

# EMPLOYMENT PRACTICES GUIDE

Managing Employment-Related Liabilities



# EMPLOYMENT PRACTICES GUIDE

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# SECTION 1: Introduction and Disclaimers

## Introduction

Employee lawsuits can be among some of the costliest and most frequent forms of litigation an organization can face, mainly due to hardship and other economic factors. This manual provides general information to housing agencies to assist with potentially mitigating exposures associated with employment practices.

## Disclaimer

This guide is for general information purposes only. It is not legal advice, nor is it to be acted or relied upon as such. This guide is not, and should not be, a substitute for obtaining legal advice from a qualified attorney, and you should not act upon any such information without first seeking professional counsel. If you have questions about employment-related matters, we strongly suggest consulting with a legal professional.

The information contained within this guide is subject to change at any time without notice and may not be current at the time of use, as information contained herein is frequently evolving.

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## SECTION 2: Managing Employment-Related Exposures in Housing Organizations

### What is an Employee?

As defined by the [Internal Revenue Service](#), “anyone who performs services for you is your employee if you can control what will be done and how it will be done.” The critical element in determining an employer/employee relationship is ‘control.’

### Contractors, Volunteers, and Others

The concept of employment has become more complicated in recent years. It is essential to understand the different types of workers that your organization may employ.

#### Independent Contractor

It is not unusual for housing organizations to hire independent contractors. These are people or groups with a written contract from your organization to provide a particular product or service. The contractor may be obligated to work on your organization’s behalf for a designated period or deliver a project or task. Examples of independent contractors include consultants and those working on-site employed by another firm, like temporary administrative services, construction services, or inspection services.

Who qualifies as an independent contractor? The U.S. Department of Labor recently [clarified the standard](#). In general, if a worker is economically dependent on your organization for work (as opposed to being in business for himself or herself), that person is considered your employee and is likely eligible to receive benefits from you. There are additional tests that may factor into eligibility. However, as a rule, the economic dependency standard will usually prevail.

It is vital to manage the risks associated with independent contractors. An organization may mitigate certain risks by ensuring the contractor or their employer has both workers’ compensation and general liability insurance and has named your housing organization and its representatives as additional insureds. Another mitigation factor to consider adopting is contractual language holding your organization harmless for any injury or damage that may arise from an independent contractor’s actions.

#### Casual Labor

The definition of casual labor differs slightly by state but is commonly used to describe a type of independent contractor presented with work opportunities they have the option of performing. The work performed is usually short-term and does not typically follow a regular schedule. For example, if you hired someone to bring in a truck for two hours to help clean out a storage space, that person has performed casual labor without any expectation of continued employment. It is important to make sure that any person or group providing this type of service: (1) has their own insurance; (2) has added language to their policy that names your housing organization as an additional insured; and (3) agrees to hold you harmless in the event of injury or damage.

## Volunteers

The U.S. Fair Labor Standards Act [defines a volunteer](#) as “an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered ... .” To be considered a volunteer, an individual must offer their services freely and without an employer’s pressure.

Suppose an individual employed by a public agency is asked or proposes to volunteer to perform similar job duties for the same public agency. In that case, they would not be considered volunteers according to federal regulations. For example, an employee who handles vehicle maintenance for a public agency cannot volunteer to perform vehicle maintenance for the same public agency.

## Interns

Interns perform work for an employer—public, non-profit, or for-profit—by choice to develop their skills.



The question of whether an intern should be paid or unpaid often arises. Since interns may not be considered employees, compensation is not always guaranteed. A [seven-step test](#) is often applied to determine whether an intern is an employee. Factors include whether the internship is tied to a formal education program, if the intern’s work complements rather than displaces paid employees’ work, and if a promise of compensation was expressly stated or implied.

At a public agency, an unpaid internship can be comparable to a volunteer position. The critical difference is an intern’s skill-building intent versus a volunteer’s civic, charitable, or humanitarian focus.

According to the [U.S. Department of Labor](#), it has been established that unpaid internships for public agencies and non-profit organizations, where the intern volunteers “without expectation of compensation,” are permissible.

These are general guidelines. If you have questions about your organization, contact your human resources department for advice.

## Employment Laws

So long as your organization has employees, it is likely to face some type of employment practice liability exposure. Fortunately, there are ways an organization may mitigate this type of loss. The first step is understanding the employment laws your organization must follow. The U.S. Department of Labor and the U.S. Equal Employment Opportunity Commission administer and enforce more than 180 federal employment laws. Below are some of the most common, but not all, employment laws applicable to organizations.

*Note: As a reminder, the information provided in this guide is not legal advice, nor is it to be acted or relied upon as such. We strongly suggest consulting with a legal professional as employment laws and regulations are often state-specific. It is important to consider the different employment classifications to ensure applicable laws and regulations are understood.*

### [Title VII of the Civil Rights Act of 1964 \(Title VII\)](#)

Section 1981 of the Civil Rights Act of 1866

Disparate impact

Disparate treatment

### [The Equal Pay Act of 1963](#)

[Executive Order 11246](#) (Affirmative Action Plans and the Office of Federal Contract Compliance Programs (OFCCP))

### [The Age Discrimination in Employment Act of 1967 \(ADEA\)](#)

### [The Americans with Disabilities Act of 1990 \(ADA\)](#)

Reasonable Accommodations

### [The Pregnancy Discrimination Act \(PDA\)](#)

### [The Fair Labor Standards Act \(FLSA\)](#)

### [The Family and Medical Leave Act \(FMLA\)](#)

### [The Occupational Safety and Health Act \(OSHA\)](#)

### [Lilly Ledbetter Fair Pay Act of 2009 \(LLFPA\)](#)

### [Uniformed Services Employment and Reemployment Rights Act of 1994 \(USERRA\)](#)

### [The Vietnam Era Veteran's Readjustment Assistance Act of 1974](#)

### [Genetic Information Nondiscrimination Act \(GINA\) Executive Order 11246 \(Affirmative Action Plans and the Office of Federal Contract Compliance Programs \(OFCCP\)\)](#)

### [National Labor Relations Act \(NLRA\)](#)

### [Employee Retirement Income Security Act of 1974 \(ERISA\)](#)

### [Consolidated Omnibus Budget Reconciliation Act \(COBRA\)](#)

### [Health Insurance Portability and Accountability Act \(HIPAA\)](#)

### [Patient Protection and Affordable Care Act \(PPACA\)](#)

### [Fair Credit Reporting Act \(FCRA\)](#)

### [Consumer Credit Reporting Act of 1996](#)

### [Drug-free Workplace Act \(1988\)](#)

### [Employee Polygraph Protection Act of 1988](#)

### [Worker Adjustment and Retraining Notification Act \(WARN\)](#)

## Enforcement Agencies

Below are some of the major agencies tasked with administering and enforcing employment laws and providing educational resources.

### [U.S. Department of Labor \(DOL\)](#)

- Administers and enforces most federal employment laws, including wages and hours of work, safety and health standards, employee health and retirement benefits, and federal contracts.
- Refers complaints to federal courts for enforcement if and when necessary.

### [U.S. Equal Opportunity Commission \(EEOC\)](#)

- Enforces many of the laws regarding discrimination in the workplace.
- Refers complaints to federal courts for enforcement if and when necessary.

### [National Labor Relations Board \(NLRB\)](#)

- Administers primary law governing relations between unions and employers.
- Covers most employees in the private sector.
- Some considerations for employees are covered under the National Labor Relations Act (NLRA):
  - provides protected concerted activity protections to union and non-union employees; and
  - identifies union employees/employers collective bargaining rights.

### [State Labor Offices](#)

- Employment laws may differ by state. Each state's labor office administers and enforces state common law and other state-specific employment regulations.
  - State labor offices refer complaints to state courts for enforcement if and when necessary.
  - Employees in select states may be protected under Right to Work laws, which may differ by state.

## Common Employment Claims

The following are common employment claims. This list is provided for informative purposes only and does not insinuate coverage for any said claim. We suggest confirming coverage for specific claims with your insurance carrier.

**Wrongful discipline/termination.** Can include claims such as breach of contract (express and implied), covenant of good faith and fair dealing, and public policy (whistleblower actions).

**Failure to employ or promote.** Occurs when the employee alleges that the employer failed to employ or promote based on illegal discrimination.

**Mismanagement of employee benefits plans.** Claim that employer breached fiduciary duties for mismanaging plans such as 401(k), profit sharing, pensions, and health care.

**Wage and hour claims (Fair Labor Standards Act).** Address an employer's failure to pay wages owed to an employee.

**Class actions.** Lawsuits filed on behalf of numerous plaintiffs with similar claims. For example, [this U.S. Department of Labor lawsuit](#) seeks to recover back wages for any current or former employees who have worked for a contractor since October 2015.

**Family and Medical Leave Act (FMLA) violations.** Addresses claims of an employer interfering with an employee who is trying to take leave as well as retaliation for taking leave.

**Whistleblower actions/retaliation.** Addresses claims of an employer punishing an employee based on a protected activity (e.g., reporting a safety concern, abuse of authority, or a legal violation in the workplace).

**At-will employment.** Although employees may be at-will, there can be exceptions "to the at-will presumption," according to [the National Conference of State Legislatures](#). These exceptions may include public policy, implied contract, and the implied covenant of good faith.

**Tort claims.** These claims can occur when the claimant seeks compensation for someone else's wrongdoing, resulting in property loss, personal injury, or death. Injuries can be physical, emotional, psychological, or financial. Examples include defamation, negligence, promissory estoppel, harassment/sexual harassment, civil assault and battery, tortious interference with contract, invasion of privacy, and wrongful infliction of emotional distress.

**Failure to meet reasonable accommodations.** These claims can arise from allegations of an employer failing to meet a reasonable accommodation in violation of the Americans with Disabilities Act.

**Illegal discrimination (Equal Employment Opportunity Commission).** Arises from alleged unfair treatment due to race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information.





## Insurance

The following types of insurance may offer organizations some protection against employment claims. Always consult with your insurance representative to understand the coverage offered by your policy and to determine whether you have adequate coverage.

### Employment Practices Liability Insurance (EPLI)

EPLI may protect against claims by workers who allege an employer violated their rights as employees. EPLI can protect against various types of employee claims and may cover claims of discrimination, sexual harassment, wrongful termination, and breach of an employment contract.

### Workers' Compensation

Workers' compensation insurance may help protect businesses and their employees from financial loss if an individual suffers a work-related injury or becomes sick due to a work-related cause. Almost all states require employers to provide workers' compensation coverage to their employees. (In a few states, employers may have the option not to provide these benefits; however, doing so may increase their exposure and liability.) Although workers' compensation insurance may cover most employee injuries, there can be exceptions, for example, if an employee is intentionally injured or if the employer has insufficient coverage. Examples of benefits regulated by state law may include:

- reasonable and necessary medical expenses;
- disability income benefits when an employee is unable to work;
- death benefits to the surviving family; and
- rehabilitation benefits.

Next:

**SECTION 3:** Employee Safety and Health

## SECTION 3: Employee Safety and Health

Human Resources (“HR”) departments play an essential role in employee safety and health. HR’s responsibilities can include safety training, insurance, security, data management and protection, health and wellness, emergency preparedness, loss prevention, and more.

### Occupational Safety and Health Act (1970) Standards

The [Occupational Safety and Health Administration](#) (OSHA) sets and enforces standards to ensure safe and healthy working conditions by providing training, outreach, education, and assistance. The [OSH Act](#) covers most private-sector employees and their workers as well as some public sector employers and workers in most, if not all, 50 states. It may also cover workers in certain territories and jurisdictions under federal authority. The act does not typically cover:

- those who are self-employed;
- workplaces already protected by other federal statutes;
- state and local governments; and
- family farms (only family members working).

***Please note you should not rely on this information to determine whether OSHA governs your organization. We strongly suggest consulting a legal professional regarding OSHA regulations and requirements.***

OSHA’s [general duty clause](#) requires employers to offer employment free from hazards that could harm employees. It also states that each employee must comply with these standards and all rules, regulations, and orders under OSHA, which apply to the individual’s actions and conduct.

Businesses covered by the OSHA are subject to federal workplace safety and health standards and/or comparable state standards if applicable in their jurisdiction. Establishments covered by the OSH Act are subject to inspection.

Most businesses with 11 or more employees at any time during the calendar year may need to maintain records of occupational injuries and illnesses as they occur using OSHA Form 300, Log of Work-Related Injuries and Illnesses (the Log).

Form 300 classifies work-related injuries and illnesses and notes each case’s extent and severity. They typically contain details about what happened and how it happened. The Summary (Form 300A) shows the totals for the year in each category. OSHA has established certain retention and visibility requirements for the Form 300, which can be found [here](#).

Work-related injuries and illnesses resulting in the following likely need to be recorded. Please note this list is not exhaustive, and there may be other instances where work-related injuries and illnesses may require recording:

- medical treatment beyond first aid;
- restricted work activity or job transfer;
- days away from work;
- loss of consciousness; and
- loss of life.

Please refer to the [general recording criteria](#) to determine if a work-related injury or illness must be recorded. It is important to note that cases listed in the Log are not necessarily eligible for workers' compensation or other insurance benefits and may require further assessment to determine eligibility and coverage.

OSHA requires certain information to be on display regarding rights and responsibilities under the Act. Consult with your local OSHA representative to learn what is required. OSHA inspections may be conducted based on the following:

- reports of imminent danger;
- investigations of fatalities and catastrophes;
- employee complaints of violations; and
- programmed inspections based on industrial accident statistics.

Please note there may be legal consequences if notification of inspection is provided prior to an OSHA inspection.

## Accident Investigations

OSHA requires a post-accident investigation after each incident. The investigation should begin immediately using a form that includes *who, what, where, why, and when*. It is recommended to take photographs of the incident site if possible, given that visual evidence can be invaluable.

Witness statements are also an essential part of the investigation but should not contain any statements that contain bias or conjecture. Remember, too, that the employee conducting the investigation should not inject or record their own opinion, biases, or assumptions of the events that led to the incident. The statements should consist of facts only.

Post-accident investigations should include a report that can be made available to OSHA for inspection.



## Personal Protective Equipment (PPE)

OSHA requires that employees wear personal protective equipment (PPE) when necessary to help reduce and eliminate hazards that may lead to injury and illness. Examples of PPE include gloves, glasses, hard hats, shoes, respirators, coveralls, vests, and full bodysuits.

If your organization uses PPE, it is vital to implement a PPE program to address issues like how to properly fit the equipment, when to use it, how to care for it, and its limitations. Training should also be provided on the proper use of PPE, and every organization should monitor the effectiveness of their program.

## The Hazard Communication Standard and Safety Data Sheets (SDS)

The Hazard Communication Standard (HCS), aligned with the [Globally Harmonized System of Classification and Labeling of Chemicals](#), establishes standards and protocols related to chemical safety in the workplace. According to HCS, organizations using hazardous chemicals must label them, maintain safety data sheets, and train exposed employees to handle the chemicals in a manner and language employees understand. Labels should include the following:

**Product identifier.** Includes the chemical name, code number, or batch number designated by the manufacturer, importer, or distributor, which must match the product identifier on the SDS.

**Signal word.** Describes the severity of the hazard—either “danger” (more severe) or “warning” (less severe).

**Precautionary statement.** Recommends measures to minimize or prevent adverse effects resulting from exposure or improper storage or handling, including the degree of the hazard.

**Hazard statement.** Describes the nature of the hazard.

**Pictograms.** [Define the hazard category](#) and can be mandatory; OSHA has standards that govern pictogram shape, size, and color.

**Supplier identification.** Include the name, address, and phone number of the chemical manufacturer, distributor, or importer.

Be aware that the HCS also requires the manufacturer, distributor, or chemical importer to provide an SDS to those who use the substance. The SDS contains information such as each chemical’s properties, the physical, health and environmental hazards, and the protective measures and safety precautions for storing and transporting the chemical.

## Safety Programs

OSHA encourages organizations to maintain an ongoing, four-point safety program that includes:

- management commitment and employee involvement;
- worksite analysis;
- hazard prevention and control; and
- training for employees, supervisors, and managers.

Some organizations designate a person, multiple persons, or an entire department to the initiative. You can read more about these programs and get helpful tips in HAI Group’s [Risk Control Manual](#).

## Bloodborne Pathogens Standard

The Bloodborne Pathogens Standard applies to employees who have occupational exposure to blood or other potentially infectious materials. Bloodborne pathogens are microorganisms found in human blood, such as the hepatitis B virus, that can cause disease. The CDC and OSHA recommend employers:

- identify job classification, tasks, and procedures where exposure exists;
- create an exposure control plan, and update and communicate it to employees annually;
- evaluate medical devices and use them appropriately (document the evaluation and selection of said devices); and
- ensure employees comply with universal precautions and treat all human blood and other potentially infectious materials (OPIM) as if they are infectious for bloodborne pathogens.

Furthermore, the standard calls for:

- the use of engineering, workplace practice controls, and PPE to eliminate or minimize exposure;
- labels and signs to communicate hazards;
- information and training for workers; and
- up-to-date worker medical and training records, unless exempt.

It is important to note that the Bloodborne Pathogens Standard requires employees with occupational exposure to hepatitis B to have access to vaccination. However, employers should consult with legal counsel regarding vaccines.

The Bloodborne Pathogens Standard also requires post-exposure evaluation and follow-up procedures for employees, including:

- documentation of the exposure route and circumstances;
- source tests for HBV and HIV infectivity, with employee consent if required by law;
- collecting and testing, with permission, of any exposed employee's blood; and
- post-exposure illness evaluation, prophylaxis, and advice (diagnoses must remain confidential).

Since there are legal considerations in cases involving bloodborne pathogens, including, but not limited to, consent, health information, privacy, and confidentiality, we strongly suggest that you consult with your legal counsel regarding the implementation of a bloodborne pathogens program and the proper handling of related cases.

## Workplace Violence and Security

It is recommended that employers take proper precautions regarding workplace security, including physical security and certain employee behaviors. OSHA [defines workplace violence](#) as “violence or the threat of violence against workers.” Examples of violent crimes include assault, criminal mischief, disorderly conduct, harassment, robbery, sex offense, and reckless endangerment. [According to OSHA](#), workplace violence policies should consist of:

- strategies to prevent workplace violence;
- crisis management plans;
- a zero-tolerance provision; and
- recovery resources such as counseling.

Workplace violence can sometimes occur if an employee is subject to an adverse event at work or experiencing personal difficulties outside of work. It is essential to keep this in mind when considering termination, demotion, or difficult conversations due to disruptive or unprofessional behavior. Having security measures in place, such as escorting terminated employees out of the building and collecting their access cards, can help mitigate this behavior. Exposure and risk may also be reduced by conducting periodic training and vulnerability assessments. The U.S. Department of Homeland Security [provides in-depth resources](#) on workplace violence.



## Crisis Management and Emergency Planning

Employers are responsible for providing a safe and healthy work environment. It is recommended that your organization's emergency preparedness plan include:

- a chain of command;
- an emergency team;
- a communications center;
- an accounting of all employees;
- medical assistance (first aid training, on-site supplies, trained employees);

- business continuity and emergency action plans; and
- employee training.

Refer to our [Risk Control Manual](#) for more information.

## Ergonomics

[Ergonomics](#) is the science of designing and arranging the workplace to improve efficiency and help remove risk factors that can lead to musculoskeletal disorders (MSDs) such as carpal tunnel syndrome, tendinitis, rotator cuff injuries, muscle strains, and low back injuries. Implementing an ergonomic process can reduce the development of MSDs in office jobs and high-risk industries such as construction, food processing, healthcare, transportation, warehousing, and firefighting.

Interventions may include making changes to work practices and purchasing new tools or devices. According to OSHA, such measures can reduce physical demands, eliminate unnecessary movement, lower injury rates, associated worker's compensation costs, and reduce turnover.

It's vital that those who conduct ergonomic training have formal training or are certified through an organization such as the Board of Certification Professional Ergonomics (BCPE).



## Grievance Procedures

A formal grievance procedure should be established to ensure employee complaints are documented in writing and addressed promptly. Grievance procedures for union employees are typically outlined in a collective bargaining agreement and may have specific requirements, such as having a union representative present. Always check with your legal counsel before proceeding with an investigation or corrective actions. For non-union employees and grievances, consider the following:

- Employers may resolve complaints informally when appropriate. If they feel comfortable, employees may discuss the complaint with their immediate supervisor. However, if the employee feels strongly about filing a formal complaint, the employee should be encouraged to do so through the proper channels. Anti-harassment and codes of conduct policies should encourage employees to maintain compliance, ask questions, and adhere to the policy.
- Employees should be able to submit a written formal complaint to their supervisor through a grievance form that includes at least the following:
  1. the nature of the complaint;
  2. detailed supporting information; and

3. their expectations.

- It is important to notify HR, who can then work with the supervisor.
- If the employee is not satisfied with the immediate supervisor's actions, the employee can submit a written complaint to senior management and HR. The employee should explain the grievance as stated above and submit copies of any correspondence with their supervisor. Senior management and HR can work with relevant parties to provide a written response within a reasonable number of days. HR should maintain all documentation.

Employers may provide employees with different reporting options depending on the severity of the complaint. For example, they may implement anonymous reporting or have complaints go directly to HR. The employer should communicate this process and have resources available—such as electronic links and forms—so employees know how to file a grievance. This procedure can be outlined in your employee handbook as well.

Consult with legal counsel for additional support related to grievances, especially union-specific grievances.

## Workplace Investigations

Employers should take immediate action and begin an investigation when an employee makes a complaint. It is also important to take the proper corrective steps to stop activities and behaviors that may be illegal. Consider the following steps when conducting an investigation:

**Appoint an investigator.** This can be a trained internal staff member or a third party. The investigator must be objective. Consult with your legal counsel to determine if your organization has a trained investigator on staff.

**Take immediate action.** Determine if interim action is needed before the investigation is complete, including the employees' separation and suspension. Seek legal counsel to potentially minimize legal action.

**Plan ahead.** The investigator should outline the issues and parties involved and determine the right questions to ask during the investigation. The investigator should develop a documentation process if one isn't already in place.

**Interview the accused.** Talk with the accused about the allegations against them, and let them know a follow-up meeting will occur.

**Interview witnesses.** Talk with the accuser and any witnesses about the allegations. While witness interviews may vary, attempt to ask questions in the same order and encourage witnesses to come forward later with any additional information.

**Final interviews.** Conduct a second round of interviews with the accuser and accused based on any new information or witness statements.

**Investigation summary.** The investigator should write up findings in a summary report and provide copies to HR, senior management, or legal counsel to determine the next steps. Check with your legal counsel before documenting the conclusion of your investigation. The report should be retained by HR and kept confidential.

**Corrective measures.** Provide written copies of the decision to the accused and accuser and take any necessary remedial measures.

**Monitor the situation.** Determine whether corrective actions were useful and, if necessary, continue to follow up with the parties involved.

It is important to note information must be kept confidential throughout the duration of the investigative process.

*Note: The above steps are meant as a guide and are not intended to replace legal advice or to be acted or relied upon as such. Consult with legal counsel to ensure compliance with federal, state, and local laws when conducting an internal investigation. The Society for Human Resource Management provides workplace investigation resources [here](#).*

## Other Health, Security, and Safety Considerations

### Employee Assistance Programs (EAPs)

Many employers have developed Employee Assistance Programs (EAPs) to support employees dealing with personal matters. Some organizations offer this as an in-house program, while others may refer employees to professional counselors, social workers, etc. If someone at your organization is struggling but is resisting assistance, it is important to document any performance issues. It is also essential to be aware that certain conditions, such as alcoholism, are a protected disability under [the ADA](#). It is important to have the right resources and programs to ensure ADA compliance and support an employee's success. EAPs should be:

- staffed with people who are knowledgeable about the program, sensitive, and able to maintain confidentiality;
- accessible 24/7;
- open to all employees;
- available outside of the workplace; and
- communicated to employees.

Note that your EAP may need to comply with the Employee Retirement Income and Security Act (ERISA) and the IRS. Consult with your legal counsel and the Department of Labor for guidance.

### Employee Wellness Programs

Wellness programs help promote overall employee well-being and improve employees' health and productivity, which may reduce health care costs. Before implementing a wellness program, consider a plan that includes assessment, planning, implementation, and evaluation. Wellness initiatives can include on-site gym/fitness classes, employee assistance programs, healthy snacks/lunches, walking programs, etc.

It is crucial to consult with legal counsel before offering a wellness program, as some wellness programs may increase employer liability risk and require additional protections, including, but not limited to, disclaimers or liability waivers.

Next:

**SECTION 4:** Employee Handbook



## SECTION 4: Employee Handbook

### Goals and Benefits of an Employee Handbook

Organizations should create an employee handbook they distribute to employees. The handbook's purpose is to communicate policies and procedures and clarify expectations; as such, it should be reviewed and updated regularly in conjunction with legal counsel.

### Policies and Procedures

Written policies and procedures help organizations address employee issues in a proper, fair, and consistent manner. Managers are typically responsible for enforcing policies and procedures consistently. A few policy examples are listed here, though your organization may require or benefit from additional or different policies or procedures.

#### Equal Employment Opportunity Statement

- Diversity policy/non-discrimination statement
- Americans with Disabilities Act (ADA) and Reasonable Accommodations
- Harassment policy (including sexual harassment)
- Harassment and discrimination reporting procedures
- No retaliation/open-door policy

#### Complaint procedure/conflict resolution

##### Safety rules

##### Communicable diseases in the workplace (this may be added to a business continuity plan or emergency action plan instead)

##### Performance management

- Employee conduct and performance
- Performance incentives
- Bonuses, performance-based merit increases
- Termination policy
- Disciplinary policy (progressive vs. immediate termination)

##### Code of conduct/ethics

- Conflicts of interest/confidentiality

- Workplace violence/weapons at work (this can be an added exposure)
- Safety and security (parking, visitors, etc.)
- Drugs and alcohol policy
- Whistleblower policy
- Procurement—gifts/entertainment
- Smoking policy
- Dress code

#### Travel policy/reimbursements

##### Time off and leaves of absence

- Family and Medical Leave Act (FMLA)
- Paid holidays
- Paid time off (PTO), vacation, and sick leave
- Attendance policy
- Bereavement leave
- Jury duty
- Military leave (USERRA)
- Telecommuting/work from home
- Severe weather and emergency closings
- Employment classifications (exempt vs. non-exempt)
- Break and lunch periods

### **Employee benefits**

- Health, dental, vision, life, and disability insurance
- Consolidated Omnibus Budget Reconciliation Act (COBRA)
- Short-term and long-term disability
- 401(k) plan
- HSAs, FSAs
- Employee Assistance Program (EAP)
- Supplemental insurance
- Unemployment compensation
- Workers' compensation
- Retirement

### **Employment relationship**

- At-will employment statement (if applicable)
- Referrals
- Employment of relatives

- Rehiring policy
- Workplace relationships

### **Payroll**

- Pay/compensation schedule
- Recording time (if applicable)

### **Company equipment/electronics**

- Return of equipment
- Intellectual property
- Computer and internet use policy
- Social media policy

### **Employee acknowledgment form(s)**

- Receipt and acceptance of handbook
- At-will statement
- Harassment, code of conduct, discrimination
- Conflicts of interest (disclose)

It is important to note that this list may not be suitable or appropriate for all situations or organizations. Different laws, regulations, or other legislation may govern your organization. Consult with legal counsel when developing your policies, procedures, and employee handbook.

## **Employee Handbook Training**

All employees must be aware of and understand the information contained in the employee handbook. Managers should receive additional training since they'll likely be responsible for enforcing the policies and procedures. As a best practice, it's suggested that you: (1) distribute the employee handbook to all employees to ensure they are familiar with the organization's policies, procedures, and expectations; and (2) require employees to sign a document stating that they received, read, understand, and accept the information. Such an acknowledgment helps hold both the employer and employee accountable for actions that do not adhere to the policies and procedures outlined in the employee handbook.

It is crucial to review employment laws and regulations often as they may change and require adjustments to an organization's policies and procedures. Business changes may also trigger required updates to policies and procedures. Be sure to train managers about any changes.

Follow and enforce policies and procedures consistently to help mitigate liability. Failing to do so may create additional risk and liability to the organization.

**Next:**

**SECTION 5:** Recruiting and Hiring

## SECTION 5: Recruiting and Hiring

### Hiring Goals

The goal of the recruitment process is to find a suitable candidate for the position the organization is trying to fill. It's recommended that organizations develop a hiring process and follow it consistently to help minimize the potential for discrimination and other pre-employment claims. The hiring process typically addresses job descriptions, the application and interview process, applicant screening, and background checks.

### Job Requisition

A job requisition is a request to fill a job. The hiring manager usually completes the requisition, which then triggers HR to begin the hiring process if the role is approved. Job requisitions normally include the position title, status (exempt or non-exempt), hours, qualifications, responsibilities, and other information your organization may wish to include. After receiving the requisition, HR may meet with the hiring manager to discuss recruiting strategy.

### Job Analysis

It is recommended that organizations create job descriptions for all positions where no description currently exists. It may be necessary to conduct a job analysis to obtain information about responsibilities, activities, knowledge, skills and abilities, behaviors, and other relevant factors. This information can be gathered through observation, interviews, questionnaires, or through [O\\*NET](#) (the Occupational Information Network). Use the information gathered from the analysis to create the description.



## Position Descriptions

Developing clear job descriptions can help you attract suitable candidates. They also help during performance reviews. It's recommended that job descriptions include the essential functions of the position, the knowledge and skills required, educational and work experience requirements, physical requirements, and the environment in which an employee may perform a job. If applicable, they may also include necessary licenses or certifications. To help protect the organization, avoid including information showing a preference for a candidate or discouraging someone from applying. Job descriptions may include:

**Position title.** Titles should be specific and meaningful, such as "accounting assistant," and not broad or vague like "finance."

**Date.** This can serve as a reminder to review the description periodically and update it as needed.

**Nature of work.** Include a brief description of the position, including a general overview.

**Qualifications.** Be specific but capture minimum qualifications, not ideal ones. For readability, consider breaking the information into subsections such as education/experience and skills/ability.

**Position duties/activities.** Include a list of tasks to be performed. These should be behavioral (job expectations). Include long-range duties and more frequent tasks.

**Working conditions.** This section may not be necessary for all positions; however, if the job involves hazardous conditions, strenuous work, extreme temperatures, etc., it is worth noting. Listing the working conditions for each position can also help you address disability accommodation requests.

**Conditions of employment.** Document specific employment conditions, such as certifications required to perform essential job responsibilities or the necessity of having transportation.

**Supervision/hiring manager.** Employees must know who will coordinate and supervise their work. Specify the supervisor by position, not name.

**Additional items.** You may also consider including a summary/objective, travel demands, expected hours of work, an equal employment opportunity/affirmative action policy statement, classification, or additional duties and eligibility qualifications.

## Application Process

As with job descriptions, job applications should exclude anything that may directly or indirectly reveal a preference for a protected characteristic or the perception of doing so. Protected characteristics are personal characteristics protected by various laws and regulations. Job applications are the most common source of information about applicants and should incorporate the following elements to provide a solid foundation for screening:

**Identification.** Essential facts about the applicant such as name, current address, and phone number

**Qualifications.** Education, training, etc., relevant to the position sought.

**Experience.** Relevant experience, both volunteer and paid, with service dates, a description of duties, and the organizations' names and immediate supervisors' names.

**Waiver and consent.** The application should include a statement the applicant can sign (or e-sign) certifying that the information they provided is true and accurate and that they authorize the organization to verify it. The application should also authorize the organization to perform specific procedures such as criminal history record checks, reference checks, employment verification, and other precautionary measures as needed. It is important to note that any information provided in an application that is not otherwise public information should be considered confidential. It is recommended that you consult with legal counsel regarding the proper waiver and consent language to include on your applications as it will vary from organization to organization.

**Equal Employer Opportunity (EEO) statement.** An EEO statement informs applicants that the company is an equal opportunity employer and does not discriminate in hiring based on protected classifications (e.g., race, color, national origin, ancestry, religion, sex, disability, veteran status, age, sexual orientation, marital status, or genetic information). Please note the previously mentioned list of classifications may not be all-inclusive, and it is important to consult with your legal counsel regarding an EEO statement.

**At-will disclaimer (if applicable).** This states that the employment relationship can end at any time for any reason.

**Reasonable accommodation information.** Offers a brief explanation of how an employee can request a reasonable accommodation.

**Attestation statement.** Can reduce potential liability should the employer terminate or deny employment due to the applicant's false or misleading information.

**Data privacy information.** Consult with your legal counsel to confirm whether the application form or job description should include specific language related to data privacy regulations.

Job applications should never mention age, race, religion, or any other information an employee may view as discriminatory. Job applications may ask for voluntary self-identification information; however, it is best to include an EEO statement or affirmative action statement within the job description. We recommend consulting with legal counsel regarding EEO statements and self-identification information to minimize additional risk and liability.

Background checks on job applicants are prohibited in a number of states. It's important to comply with [an FCRA disclosure](#) for consent to obtain a background check. Background check acknowledgments can be separate from a job application, usually in a disclosure format. This is typically outsourced and is commonly a function of HR.



## Interviewing

The interview process evaluates applicants for open positions. Preparing for the screening and interviewing process is the best way to ensure consistency, validity, and hiring effectiveness. It's important to train those conducting interviews to ensure they gather the necessary information to evaluate the applicant's suitability for the role. Preparation shall include a review of the requirements for the position and the contents of the individual's application. The interviewer should be aware of topics and questions to avoid according to applicable laws. To potentially help reduce the risk of discrimination and ensure consistency among all interviews for the same position, HR should oversee

the interview process using a structured interview questionnaire. You may also use candidate evaluation scorecards to ensure a fair selection of the most qualified talent. If used, HR should collect scorecards after every interview.

Interview questions can be structured or unstructured. Structured interviews in which employers ask the same questions of all applicants may help defend against discrimination allegations. The absence of structure can make it challenging to compare applicants but allows specific questions related to an applicant's skill set.

It's important for interviewers to be familiar with questions and statements to avoid, particularly those that pertain to state and federal employment laws. Note-taking during the interview should be restricted to the applicant's qualifications and skills for the position and should be recorded on a separate interview sheet, not on the resume. Having a standard evaluation form helps to keep the process consistent.

Ensure pre-employment, job- or skill-based testing, if used, is job-related and will accurately predict job performance. Administer the same test to all candidates who apply for a given position, and be sure to follow state and federal laws to ensure compliance.

Questions to avoid include:

- How old are you?
- What is your religion?
- Do you have children?

These types of questions can lead to various legal action and claims.

Appropriate question examples include:

- Given the role we're discussing, how could you positively impact our organization and the customers we serve?
- Describe a recent accomplishment that you are proud of. What were some of the challenges you faced, and how did you handle them?
- Have you ever had a conflict with a co-worker? How did you handle the conflict?

**Next:**

**SECTION 6:** Selection and Screening

## SECTION 6: Selection and Screening

### Verbal Offers

When an employer extends a verbal job offer to a candidate in person or over the phone, it's often viewed as informal and non-binding, as details of the position may change following negotiations. Consult with your legal counsel on whether or not your organization should extend verbal job offers.

### Offer Letters

Once details of a job offer are finalized, an employer typically sends the candidate an official offer letter, including a summary of the position and any terms and conditions. An employee may attempt to negotiate changes to the offer letter, such as their start date or salary. Once negotiations are finalized, the employee commonly signs and returns an updated offer letter to HR.

A job offer may be contingent on a screening process where allowed by state and local law. Examples of screens include background and reference checks, drug testing, and medical exams. Consult with your legal counsel about the legality of applicant screens in your area, as rules differ by state.

If a candidate requires a reasonable accommodation, consult with legal counsel and HR before proceeding. Under the [ADA](#), employers must provide reasonable accommodation to qualified applicants and employees who have a disability unless the employer can demonstrate that doing so creates an undue hardship to the employer or poses a direct threat to the employee's safety or others in the workplace.

### Background Checks

Some employers rely on criminal background checks as part of the hiring process. While there are circumstances under which an applicant's criminal record may be relevant, using this information to deny employment may create a liability risk for an organization.

A growing number of states have passed legislation to eliminate "criminal background" as an automatic disqualifier. Employers who exclude job applicants convicted of a crime may be violating the Civil Rights Act of 1964's prohibition against disparate impact. In April 2012, the U.S. Equal Employment Opportunity Commission [issued guidance to employers](#) that included the following best practices:



“ If you are including criminal background checks in your employment process, make sure the criteria for disqualification are tailored to the job. This may include identifying the specific criminal offenses that would demonstrate an ‘unfitness’ for the job. Each situation needs to be evaluated on its own merits, and employers are encouraged to perform an individual assessment that includes a conversation with the applicant to determine the facts. The assessment should include a determination of when the criminal conduct occurred. If the incident is well in the applicant’s past, it shouldn’t be used as a sole disqualifier for a job today. ”

In addition to the EEOC’s guidance, some states have imposed a variety of laws aimed at protecting those who have interacted with the criminal justice system. Most jurisdictions have enacted “Ban the Box” legislation. This prohibits employers from using a simple checkbox on their employment application to screen for criminal background. Other states prohibit a criminal background check until after the offer is extended. When employers use a third party to conduct background checks on applicants or employees, the federal [Fair Credit Reporting Act \(FCRA\)](#) will likely apply. In some states, employers may only perform a drug test after they have extended an offer to the applicant.

Consult with legal counsel to outline your background check processes, including when to secure consent from prospective employees and how and when this information should be communicated and collected. Ensure your approach is consistent and abides by all applicable laws and regulations.

## Reference Checks

Employers verify references to learn more about an applicant and confirm the accuracy of details provided during the interview process. It’s important to note that failure to check references may be considered as a factor in litigation when applicable. Employers should have the applicant’s written consent to conduct reference checks and a statement to release the prospective employer from potential liability in connection with reference checks. Consult with legal counsel to determine how and when to secure consent from prospective employees.

A thorough and consistent reference screening procedure will ensure a fair and equitable process. Possible areas to screen may include:

- prior employers and references (confirm accuracy);
- education (confirm accuracy);
- licenses (confirm the applicant holds required licenses);
- driving record; and
- credit bureau records (if the position requires handling money or a company credit card).

Contacting previous employers and references should be done by telephone or in writing. It is useful to follow a script when speaking with a reference to ensure the organization collects relevant and consistent information.

Organizations are required to use reasonable care in selecting employees and may be held liable and financially responsible for harm caused by an employee if reasonable care was not used in selecting said employee. The amount of care required is typically proportional to the risks inherent to each position. A [‘reasonable person standard’](#) normally applies and ensures the organization exercised the same care that a reasonable person would have used under the same circumstances.



## Medical Testing

Employers may require potential candidates to obtain a medical exam to ensure they are physically capable of performing the position's essential functions as outlined in the position description. Medical exams are not a necessity for the application process but may be applicable for some positions. Consult with your legal counsel on this matter. Under [ADA guidelines](#), an employer may only require a medical examination after an offer of employment.

The EEOC provides additional guidance on employee testing. For example, the [EEOC has determined](#) physical agility tests, fitness tests, and tests for illegal drugs/alcohol are not considered medical exams. Depending on state and local laws, these tests are given at the pre- or post-offer stage. It's important to note tests must not screen out an applicant on the sole basis of disability as it may be in violation of the ADA. Organizations should also be consistent in their practices for all applicants in the same job category.



Any and all tests should be aligned with job-related business necessities to minimize potential employment liability. Once an employee has begun working, testing is typically not allowed unless it is job-related or a business necessity. Consider the following before implementing testing: ADA compliance, confidentiality, state statutes, federal and local laws, collective bargaining agreements, adverse impact, and the U.S. and state constitutional rights. Psychological and personality tests have additional considerations under the ADA and EEOC. Consult with your legal counsel before implementing any form of test.

## I-9 Form Collection and Verification

According to U.S. Citizenship and Immigration Services (USCIS), organizations are required to complete and retain an I-9 form for every employee in the U.S. hired after November 6, 1986, as long as they work for compensation. It's also required that organizations retain an I-9 form for terminated employees for three years following the date of hire or one year following the date of termination, whichever is later.

Employers should maintain I-9 forms separately from employee personnel files and restrict access to these forms to maintain confidentiality. Consult the [USCIS website](#) for further guidance.

## Onboarding and Orientation

Onboarding is the process of introducing new employees to your organization and teaching them some of the knowledge, skills, and behaviors they'll need to be successful in their role.

Onboarding usually starts the day the employee accepts a job offer and ends when the employer feels the employee has all the information they need to be successful. By contrast, orientation is part of the onboarding process but is limited to specific events and does not span the lifecycle of new-hire acclimation. An example of orientation would be a specific day in the onboarding process when you gather new employees to welcome them to the company.

Onboarding helps employers retain employees by providing them with a strong first impression and foundation for their position. Successful onboarding can mean the difference between an engaged employee and a disengaged one.

A sample onboarding checklist is included in the appendix. It's up to you to decide who should be responsible for each item, though it's a good idea to agree before the employee's start date to ensure consistency and efficiency.

## SECTION 7: Performance Management

### Employee Performance Evaluations

Performance management (PM) is a continuous process rather than a specific point in time. It involves setting specific goals and expectations for the employee, ongoing feedback/coaching, and the actual review process—also known as the performance appraisal process. Performance documentation is essential, however, performance appraisal/evaluation is only one part of this process. More important than having performance management is having personnel at your organization who run performance management efficiently. With these pieces together, you should have a system that serves both administrative and development purposes.

Performance management is the systematic process managers apply to involve employees in accomplishing an organization's mission and goals. Effective performance management requires that managers:

- clearly outline and identify the duties each employee/position is expected to accomplish;
- communicate the necessary knowledge and skills;
- identify a process or plan to accomplish competencies;
- provide feedback;
- reward effective performance; or
- implement a corrective process to improve employee performance.



Managers should develop a schedule to meet with employees throughout the year to discuss progress toward assigned objectives. Performance evaluations should acknowledge great work and address areas for improvement. Annual or year-end employee performance evaluations should:

- provide employees with an overall assessment of their performance for the year;
- identify goals that have been met and areas where the employee has exceeded expectations;
- highlight areas for improvement;
- hold the employee accountable for any performance issues;
- create performance and development goals and objectives for the next year;
- make updates to the position description in the future, if necessary; and
- ensure the employee has an opportunity to offer input into the evaluation.

Reviews should be acknowledged by the manager and the employee and submitted to the HR team so they can document the review in the employee's file.

Having an effective performance management system has many benefits including, but not limited to, the following:

- bottom-line results;
- employee engagement;
- retention;
- defense documentation; and
- support for salary decisions, promotions, incentives, etc.

The three major components of a performance management system normally include:

**1. Planning: Setting Expectations and Goals.** Individual goals should be specific and set by both the manager and the employee. These goals should not only relate to the individual but also link to organizational goals and business strategy. When setting goals, they should be SMART (specific, measurable, attainable, relevant, and timely) and documented in an electronic or hard copy format. They should also be available for review and reference throughout the performance management process.

**2. Monitoring: Checking In and Feedback.** Feedback is a continuous process that should occur throughout employment. Managers should make every effort to track and document employee performance and behavior throughout the year. Waiting until the last minute to start evaluating performance is not fair to the employee. This perceived unfairness can affect the entire performance management system.



Document performance during or immediately following a conversation with the employee. Performance and behavior documentation should be professional, objective, and factual. Opinions, labeling, and interpretations should be avoided. Feedback should include both positive and constructive areas.

Regular one-on-one meetings can help track performance and keep both the employee and manager accountable. These meetings can be informal; however, they require documentation. Meetings can be scheduled weekly, bi-weekly, or monthly to discuss recent accomplishments, challenges, and potential areas for improvement.

**3. The Review Process: Performance Appraisals/Performance Evaluations.** This process summarizes employee performance and assesses the employee's progress towards their goals and objectives. Organizations must choose appropriate time intervals for performance reviews and the tools and structure of the process, which can vary across industries and organizations.

Managers and employees should sign off on the written review when complete. The document should include comments by both the manager and the employee on actions and results, behaviors, and challenges discussed during the review.

## Limitations

**Legal issues.** Be aware of all federal, state, and local laws that may impact your performance management system. It's suggested that you monitor your PM system to ensure compliance with applicable laws, consistency, transparency, and fairness for all employees. As a best practice, consult with legal counsel and/or a certified HR professional for guidance.

**Rating errors.** These can cause inconsistencies in performance ratings. Common errors can include:

**Personal bias:** Allowing personal feelings about employees to get in the way of performance ratings. The halo effect can denote having a positive interpretation that impacts an employee review, while the horn effect is a negative interpretation.

**Recency effect:** Rating an employee's most recent performance and not performance earlier in the year due to insufficient documentation, failure to engage in feedback, etc.

**Leniency bias/strictness bias:** Employees may view managers as difficult or easygoing.

**Central tendency:** A tendency to evaluate all employees as "average."

**Top management support.** Company leaders should promote the performance management system. Without management support, the process may seem invaluable, which can lead to inconsistencies. For example, one department manager may regularly give employee feedback throughout the year. A manager in another business unit may never give feedback. Inconsistencies like these can promote negativity and unfairness around the review process. The process should be viewed as valuable, fair, and worth everyone's time.

**Management training.** Communication to management and employees is critical. All staff should be aware of the purpose and steps in the process before it is implemented, and managers should know how to use the performance management system.

## Employee Discipline Procedures

It is important to develop a consistent, effective disciplinary process for those who fail to meet their position requirements or fail to abide by the organization's policies and procedures. The purpose of employee discipline is to help employees change or improve their performance or behavior. To potentially lessen legal exposure, employers should document warnings and instances when the employee's performance or conduct did not meet expectations. This documentation is beneficial to the employer should any legal exposure or claim arise.

A manager may start the disciplinary process by issuing a verbal warning to the employee in an objective and confidential manner. Managers should document verbal warnings with a note in the employee's personnel file. If necessary, a written warning may be presented to the employee and include a place for the employee to sign and acknowledge the warning. A second manager or HR may need to be present during this meeting and sign or acknowledge the warning as a witness. A written warning should include the following:

- employee's name;
- name of the manager administering the warning;

- the date the warning was issued;
- a description of the issue (performance or behavior);
- the policy or rule the employee violated (if applicable);
- dates to support the performance/behavior issue;
- a signature line for the employee, manager, and witness if necessary; and
- an action plan outlining timeframes and consequences should the performance or behavior issue continue.



Another way to allow an underperforming employee to succeed is a performance improvement plan (PIP). Assigning a PIP helps the employee improve while still holding them accountable for their past performance. It is up to your organization's leaders to determine if PIPs are appropriate to add to your performance management process. As always, consult with an HR professional and legal counsel when determining whether it is reasonable to place your employee on a PIP. A PIP may not be appropriate in the following situations:

- 1. Terminations.** It's not recommended that employers use a PIP to begin the termination process. If you have an employee you will terminate regardless of their PIP performance, it is not suggested that you put the employee on a PIP.
- 2. Retaliation.** An employee with a positive performance that you may not like personally should not be placed on a PIP, as it may be seen as retaliation.
- 3. Poor management.** A manager should show commitment to the employee's success. If the manager is not committed to seeing the employee develop and succeed, the PIP may not be appropriate. It may be helpful to have HR investigate the manager's behavior and their impact on their direct employees.
- 4. Behavioral issues.** A PIP may not always be appropriate for certain behavioral issues such as insubordination. As always, consult with an HR professional and legal counsel when determining whether it is reasonable to place your employee on a PIP.
- 5. Out of the ordinary performance.** Some performance issues may be worth a conversation or check-in with the employee. A PIP should be an extension of the performance management process, meaning if an employee has been performing well all year and you've just recently noted poor performance, they may not need a PIP just yet. It's suggested to look at the whole picture. If you put an employee on a PIP who does not expect it (similar to a poor performance rating), it may result in decreased trust, perceived unfairness, and voluntary turnover.

It's strongly encouraged to always do due diligence and have proper documentation supporting employees on a PIP. Consult HR and legal counsel before discussing a PIP with an employee. A PIP typically includes the following:

- employee information and relevant dates;
- measurable objectives;

- actual performance;
- areas in need of improvement, which should align with the employee’s objectives;
- improvement expectations;
- timeline;
- management’s role in meeting objectives;
- frequency you meet to discuss progress;
- consequences for not meeting objectives; and
- signatures of the manager and employee.

Further, a PIP should include language clearly stating the plan is not intended to be a contract or employment guarantee. Consult with legal counsel on the appropriate language to include.

The performance management and PIP process should be outlined in your personnel policy and/or employee handbook, along with disciplinary procedures if applicable. Organizations must ensure consistency among employees. Managers should receive adequate training and guidance throughout the performance management process to eliminate unfair practices.

Be cautious of situations that may expose you to organizational risk, especially in instances where a PIP may lead to termination if performance is not improved. Consult with HR and legal counsel to minimize employment-related litigation risks. It is also important to become familiar with state and federal employment and labor laws before making termination decisions.

## Suspension and Termination

Employee suspensions are another option for employers if performance or behavior issues continue. They are typically the last step before termination and generally unpaid to discourage the perception that paid suspension is a reward for bad behavior or performance. It’s important to document suspensions in the employee’s personnel file. It should be made clear to the employee if termination is the next step.

Before terminating an employee, it’s important to review the employee’s personnel file to determine whether termination is appropriate. To minimize legal exposure, engage legal counsel during this process. Note that if a union represents employees, the disciplinary system may be governed by an agreement with the union. Before terminating an employee, the company should consider the following questions:

- Does the employee have an employment contract?
- Is the employee involved in a union?
- Will this termination violate any applicable employment laws?



The termination process can be divided into three parts:

- making the termination decision;
- communicating the termination decision; and
- handling potential post-termination issues

## Making the Termination Decision

In addition to poor performance, employers may consider dismissing employees due to misconduct, business closings, and companywide restructuring. Regardless of the reason, documentation to support the termination decision is crucial; this can be in employee performance reviews, documentation of unacceptable behavior/policy violations, and written warnings. To make a termination decision, you should have the support of senior management, HR, and the employee's manager. A single person should not have the authority to fire someone on the spot.

## Communicating the Decision

One of the most challenging situations a manager or HR employee may face is terminating an employee. Adequate preparation should occur to abide by company procedures before communicating the termination decision to the employee. Preparation often includes drafting talking points on how the message will be formally delivered to the employee and bringing notes for reference.

**Items to consider for a termination meeting:**

- At least two people should be present during the meeting—ideally a senior manager and HR representative.
- Hold the meeting in private.
- Schedule the meeting shortly after the termination decision has been made to prevent the word from getting out.
- Assess security issues beforehand, including electronic access and company-owned equipment such as laptops or cell phones.
- Prepare a termination package. These packages vary by state but can include final compensation, accrued benefits, any severance, an agreement related to the release of legal claims, etc.
- Be professional, factual, and avoid making statements such as “you will be better off in the long run.”

## Handling Post-Termination Issues

Should you need to respond to outside inquiries, react in a neutral manner stating the individual no longer works on behalf of the organization. It is important that details are not provided.

It's recommended that any reference requests regarding the terminated employee are forwarded to HR. Management should implement a company policy to address these requests and ensure employees are following proper procedures. It's imperative to adhere to any legal rights, such as COBRA, or any applicable laws in relation to the terminated employee.

Employment relationships end for a variety of reasons. Having a fair procedure will go a long way toward minimizing legal action related to employment matters.

**Next:**

**SECTION 8:** Employee Development and Training

## SECTION 8: Employee Development and Training



There may be certain laws and agency regulations, which apply to specific industries or employers regarding employee training requirements. Organizations should develop training programs to cover mandated and non-mandated training.

Each state may have specific training requirements to satisfy compliance. In addition, training an employee must attend for their job as it relates to safety may also be deemed necessary and mandatory. Discuss your training programs with legal counsel to ensure you adhere to regulatory requirements. A comprehensive training program may help reduce your liability exposures. For example, if you provide employee handbook training to staff, it may help mitigate employment-related claims.

In addition to job-related training, you may also want to consider incorporating professional development, such as speakers and online training that offer professional designation credits or certifications, soft-skills training, or any other appropriate training.

To create a training program consider the following:

1. consult with legal counsel to outline mandated training to maintain compliance;
2. explore partnerships with regulatory agencies if needed;
3. evaluate the current functions and goals of your organization;
4. determine how training will sync with your organizational objectives;
5. conduct an analysis consisting of surveys and/or focus groups to determine training needs;
6. construct a realistic budget;
7. conduct a cost-benefit analysis;
8. determine learning objectives, course length, audience, materials needed, training type, schedule, etc.;
9. determine the source of training (internal or external);
10. develop training materials (internal or external);
11. tie training into cultural initiatives (employee growth, recognition, etc.);
12. implement the training program and measure results; and
13. analyze results and identify areas for improvement.



## Sexual Harassment

An employer's efforts in preventing and remedying sexual harassment prove to be very important when dealing with potential legal action related to said harassment. Having a policy, procedure, training, investigation process, complaint procedure, and documentation process may help defend claims related to sexual harassment. However, failure to comply with your policies may lead to additional risks to the organization.

Claims related to sexual harassment often arise if: (1) an employment benefit is made contingent on sexual favors; or (2) there is frequent or pervasive unwanted sexual conduct within the workplace, including, but not limited to, verbal or physical conduct that is sexual in nature, sexual jokes, display of inappropriate materials, or any persistent unwanted interactions.

Sexual harassment should be taken very seriously and can be verbal, non-verbal, or physical. It is strongly suggested to consult with legal counsel on sexual harassment procedures, risk, policies, training, etc.

## Harassment

According to the U.S. Equal Employment Opportunity Commission (EEOC), general harassment [is defined as](#) harassment based on sex, race, color, religion, national origin, age, disability, citizenship, and genetic information. State law may also prohibit harassment based on additional characteristics, such as sexual orientation, sexual identity, and gender expression.

It is important to note that employers who are aware of harassment occurring and failing to act on said knowledge may be putting themselves at risk. Employers should have an anti-harassment/sexual harassment policy.

Consult with legal counsel when developing anti-harassment/sexual harassment policies and conducting harassment investigations.

## Reducing Liability

The EEOC states that organizations may be held liable if harassment results in an adverse employment action such as termination. In legal action related to a hostile work environment, it may be helpful in minimizing liability if an organization can show that it reasonably tried to prevent/remedy the harassment and the employee failed to take advantage of preventative/corrective opportunities provided. EEOC investigations will likely look at the entire record, including the nature of the conduct, the context of the allegations, and the severity and pervasive nature of the harassment.

Employees should report any harassment to their supervisor and/or HR. All complaints and concerns should be taken seriously and investigated promptly. Seniority and severity are a few factors that may be considered in determining if investigations should be done internally or by a third party. Documentation of the investigation is important, as is ensuring confidentiality.

Next:

**SECTION 9:** Strategic Human Resources

## SECTION 9: Strategic Human Resources

### Business Alignment

Aligning business strategy with HR adds value and may give your organization a strategic advantage. Recruitment, selection, performance management, compensation and benefits, organizational function, and design should align for better business outcomes. Data analytics, more specifically people analytics, can help to make HR a more tangible function. For example, calculating the turnover rate, employee engagement, and other initiatives can help others see how HR affects the organization's overall success.

Strategic HR also looks at expanding beyond administrative duties. While traditional HR can be seen as administrative, strategic HR looks at how HR functions affect the bottom line and the organization itself. Succession planning, professional development, measuring and evaluating, leadership development, performance management, and engagement are some strategic HR initiatives.



**Workplace  
Harassment**

# APPENDIX

*This appendix is for general information purposes only. It is not legal advice, nor is it to be acted or relied upon as such. It is not, and should not be, a substitute for obtaining legal advice from a qualified attorney, and you should not act upon any such information without first seeking professional counsel. If you have questions about COVID-19 related matters, we strongly suggest consulting with a legal professional.*

## COVID-19 Employment Risks

Several employment-related risks may arise from the COVID-19 pandemic:

- 1. Remote work.** Operational changes prompted by COVID-19, including remote work and modified schedules, may generate legal action or liability related to unpaid or improperly calculated wages. Employers who fail to adequately monitor, track, or pay remote employees for the hours they work may be subject to such claims.

While Employment Practices Liability Insurance (EPLI) policies cover various alleged wrongful acts by an employer, wage and hour disputes brought under federal, state, or local regulations are generally excluded, according to Wilson Elser. However, some insurers may cover defense costs up to a specified sub-limit.

- 2. Reasonable accommodations.** The U.S. Equal Employment Opportunity Commission enforces anti-discrimination laws, including the Americans with Disabilities Act and Rehabilitation Act of 1973. Under the ADA, employees with disabilities may request reasonable accommodations due to stress and anxiety related to the COVID-19 pandemic. Employers should consider accommodation requests made during the pandemic the same way they would have prior to the pandemic. For more information, consult the EEOC's recently published guidance for employers on COVID-19. (Note that the ADA allows employers to seek certain job-related information about employees' health and disabilities provided it is consistent with business necessity, but be aware that you must apply this standard consistently and keep the information strictly confidential.)

An example of a reasonable accommodation claim related to COVID-19 is an employee alleging that an employer's failure to update a workspace or provide legally required protective equipment resulted in the employee's enhanced risk of exposure to the virus. EPLI policies often limit coverage for costs incurred to comply with injunctions and equitable relief, such as claims demanding accommodations for disabled persons under ADA or to repair unsafe workplace conditions, according to Wilson Elser. However, EPLI policies typically cover acts of retaliation. Claims arising from allegations that an employer retaliated against an employee for reporting COVID-19 workspace safety issues may be eligible for coverage.

Another possible scenario is an employee alleging that the employer made others aware of the employee's positive COVID-19 status during contact tracing efforts, which is a violation of ADA privacy protections. EPLI policies often cover claims connected to alleged invasions of privacy and breaches of an employee's civil rights, according to Wilson Elser.

**3. Paid sick leave.** The Emergency Paid Sick Leave Act covers wages for employees who miss work due to COVID-19. This law references and incorporates various provisions of the Fair Labor Standards Act (FLSA), which means that claims for unpaid sick leave are likely to be treated as claims for wages, which typically are excluded under most EPLI policies.

The Emergency Family and Medical Leave Expansion Act, like the Paid Sick Leave Act, requires that employers provide paid leave to covered employees who are unable to work due to the closure of a childcare provider or school. Although EPLI policies often cover violations of the Family and Medical Leave Act, it is unclear if employers should treat expanded FMLA claims the same as wage claims not covered by their EPLI policy.

**4. Wrongful termination, demotion, failure to promote, and other workplace torts and retaliation.** The courts may perceive any adverse employment action taken after a COVID-19-related leave or sickness as a violation of the law. Similarly, an employer's handling of a COVID-19-related complaint or request may result in a retaliation complaint.

A common example would be an employee alleging retaliation after being terminated for refusing to comply with their employer's COVID-19 policies. Retaliation claims against employers for exercising legal workplace safety measures are often eligible for EPLI coverage, even if an organization's policy excludes claims made under OSHA and other employee safety regulations, notes Wilson Elser.

Alternatively, EPLI policies may cover claims asserting negligent hiring, training, and supervision of senior employees tasked with protecting subordinates' health and safety. These claims can arise if employees allege management misrepresented the severity of COVID-19 health risks in specific workplace environments or failed to take reasonable steps to improve workplace conditions.

# HIRING Checklist\*

Use this checklist as a guide when filling new or existing positions within your organization.

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- Partner with the hiring manager to conduct a job analysis, including responsibilities and budget.
- Develop a job description based on the analysis. If the job description exists, update as necessary.
- Obtain the job requisition form from the hiring manager. (This form is used to request a job posting and includes details such as position title, department, duration (full-time/temporary/contract), hiring timeframe, and budget.)
- Once the job requisition is approved, post the position internally/externally as required by state and federal law (ensure you meet all data privacy requirements). Consider posting on these platforms:
  - Social media, especially LinkedIn
  - Your organization's website
  - Job boards
  - College career centers
  - Temp agencies
  - Classified ads
- Source candidates and solicit applications within the designated timeframe.
- Notify applicants via email once their application is received and under review.
- Review applications, resumes, and any additional information provided by candidates within the hiring timeframe.
- Discuss potential candidates with the hiring manager.
- Develop interview guidelines such as length, number of interviewers, and note-taking requirements.
- Before scheduling first-round interviews, conduct phone screens and review candidates with the hiring manager.
- Review interview guidelines and best practices if the hiring manager is unfamiliar with the process.
- If the first-round interview is on-site and the candidate has yet to fill out an application, provide a hard copy to the candidate for completion (include consent for disclosure of optional affirmative action information separate from the application, if applicable).
- Notify applicants rejected for subsequent interview rounds.
- Conduct interviews until there's consensus on a candidate between the hiring manager, HR, and other stakeholders. Notify rejected candidates.
- Develop and extend an offer letter to the selected candidate.
- If the offer letter is accepted and signed by the candidate, conduct background, credential, and reference checks according to state and federal law.
- Repeat the above steps as necessary if the candidate rejects the job offer or fails the background check.

*\*Note that you may have hiring policies and procedures beyond this checklist. It's crucial to analyze your hiring process periodically to determine whether it is meeting your organization's needs. Your hiring process should be built and customized to fit your organizational needs. This list may not be appropriate for all organizations and situations.*

# ONBOARDING Checklist\*

Use this checklist to help plan an employee's initial onboarding and first 90 days on the job.

---

## UPON EMPLOYEE'S ACCEPTANCE OF JOB OFFER

- Once a candidate accepts your offer of employment and passes the background check, contact the following departments about the new employee's start date, job function, hardware/software requirements, building access, and any other needs:
  - HR/Payroll
  - Benefits
  - IT
  - Facilities
  
- Send the employee a welcome email with the following details:
  - Start date and time
  - Directions and any specifics about where to meet for onboarding
  - Dress code (if applicable)
  - First day/onboarding schedule
  - What to bring (license for I-9 verification, voided check for payroll, etc.)
  - Team photo (if available)
  - Company website and social media links
  - FAQ document (if available)
  
- Before new employees arrive for their first day, consider these items for a smooth onboarding process:
  - Assign a mentor/onboarding liaison
  - Schedule a new hire meet-and-greet (breakfast, lunch, etc.)
  - Create an orientation schedule; send to all parties involved
  - Designate the employee's workspace and include standard supplies; add items like a card or company-branded materials as a bonus
  - Set up the employee's IT permissions, desktop applications, and phone
  - Include the employee in any applicable financial systems (reimbursements, vouchers, etc.)
  - Add the employee to directories and distribution lists
  - Gather payroll, benefits, and I-9 forms

CONTINUED...

- Gather employee handbook/policies
- Schedule badge and employee photos
- Prepare parking permit information (if applicable)
- Print nametags

## **EMPLOYEE'S FIRST DAY ON THE JOB**

- Consider these items on the employee's first day with your organization:
  - Provide the employee with another copy of their onboarding schedule
  - Provide the employee with your organization's employee handbook
  - Review key policies (anti-harassment, performance review schedule, dress code, PTO, etc.)
  - Review administrative procedures (mail, business cards, ID badge, office supplies, etc.)
  - Provide an overview of the company
  - Deliver orientation training presentations (if applicable)
  - Have the employee sign the necessary paperwork and provide required legal documentation
  - Make introductions to department staff and personnel—including the mentor
  - Conduct a facility tour
  - Review hardware, software, and the company intranet, if you have one
  - Review process for submitting a timesheet (if applicable)

## **EMPLOYEE'S FIRST TWO WEEKS ON THE JOB**

- Consider these items during the employee's first two weeks with your organization:
  - Continue orientation meeting presentations created by each department
  - Create and share a schedule for periodic check-ins with the employee to review job description and performance expectations
  - Develop an on-the-job training schedule
  - Schedule any mandatory safety, HR, or skill-specific training
  - Review job schedule and hours
  - Review payroll timing, time cards, policies, and procedures
  - Introduce the employee to critical members of your organization
  - Tour conference rooms and show the employee how to reserve them (if applicable)
  - Add the employee to team meetings and email groups
  - Discuss hiring manager's style and expectations

- Review standard programs and websites used by the team
- Ask the employee to fill out an orientation survey (if applicable)

### **EMPLOYEE'S FIRST 30 DAYS ON THE JOB**

- Consider these items during the employee's first 30 days with your organization:
  - Set performance goals for a 90-day performance review
  - Discuss career development goals
  - Answer any questions regarding logistics
  - Ensure the employee is adapting well

### **EMPLOYEE'S FIRST 90 DAYS ON THE JOB**

- Consider these items after the employee's first 90 days with your organization:
  - Complete a 90-day performance review
  - Send a follow-up survey about the employee's onboarding experience
  - Establish more or less frequent manager and mentor meetings depending on results of 90-day performance review

*\*Note that you should establish onboarding policies and procedures beyond this checklist. It's crucial to analyze your onboarding process periodically to determine whether it's meeting your organization's needs. Consider creating an onboarding guide that outlines your onboarding program. Roll out the program to managers, mentors, and other involved parties to ensure that they know their role in the process and that expectations are clear. Your onboarding program should be built and customized to fit your organizational needs. This list may not be appropriate for all organizations and situations.*



# TRAINING Checklist\*

Use this checklist to outline and track required training for new employees.

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Below each section, list the courses required for this position, including those mandated by state and federal law. Add training timeline requirements when applicable (e.g., complete within the first 90 days of employment).

Name of employee: \_\_\_\_\_

Date: \_\_\_\_\_

## ORGANIZATION-WIDE TRAINING

■ Training/certifications required for all employees (e.g., harassment training/acknowledgment, employee handbook training/acknowledgment, cybersecurity training, etc.):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## JOB-SPECIFIC TRAINING

■ Training/certifications required for this position (e.g., OSHA-mandated training, software training, process training, etc.):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## MANAGEMENT TRAINING

■ Training required for senior/management positions (e.g., conflict resolution, communication best practices, etc.):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

CONTINUED...

## EMERGENCY TRAINING

- Training designed to prepare employees for emergencies (e.g., emergency action plan training, business continuity plan training, etc.):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## OTHER

- Employee training/certifications that don't fall into the categories listed above (e.g., soft skills training, career development training, etc.):

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

# TERMINATION Checklist\*

Use this checklist as a guide when processing an employee's termination.

---

## TERMINATION TYPE

■ While there are general considerations for any type of termination—voluntary or involuntary—there are critical differences to account for:

- Voluntary
  - Collect the employee's resignation letter/written confirmation of resignation
  - Schedule exit interview with the employee
  - Complete exit interview with the employee
- Involuntary
  - Create termination letter
  - Provide the employee with the termination letter
  - Provide the employee with their severance agreement (if applicable)
  - Provide the employee with their WARN/OWBPA notices (if applicable)

## GENERAL CONSIDERATIONS

■ Cover these items as part of every termination process:

- Notify staff
- Collect company property
- Disable employee network and building access
- Collect new address (if applicable)
- Update payroll records
- Review COBRA compliance and other insurance
- Discuss retirement plan options
- Review confidentiality and non-compete agreements
- Pull I-9 form and add to terminated employees
- Issue final paycheck\*\* (FSA/HSA participation, unused PTO, severance)
- Place documents in the employee file

*\*Note that you may have termination policies and requirements beyond this checklist. It's crucial to analyze your termination process periodically to determine whether it meets your organization's needs. Your termination process should be built and customized to fit your organizational needs. This list may not be appropriate for all organizations and situations.*

*\*\*Final paycheck timelines vary by state and depend on whether the separation was voluntary or involuntary.*

# EMPLOYEE FILE Checklist\*

Use this checklist as a guide when creating, updating, or auditing an employee's file.

Name of employee: \_\_\_\_\_

Reviewer/Auditor: \_\_\_\_\_

Date: \_\_\_\_\_

## PERSONNEL FILE

■ This file often includes documents the employee has reviewed and acknowledged:

- Job description
- Job application
- Resume and cover letter
- Job offer
- W-9 (if applicable)
- Receipt or signed acknowledgment of employee handbook
- Additional policy acknowledgments (if applicable, fill in the name below)
  - \_\_\_\_\_
  - \_\_\_\_\_
  - \_\_\_\_\_
- Performance reviews (write-ups, awards, recognition, etc.)
- Educational transcripts (training records)
- Employee orientation checklist
- Test documents (if applicable)
- Termination records
- Emergency contact information
- Requests to review the personnel file

## CONFIDENTIALITY FILE

- This file often includes records and documents that are sensitive in nature:

### General

- W-4 and any payroll records with Social Security numbers or protected information
- Investigation notes and reports

### Medical

- Drug and alcohol tests
- FMLA documents
- Short-term/long-term disability records
- OSHA injury and illness reports
- General requests for leave
- Medical records
- ADA accommodations

### Benefits

- COBRA notification
- Benefit acknowledgments
- Beneficiary designation forms
- Tuition reimbursement information
- Insurance coverage forms

### Security

- Background information
- Reference checks
- Credit history/consumer-related credit information
- Criminal conviction history
- Accusations of policy/legal violations

## MISCELLANEOUS

- Store an employee's I-9 form separate from their personnel and confidentiality files:
  - I-9 form

*\*Note that this checklist does not include everything that can be included in your files and audit process. Please consult with your legal counsel for more information. You may have filing policies and requirements beyond this checklist. It's crucial to analyze your filing process periodically to determine whether it meets your organization's needs. Your filing process should be built and customized to fit your organizational needs. This list may not be appropriate for all organizations and situations.*



# EMPLOYMENT PRACTICES GUIDE

## Managing Employment-Related Liabilities

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