*

### *P Workweek*

*< Need not correspond to calendar week*

*< A fixed and recurring period of*

*B 168 hours*

*B 7 consecutive 24-hour days*

# *Wage & Hour*

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## *Overtime*

*PMost common exemptions are the Awhite collar @ exemptions*

*<Executive*

*<Administrative*

*<Professional*

*<Outside salespersons*

*PEach have a Asalary @and Aduties @ component*

# *Wage & Hour*

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## *Overtime*

### *PA Administrative Exemption*

#### *< Salary Requirement*

*B Generally must receive salary of \$250 or more per week*

*B Can receive salary as low as \$155/week, but tougher standard*

#### *< Duties Requirement*

*B Primary duty is office or nonmanual work that is directly related to the management policies or general business operations of the company; and*

*B Job requires employee to exercise discretion and independent judgment*

# *Wage & Hour*

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## *Child Labor*

*P Distinctions between Agricultural and Nonagricultural Jobs*

*P Nonagricultural Jobs*

*< 14 & 15 year olds*

*B Nonhazardous jobs only*

*B Maximum of 3 hours on school day*

*B Maximum of 18 hours in school week*

*B Maximum of 8 hours on nonschool day*

*B Maximum of 40 hours in nonschool week*

*B 7 a.m. to 7 p.m. (9 p.m. from June 1 to Labor Day)*

# *Wage & Hour*

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## *Child Labor*

### *P Nonagricultural Jobs (cont=d)*

*< 16 and 17 year olds*

*B No restriction on hours*

*B Prevented from working in hazardous occupations*

*B 17 Hazardous Occupation Orders*

*B Coal Mines*

*B Operating power-driven woodworking machines*

*B Operating power driven metal-forming, punching or shearing machines*

*B Operating bakery machines*

*B Operating power saws*

*B Roofing operations*

*B Excavation operations*

# *Wage & Hour*

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## *Recordkeeping Requirements*

*P Burden is on employer to keep accurate records on:*

- < Personal information*
- < Hours worked*
- < Regular rate of pay*
- < Deductions from wages*
- < Total wages paid*

# *Wage & Hour*

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## *Nebraska Wage Payment & Collection Act*

*P*Must provide employees with 30 days written notice prior to changing payday.

*P*Must pay separated employee his wages owed  
< On next regular payday, or  
< Within 2 weeks of separation, whichever comes first.

*P*Unless authorized or required by law or court order, cannot make any deductions from employee's wages without employee's written consent.

# *Wage & Hour*

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## *Common Pitfalls*

### *Allowing 16 and 17 year olds to operate motor vehicles*

*< Drive for Teen Employment Act (Oct. 1998)*

*< 16 year olds can never operate motor vehicle on-the-job*

*< 17 year olds can, provided:*

*B daylight hours only*

*B completed state-approved drivers ed course*

*B instructed to wear seatbelts*

*B severe limitations on transporting passengers or goods*

*B cannot drive beyond 30 mile radius from work*

*B no more than 1/3 of time in any workday or 20% in*

# *Wage & Hour*

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## *Common Pitfalls*

### *P Classifying Nonexempt Employees as Exempt*

- < Must be able to point to applicable exemption*

- < White collar exemptions have duties and salary test*

- < Salary Test:*

- B Employee receives predetermined amount not subject to reduction because of variations in quality or quantity of work*

- < Policies that tend to jeopardize salary-basis test:*

- B deductions for part-day absences*

- B payment of additional compensation for extra hours worked*

# *Wage & Hour*

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## *Common Pitfalls*

*PIgnoring What is Meant by AHours Worked @*

*<Eager Beavers*

*<Working off the clock*

*<Prepartory activities*

# *Wage & Hour*

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## *Common Pitfalls*

### *P Improper Treatment of Rest & Lunch Breaks*

*< Rest breaks between 5 and 20 minutes are A hours worked @*

*< Bona fide meal breaks of 30 or more minutes are not A hours worked @*

*B Employee must be completely relieved of work*

*B Employee need not be allowed to leave the premises*

# *Avoiding Claims of Workplace Retaliation*

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# *Unlawful Retaliation*

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## *Employment Laws That Make Retaliation Unlawful*

P *Title VII*

P *ADEA*

P *ADA*

P *FMLA*

P *Nebraska Fair Employment Practice Act*

# *Unlawful Retaliation*

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## *A Growing Threat*

*P Fastest growing category of discrimination*

*P Retaliation claims now account for more than 25% of all claims filed with EEOC*

# *Unlawful Retaliation*

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## *3 Factors*

- P The individual engaged in protected activity;*
- P The employer subjected the individual to some adverse action; and*
- P There is a causal relationship.*

# *Unlawful Retaliation*

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*A Protected Activity @*

*P Participation*

*P Opposition*

# *Protected Activity*

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*AParticipation @*

*P Filing a Charge*

*P Gathering nonconfidential Company info*

*P Testifying*

*P Being a probable witness*

*P Assisting coworkers with discrimination*

*Charge*

*P Having a spouse/family member file a Charge*

# *Protected Activity*

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*AParticipation @*

*P No Reasonableness Requirement*

*P No Validity Requirement*

*P Protects Frivolous Claims*

*P Protects Defamatory Claims*

*P Protection Extends to Participation Involving  
Past Employers*

# *Protected Activity*

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## *AOpposition @*

- P Complaining about sexual harassment*
- P Threatening to file a lawsuit*
- P Hiring an attorney*
- P Requesting reasonable accommodation*
- P Filing internal grievance*
- P Inquiring as to whether race played a role in decision*

# *Protected Activity*

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*AOpposition @*

- P Manner of Opposition Must be Reasonable*
- P Opposition Cannot be Unnecessarily Injurious to Employer*

# *AAverse Action @*

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- P Termination*
- P Denial of Promotion/Demotion*
- P Refusal to Hire*
- P Suspension*
- P Threats*
- P Negative Job Evaluation*
- P Harassment*
- P Counterclaim*

# *Adverse Action @*

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P Majority View: Applies only to *ultimate employment actions*. @

P EEOC View: Any action above *petty slights* @ can be adverse.

# *A Causal Relationship @*

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- P Must show suffered A adverse action @ because of engaging in A protected activity @*
- P Established through direct or circumstantial evidence*
- P Defense exists for legitimate, nondiscriminatory reason for adverse action*

# *Unlawful Retaliation*

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## *Special Issues*

- P *Former Employees*
- P *Retaliation Requires Knowledge*
- P *Counterclaims and Lawsuits*

*Documentation, Discipline and  
Discharge*

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# *Documentation, Discipline & Discharge*

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## *Documentation*

*PMay be the most important thing you do as a supervisor*

*Pin every employment claim it=s the employee=s word against your=s--why take a chance?*

*PSaves Chief and you time and money*

*PMust be:*

*< Accurate*

*< Contemporaneous*

*< Preserved*

*< Prepared knowing that one day it might end up in Court*

# *Documentation, Discipline & Discharge*

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## *Investigate Before Disciplining or Discharging*

*P Discover the problem once put on notice*

*< Don't wait for formal complaint*

*P Pre-investigation*

*< Consider immediate steps*

*< Identify witnesses and gather relevant documents*

*P Choose investigator*

*< Depends on type of misconduct*

*P Interview Complainant*

*< Don't promise confidentiality*

# *Documentation, Discipline & Discharge*

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## *Investigate Before Disciplining or Discharging (cont=d)*

### *P Interview other witnesses*

*< Advise witness that no judgment has been made*

### *P Interview alleged perpetrator*

*< Give employee full opportunity to respond*

*< Employee may have right to have representative present*

### *P Objectively analyze results*

*< Assess credibility of witnesses*

# *Documentation, Discipline & Discharge*

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*Investigate Before Disciplining or Discharging (cont=d)*

*P Implement prompt, remedial action*

*< Ensure consistent with prior actions*

*P Follow Up*

*< Thoroughly document investigation*

*< Use opportunity to remind employees of Chief policies and procedures*

# *Documentation, Discipline & Discharge*

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## *Disciplining and Discharging Employees*

### *P Chief ⇒ Disciplinary Policy*

*< Discipline depends upon*

*B Nature of and circumstances surrounding offense*

*B Previous infractions*

*B Work Record*

*< May include*

*B Verbal warnings*

*B Written warnings*

*B Suspensions*

*B Probation*

*B Discharge*

*< Not a Aprogressive discipline @ policy*

# *Documentation, Discipline & Discharge*

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## *Keys to Disciplining and Discharging Employees*

*P Did the employee have knowledge of the work policy at issue?*

*P Did the employee clearly violate the Company policy?*  
*< Read the policy!*

*P Is policy being administered consistently?*

*P What other legitimate factors are at issue?*

*< Past violations of work policy*

*< Past work performance*

*P Is discipline consistent with past infractions?*

*P Are you implementing discipline in respectful manner?*

*Employee Review  
and  
Performance Appraisals*

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# *Employee Performance Appraisals*

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*P Can serve as positive tool for improving employee performance*

*P Must be taken seriously by supervisor and employee*

*P Not the only time to provide employees with feedback*

# *Employee Performance Appraisals*

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## *Double-Edged Sword?*

*Performance evaluations can serve as the basis for lawsuits against Company and supervisor*

*<Liability can result from positive and negative evaluations*

*<Liability can result from saying too much and saying too little*

*<Liability can result from not conducting evaluation when scheduled*

# *Employee Performance Appraisals*

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## *Avoiding Liability*

*P Explain review process to employees*

*P Be honest!*

*< If attendance is poor, say so.*

*P Every employee can improve his/her performance*

*P Stick to the facts*

*P Prepare knowing that it may end up in Court*

# Pop Quiz

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