KAINEN ESCALERA AND McHALE PC

LABOR, EMPLOYMENT & EDUCATION LAWYERS

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CONNECTICUT BUSINESS & INDUSTRY ASSOCIATION

Essential Skills for Supervisors & Managers

WARNING SIGNS: SAFETY ISSUES AND PROTECTED RIGHTS

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Presented by:

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I. PROPER HIRING TECHNIQUES

A. Job Description

1. Need to establish qualifications for the position (e.g., education, experience, certifications, etc.) and essential functions. Be prepared to demonstrate a business necessity for each of the qualifications and essential functions selected. Best practice to prepare/have an accurate job description, updated annually.

B. The Application

1. Ensure that all information on application has been completed (don't just allow "see attached resume."). Make sure application has been signed and dated where required.

2. Review all applications/resumes to determine if each candidate meets minimum job qualifications.

3. Be especially wary of gaps in employment, history of short-term jobs or refusal or inability to provide information about former jobs/references.

4. Inquiries regarding prior salary history are no longer permitted under Connecticut las after January 1, 2019.

5. Job applications must be in at least three parts: (a) experience and qualifications; (b) Fair Credit Reporting Act (must be a stand-alone document); and (c) criminal background inquiry (may only be made after job interview).

C. The Interview

- Be consistent in personnel who conduct interviews, types of interviews conducted (i.e., phone screen vs. in-person) and number of interviews conducted.

- Avoid any statements during interview process that could be construed as an offer of employment, until and unless you specifically intend to make an offer.

- Don't assume anything in the interview or hiring process is "off the record."

- Be consistent in the subject areas explored and the types of questions asked during interviews. Develop a standard set of

questions to be asked of all applicants and keep a record of the questions used.

- Consider completing a written interview report following each interview. The report should contain only information that is directly related to an applicant's qualifications for the position and his/her ability to perform the duties in question. The report should identify the specific basis for the interviewer's overall assessment of whether the candidate is a good prospect for the position. Keep in mind that such reports (and any other interview notes or hiring documents) are discoverable in litigation.

- Make sure that all interview questions are legitimate, business-related and non-discriminatory. If a question does not relate directly to an applicant's qualifications for the position and his/her ability to perform the required duties, you should probably not ask it.

- Design interview questions to elicit the most effective information to make informed decision. Example of effective interview questions:

    - **Current/Prior Job**
      Describe your major responsibilities in your current/last job?
      Describe the advancement opportunities that existed in your current/last job? Did you achieve them?
      What training did you receive in your last job?
      Did you receive raises? How often? How much? Were the raises based on merit?
      Describe the equipment/technology you used in your last job.
      Describe your thought process in deciding to leave your current/last job?
      What are you looking for in this job that you are not obtaining in your present job (or did not obtain in your last job)?

    - **Job Satisfaction/Motivation**
      In your current/last position, how do/did you measure whether you are/were performing successfully?
      What has been your most satisfying work accomplishment?
      What contributed most to any success achieved in your current/last job?
      What specific job elements are important to you and why?
      Are there any job elements you would like to avoid, and why?
      Of all your duties, which presented the most difficulty for you? How did you deal with the duty that presented the most

difficulty for you? As you look back, would you change anything about the way you handled that difficulty?
What is the most effective way to motivate you? Why?

- **Leadership**
  Describe your supervisory experience.
  How would you describe yourself as a manager?
  What methods do you use to motivate your subordinates?
  Do you consider yourself to be a leader? Why?
  How do employees respond to your management style?
  How do you set priorities?
  What aspects of your management style are the least effective?
  What is the best way to handle employee problems and complaints that arise on the job?

- **Attitude**
  If you could have changed anything in your current/last company, what would you have changed?
  If you had a complaint or a problem with your supervisor, how would you handle it?

- **Education**
  What subjects did you prefer at school? Why?
  What subjects did you like the least? Why?
  What did you choose as your major? Why?
  Did you work at an outside job while at school?
  How did you balance your various responsibilities?
  Are you interested in furthering your education? Why? When?
  How does your educational background relate to this job?

- **Career Goals**
  What are your career objectives and what have you done to enable yourself to achieve your career objectives?
  What goals do you want to attain in this job?
  Do you want to be in this job in five years? Why or why not?

- **Fit with Company**
  How did you become interested in our company?
  Why do you want to work for our company?
  What is your understanding about the job that you are applying?
  What do you think you would enjoy most about working for our company?

How did your last job prepare you for the job we currently have open?

- The Right & Wrong Way to Address Certain Issues

  - **National Origin**

    Acceptable: Asking, "Do you speak Spanish," is acceptable if job requires the applicant to speak Spanish.
    Are you a U.S. Citizen or an Alien authorized to work in the United States?

    Problematic: What language do you speak at home?
    Where were you born?
    Gasparini . . . that's Italian, isn't it?
    Where is your family from, originally?

  - **Marital/Family Status**

    Acceptable: Discussing company policies on leaves of absence or employing relatives/persons who are married or dating.

    Problematic: Is it Miss or Mrs.?
    Are you married?
    What is your maiden name? (unless for background check)
    Do you have any children?
    What child care arrangements do you have?
    Do you plan on starting a family in the near future?
    Do you think this job will interfere with your family commitments?

  - **Religion**

    Acceptable: Advising applicant of the schedule of approved holidays or weekend work requirements.

    Problematic: Do you observe religious holidays?
    Will your religion keep you from working on weekends?

  - **Attendance**

    Acceptable: Can you meet the attendance requirements of this job?
    In your last job, how many days were you absent?
    How many Mondays or Fridays were you absent last year?

Problematic: How many days were you absent in your last job on account of sickness or illness?
Do you have any medical conditions that affect your ability to attend work regularly?

- **Disability**

  Acceptable: Can you perform the essential functions of the job, with or without accommodation?
  This job requires carrying equipment up stairs and making repairs using ladders. Can you perform these tasks, with or without accommodation?

  Problematic: Do you have any medical condition that prevents you from performing this job?
  Describe any physical problems that preclude you from performing certain kinds of work?
  Have you ever filed a workers' comp. claim?

- **Employees with Obvious Disabilities or Who Voluntarily Request Accommodation**

  Acceptable: Would you need an accommodation to perform the job?
  What type of accommodation would you need?
  Can you explain or demonstrate how you could perform the job, with or without accommodations?

  Problematic: Tell me about the medical condition that causes you to require accommodation.
  Tell me about how you became disabled.

D. Pre-Employment Written Tests (Skills/Traits)

- Permissible to conduct written testing to evaluate skills or traits (such as honesty, integrity, working styles) either before or after job offer. Cannot be used if medical in nature or designed to identify mental disorders.

- All tests must be directly related to the specific responsibilities of the position in question and must be valid predictors of successful performance of such responsibilities. Even then, if they have an adverse impact on protected groups, they cannot be used.

E. Pre-Employment Drug Testing and Medical Examinations

- Drug Testing

    a. Employment may be denied on the basis of one positive and properly confirmed drug test result or if an applicant refuses to submit to a drug test.

    b. Past addiction to illegal drugs with no current usage may not be used as a basis for denying employment.

- Medical Examinations

    a. May only be required after an offer of employment has been made.

    b. Employment may be conditioned on passing a complete medical examination, including providing a complete medical history, workers' compensation history, and acknowledgment of pre-existing injury.

    c. Should be required of all entering employees in all (or particular) jobs; not selectively required.

    d. A job offer may not be withdrawn based on a medical examination unless the medical impairment (with or without reasonable accommodation) prevents the applicant from performing the essential functions of the job, or the individual poses a direct threat to himself or others and there is no reasonable accommodation that would enable the employee to safely perform the job.

F. Reference & Background Checks / Arrest & Conviction Inquiries

1. Verify qualifications and check references

    a. Check references, including using prior employers listed on the application.

    b. All reference questions must be directly related to the applicant's qualifications and ability to perform the job in question. Questions that are impermissible in the application/interview context are equally improper in the reference-checking stage.

d. Just as in the interview context, remember that nothing is "off the record." The contents of reference checks will be discoverable in litigation.

e. Develop an appropriate reference check form specifically related to the qualifications for the position in question, and then use the form consistently.

f. Be aware of the statutory hurdles with respect to obtaining employment and educational references (e.g., Connecticut's Personnel Files Act - confirmation of salary, dates of employment and job title).

g. Reference and background checks require signed authorization forms and compliance with The Fair Credit Reporting Act and Connecticut's Credit Report Act.

2. Criminal History Requests to Applicants/Employees

a. Employers are prohibited from asking applicants about criminal history on an application or from obtaining criminal history report **prior to interview**. Employers can still obtain criminal information after interview and before hire.

b. Employers are prohibited from requiring a job applicant (or employee) to disclose the existence of any arrest, criminal charge or conviction that has been "erased" under Connecticut law and from refusing to hire, otherwise discriminating against, or discharging on this basis.

c. Best practice to require applicants to undergo criminal background check for convictions, regardless of type or date. However, rejecting an applicant based on criminal history requires individualized assessment of: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense, conduct and/or completion of the sentence; and (iii) the nature of the job held or sought.

G. Credit Checks

1. The Fair Credit Reporting Act ("FCRA")

a. Applies to an employer's use of background "consumer reports" to investigate applicants for employment and/or to make employment decisions about existing employees.

i. “Consumer reports” include information about credit status, character, general reputation, or criminal background of a consumer.

ii. A “consumer” includes an applicant for employment or a current employee.

b. An employer cannot obtain a report for employment purposes unless a clear and conspicuous disclosure has been made to the individual and the individual has authorized the procurement of the report.

c. Except in the case of an investigation into misconduct, an employer cannot use a report in connection with an employment decision unless it first provides to the individual a copy of the report and a summary of the individual’s rights under the FCRA and the opportunity to provide a written explanation.

d. An employer cannot reject an applicant for employment until after the time for providing a written response has passed without a response or until after considering the written response. Employer must send final action notice in writing to applicant.

2. Connecticut Credit Reporting Act

a. Except for certain circumstances, Connecticut employers are prevented from requiring an applicant or employee to consent to a request for a “credit report” as a condition of employment and from using credit scores in making hiring or employment decisions.

b. A “credit report” is something that contains information about the credit score, credit account balances, payment history or savings or checking account numbers or balances of the applicant or employee.

d. This prohibition does **not** apply when: (a) the employer is a financial institution (i.e., bank, savings and loan association, credit union, insurance company, investment advisor or broker-dealer); or (b) when the report is required by law; or (c) when the employer “reasonably” believes the employee engaged in any activity that constitutes a violation of the law related to his/her employment; or (d) when the report is “substantially” related to the applicant or employee’s current

or potential job or when the employer has a bona fide purpose for requesting or using the information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant.

H. Social Media Checks

1. Employers may check all public information available on social networking sites to obtain information regarding applicants (or employees) and may use such publicly available information when making employment decisions (in same lawful manner as background information is otherwise obtained and used).

2. Best practice to follow FCRA rules (obtain authorization prior to checking and provide opportunity for explanation and verification before taking adverse action).

3. Employers in Connecticut may not require applicants or employees to provide social networking passwords as condition of employment (several other states and local governments have similar bans).

4. Best practice to implement social media policy that is compliant with current restrictive view of the National Labor Relations Board ("NLRB"), until courts say otherwise.

I. Employment Contracts

1. Determine whether all employees are "at-will" or whether certain employees require additional protections or additional obligations.

2. Basic elements of an employment agreement could include:

   - Description of or reference to required duties;
   - Wage and benefit information;
   - Conditions for any raises or bonuses;
   - Confirmation that employee is not restricted to work (e.g., has no non-compete or non-solicitation or similar agreement with prior employer precluding employment)
   - Non-compete, non-solicitation and non-disclosure provisions (as applicable)
   - Acknowledgement to review and abide by company policies/handbook, and understanding of company's rights to change, delete, add to or discontinue policies
   - Acknowledgement that employment is "at-will" or alternatively description of how employment can be terminated (e.g., by

employee and/or employer for cause and/or without cause, and including the definition of cause)
- Provision providing for resolution of any disputes (e.g., through mediation, arbitration and/or, court)
- Acknowledgement that agreement supersedes all prior understandings, contains the parties' entire agreement, and can only be modified by subsequent written agreement.

J. Communicating with Successful & Unsuccessful Applicants

1. Making the Offer/Acceptance of Offer
    - Do not make offers until all steps in the pre-employment process have been completed. Develop and use a checklist.
    - All offers of employment should be made in writing specifying that the writing sets forth the complete terms of the offer and supersedes any prior oral or written representations to the contrary and does not constitute a contract of employment. When including any information about benefits, be careful to specify that benefits are subject to change.
    - Specify any and all contingencies (such as):
    i. Results of reference/credit/criminal background checks
    ii. Completion of I-9 Form.
    iii Drug test.
    iv. Post-offer medical examinations.
    v. Employment Contract
    - Specify when the offer will expire (optional).
    - Make applicant accept offer by signing offer letter.

2. How to Turn Down Applicants – Do's and Don'ts
    - DON'T set expectations too high during application/interview.
    - DO provide a timely written response to (at least) every applicant who was interviewed in person.
    - DO keep the response succinct: "Thank you for your interest. We have selected another candidate to fill the position."
    - DON'T engage in discussing with the rejected applicant his//her qualifications compared to those of the person selected. Instead, use phrases like: "We have selected the person who we believe is the best fit."

II. PERFORMANCE MANAGEMENT

A. Importance of Performance Management

1. Approximately 20% of employees are considered to be "problem" employees. But, managers spend approximately 80% of their time dealing with issues related to these "problem" employees.

2. Allowing "problem" employees to remain employed imposes significant costs, such as: low productivity; time spent dealing with performance problems; and negative impact on morale of others.

3. Employers need to find an effective way to avoid devoting excessive management time to "problem" employees without incurring litigation.

    a. Likelihood that a terminated employee will challenge his/her former employer's decision is increasing;

    b. Cost of defending against employment-related claims is increasing;

    c. Juries are increasingly sympathetic to employee claims of wrongful discharge and unsympathetic to management (runaway damage awards).

B. Performance Counseling and Performance Improvement Plans

1. For a first-time performance problem, or a minor violation of company policy, or when there have not been other issues with employee performance/conduct, managers typically need only counsel employee in a timely and clear manner.

2. Any counseling (sometimes also referred to as verbal warning) given to employees should be done in person and is best memorialized in writing with an acknowledgement of receipt by the employee and an opportunity to respond.

3. Minimize (or avoid, if possible) having non-privileged discussions about employee performance issues via e-mail or otherwise. If written communications occur, **JUST STICK TO THE FACTS!** Do not provide any extraneous personal commentary or opinions.

4. For recurring performance problems, or for employees with multiple performance deficiencies, or when counseling has not resulted in correction, performance improvement plans ("PIPs") are typically warranted, in lieu of or in addition to disciplinary action.

5. PIPs should be prepared in consultation with appropriate higher-level manager and Human Resources.

6. PIPs are typically not employed if there are only issues of misconduct that need to be addressed, though any PIP that may otherwise be issued to address performance deficiencies could also reference any conduct that must be corrected.

7. PIPs are typically issued to give employees a "final chance" to correct deficiencies prior to taking more significant adverse action (i.e., suspension/discharge).

8. PIPs should describe any past history of counseling and disciplinary action taken against the employee, identify each continued area of deficiency by providing specific examples of the same, identify what the specific expectations/goals the employee needs to accomplish going forward and the time frame (generally 30 to 60 days) to accomplish the expectations, and the consequences for failing to improve. Employee must be allowed to file response.

9. Copies of the PIP should be provided to the employee and the employee must acknowledge receipt of the PIP, or if the employee refuses to sign, the manager must acknowledge that the employee has refused to sign but has been given a copy of the PIP.

III. INVESTIGATING COMPLAINTS AGAINST EMPLOYEES

A. When one co-worker or an outside party makes a complaint against another co-worker for acts of misconduct or violations of company policy, or when it is reported to a manager or a manager otherwise learns that an employee may have engaged in misconduct or violation of company policy, an investigation will need to be conducted into each complaint by the manager (with the assistance of the higher level manager and/or Human Resources) prior to determining further action (such as imposing any discipline).

B. Typically, any investigation will require obtaining signed written statements by the complaining party and any witnesses as to who, what, where, when, why; gathering and reviewing any audio or video footage of the

incident; and gathering and reviewing any relevant documentation about any prior counseling/disciplinary action.

C. Typically, the manager responsible for the investigation should not settle for general or conclusory answers; be sure to get the full picture. Get both sides of the story – arbitrators and courts will react more favorably if the evidence establishes that the employer conducted a fair, even-handed and thorough investigation before acting.

D. The manager responsible for the investigation should provide the higher level manager and/or Human Resources with a statement as to how the manager became aware of the incident and what was done to investigate. **JUST STICK TO THE FACTS!** Do not provide any extraneous personal commentary, opinions or thoughts.

E. Send all information from the investigation to the higher level manager and/or Human Resources for review before addressing incident with the employee accused of wrongdoing.

F. Depending on the nature of the incident, and only after consultation with the higher level manager and/or Human Resources (and outside counsel when necessary) a determination needs to be made as to whether, when and in what format (in-person or in-writing) the employee accused of wrongdoing will be asked to respond and what information will be shared with the employee.

G. For complaints of serious or significant acts of misconduct or violations of company policy, an employee accused of wrongdoing may be suspended immediately pending the outcome of the investigation and/or after the incident has been addressed with them. Suspension may be with pay or without pay (depending on circumstances and applicable law).

IV. PROPER DISCIPLINARY AND TERMINATION TECHNIQUES

A. Necessity of Discipline/Termination

1. Recruitment and training costs and labor market conditions can make employee turnover a huge business expense.

2. The purpose of disciplining employees about poor performance (or misconduct) is to achieve better performance (or eliminate the offensive behavior).

3. While the administration of discipline for poor performance and misconduct must be consistent and firm, it should also be done in a

way that makes employees understand that it is the intent for them (and the employer) to succeed, not fail.

4. Discipline in the form of written warnings and/or suspensions is typically employed when counseling and/or PIPs have failed to correct the problem, or when the issue involves more significant policy violations or acts of misconduct (even if first time offenses).

5. An employee may always be terminated "at-will" for any lawful reason at any time. Typically, for performance related issues, termination should only occur if progressive discipline has failed to correct the problem. When the issue involves more significant violations of company policy or acts of misconduct (even if first time offenses), progressive discipline may not be warranted.

6. Discipline (or dismissal) should rarely be a surprise to the employee (unless imposed for significant, first time infraction or misconduct).

B. Common Shortcomings in Taking Disciplinary Action

1. Failure to discipline in timely manner ("letting things slide").

2. Failure to thoroughly investigate all the facts, including the employee's side of the story, before taking disciplinary action. Typically, any investigation will require obtaining signed written statements by the complaining party and any witnesses as to who, what, where, when, why; gathering and reviewing any audio or video footage of the incident; and gathering and reviewing any relevant documentation about any prior counseling/disciplinary action. Do not settle for general or conclusory answers; be sure to get the full picture.

3. Inconsistent treatment (management should respond to similar circumstances in a similar manner).

4. Inappropriate penalties: Serious offenses receive little or no penalty, and minor offenses are punished severely. Aggravating and mitigating circumstances are not properly weighted.

5. Failure to impose discipline in a progressive manner if circumstances appropriately warrant doing so, consistent with any company policy or practice.

6. Failure to identify and evaluate any recent potential protected activity or positive performance reviews/bonuses/raises: avoiding bad timing.

7. Improper communication of disciplinary action (including having non-privileged discussions about employee disciplinary issues via e-mail). If written communications occur, **JUST STICK TO THE FACTS!** Do not provide any extraneous personal commentary, opinions or thoughts.

8. Poor documentation and record-keeping practices regarding any disciplinary action taken.

C. Preparing and Delivering Discipline & Appropriately Terminating Employees

1. Documentation of disciplinary action is crucial.

2. All disciplinary documents should contain the following information:

   a. Factual explanation of the events, behavior or deficiencies which led to the disciplinary action.
   b. Listing of rule(s) or standards which were violated. Include all which might reasonably apply.
   c. Reference to any prior counseling/discipline.
   d. If applicable, nature and amount of improvement required, and time frame in which results are expected with specific suggestions on how to improve as appropriate.
   e. If applicable, consequences of failure to correct problem.
   f. Acknowledgement of receipt & understanding by employee.
   g. Notification to employee that s/he can submit response.

3. Document all reasons for any disciplinary decisions taken. Give the real and complete reasons! (i.e., don't disguise a performance-based discharge as a layoff).
4. Typically use "Employee Disciplinary Notice" checklist form to address problems involving non-managers or for initial and/or more routine disciplinary actions.

5. Typically use "narrative" memorandum when taking disciplinary action against management employees or for issues that are more complex in nature (such as when investigation has taken place or for discipline that involves multiple issues) or for subsequent or final disciplinary actions.

6. Depending on the nature of the incident, and only after consultation with the higher level manager and/or Human Resources (and outside counsel when necessary at the request of higher level manager and/or Human Resources), a determination needs to be

made as to whether to issue a notice of proposed disciplinary action before issuing discipline (particularly when termination of employment is contemplated).

7. Typically, manager should meet in-person with employee when taking any disciplinary action (including termination) and have higher-level manager and/or Human Resources present.

8. Understand that the direct supervisor will be the key witness regarding any discipline/termination decision. Be prepared to be able to answer "Yes" to the following questions:

Is my decision based on accurate facts and reasonable belief, not suspicion or emotion?
Have I documented all facts and actions?
Have I assembled and preserved the supporting records?
Have I reviewed the employee's past counseling, performance and disciplinary record?
Will the employee know why this action is being taken?
If applicable: has the employee had sufficient time to correct the condition that led me to take this disciplinary action?
For terminations (where appropriate): have reasonable steps been taken to attempt to "salvage" this employee? (e.g. training, transfer, demotion or job restructuring)
If applicable: has the employee had notice of the potential for discipline and opportunity to present his/her side of the story?
Is discipline consistent with any past practice in similar situations?
Has this decision been discussed with and approved by appropriate levels of higher management and Human Resources (including possible review by outside counsel as necessary)?
Am I ready to take full responsibility for the decision?

9. Don't humiliate the employee (handle discipline/termination privately with minimal embarrassment to the employee).

10. Don't treat the employee "like a criminal" (i.e., the "perp walk" out of the building), unless there is good reason (i.e., the employee is

disrupting the workplace or is being terminated for an act of violence).

11. At time of employment termination, provide written notice of termination.

12. If employee resigns, obtain resignation letter. If manager is notified of resignation via phone, typically send letter confirming and accepting resignation.

13. Don't give references for former employees.

14. Don't discuss discipline/termination with others who do not need to know and stop others from doing so.

15. Send all original, signed disciplinary and termination paperwork to personnel file/Human Resources.

16. Ensure unemployment compensation paperwork coincides with the termination reasons given to employee.

17. Properly pay departing employee pursuant to legal requirements.

    a. Employees who quit and those who are laid off must be paid final wages on next regular payday.

    b. Employees who are discharged must be paid final wages by next business day.

    c. Make only proper deductions from final pay.

    e. Comply with company vacation pay policy/practice.

V. PROPER HANDLING OF EMPLOYEE MEDICAL ISSUES AND LEAVE

A. If employee is absent for more than 3 days, manager (in conjunction with Human Resources) must determine reason for absence.

B. If reason for absence is medically related, need to evaluate basis for any medical leave and determine which policies and/or law(s) may apply (Americans With Disabilities Act - ADA; Family and Medical Leave Act - FMLA; Workers' Compensation; Connecticut Paid Sick Leave Act; short term disability benefit insurance policy - STD, as applicable) and whether the employee has met eligibility requirements (period of employment, need for leave, qualifying condition, etc.).

C. Manager must not promise or allow employees to decide that leave is/is not governed by ADA, FMLA, workers' compensation etc. or that leave will/will not be covered by paid benefits (sick time, vacation time, STD).

D. Manager (in conjunction with Human Resources) needs to determine notice obligations and medical certification requirements for employee leave issues.

E. Combining all applicable laws and policies, employee needs to be provided with the most generous benefits in terms of amount of leave, pay and benefit status during leave, and alternatives to leave (such as transfer or light duty work).

F. During approved medical leaves, employee's position must be kept open (absent limited special circumstances) but may be temporarily filled.

G. Manager must coordinate with Human Resources to monitor employee leave and determine any reinstatement rights and obligations.

VI. CONNECTICUT FAMILY AND MEDICAL LEAVE ACT ("FMLA")

A. Applies to private sector employers with 75 or more employees.

B. Eligibility requirements include working for employer for 12 months and 1,000 hours.

C. Provides eligible employees with up to 16 weeks of unpaid family and medical leave within the two-year period following the first day of leave. Employee may further be eligible for an additional 12 weeks of unpaid family and medical leave in the second-year of this two-year period in accordance with the Federal Family and Medical Leave Act.

D. Provides eligible employees with up to 26 weeks of leave to care for a serious injury or illness of a covered service member.

E. In addition to allowing the same types of leave for the reasons afforded under Federal FMLA (serious health condition of employee, child, spouse or parent; birth, adoption or foster care placement of child; serious injury or illness of a covered service member/covered veteran; because of a qualifying exigency), Connecticut FMLA allows leave to care for parent-in-law and to serve as organ or bone marrow donor (neither allowed under Federal FMLA).

F. Having a system in place to designate leave and to notify employees when leave is exhausted is key to compliance.

G. Employer designates leaves which qualify under FMLA; the employee does not decide whether a leave is protected by FMLA.

H. Must use Connecticut FMLA Certification of Health Provider Form to verify and gather available information about the need for leave, the expected duration of leave, nature and frequency of the absence(s) and work limitations (or other applicable verification form).

I. Employers are required to continue health insurance benefits in effect during FMLA leave, subject to the same terms and conditions under which coverage would have been provided if the employee had continued in employment for the period of the leave.

J. Requires reinstatement to original job at end of leave (or to equivalent job but only if none of the duties or original job are still being performed).

K. Damages include reinstatement, lost wages, benefits or other compensation due to violation, liquidated damages, and attorneys' fees and costs.

VII. THE AMERICANS WITH DISABILITIES ACT ("ADA")

A. Applies to employers with 15 or more employees.

B. Prohibits discrimination against a "qualified individual with a disability." A qualified disabled employee is one who, with or without reasonable accommodation, can perform the essential functions of the position in question, without posing a direct threat to the safety of himself or others. For example, a blind applicant for the position of bus driver is not a qualified disabled applicant because he cannot safely perform the essential functions of a bus driver, with or without reasonable accommodation.

C. There are three ways to meet the definition of a disabled person under the ADA. First, a person with a substantial limitation of a major life activity (such as walking, talking, seeing, hearing, breathing, learning, or working) is disabled. Second, a person with a record of such an impairment is disabled (e.g., past history of cancer). Third, an individual who is "regarded" as disabled is protected by the ADA, even though they may not have a substantial limitation of a major life activity. For example, an individual with a facial disfigurement that is kept away from customers by the employer is treated as if they were disabled, even though not limited in any major life activities.

D. The ADA excludes from its coverage individuals with certain disorders, including compulsive gamblers, kleptomaniacs, current illegal drug users,

and current users of alcohol who cannot perform their job duties or whose employment presents a threat to the property or safety of others.

E. The ADA does not provide protection for individuals with impairments applicable to a single job or to those with temporary, non-chronic injuries.

F. The ADA imposes a duty on employers to provide a reasonable accommodation to qualified disabled applicants or employees unless the accommodation would pose an undue hardship. The reasonable accommodation must remove workplace barriers, which can include either physical obstacles (inaccessible facilities or equipment) or work procedures or rules (when or where work is performed, when breaks are taken, or how tasks are accomplished).

G. There are an unlimited number of possible accommodations. The EEOC's regulations and court decisions have identified some examples, including leave of absence for treatment; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquiring or modifying equipment; modifying exams or training programs; and providing qualified readers or interpreters. Employers do not have to provide an accommodation that causes an undue hardship (i.e., an accommodation which causes significant difficulty or disruption in the workplace, or significant expense based on an employer's resources).

H. Generally, it is the employee's duty under the ADA to first request an accommodation. There is no requirement for the employee to use "magic" language, or even use the term "reasonable accommodation" in making the request. An employer should consider any notification that a job modification is needed because of a medical condition to be a request for reasonable accommodation due to a disability. Once an accommodation has been requested, the employer has a duty to initiate an interactive process with the employee to identify the individual's functional limitations and the potential reasonable accommodation that is needed. The employee can be required to sign a limited release allowing the employer to seek specific medical records about the disability, and/or to submit a list of specific questions to the employee’s health care professional. An employer may require an employee to go to a health professional of the employer's choice, at the employer's expense, if there are unresolved questions about the individual's condition, or if the employee provides insufficient information from his/her health care professional to substantiate the disability or need for the accommodation.

I. A reasonable accommodation does not include waiving discipline. An employer is entitled to hold all employees (those with and without disabilities) to the same performance and conduct standards. An employer does not need to forgive an employee for breaking rules, even if it is later

determined that the misconduct was the result of a disability (i.e., an employee disciplined for tardiness still can be disciplined even if s/he later reveals that the tardiness was due to morning treatments for her disability). Once a disability is known, an employer may have to provide a reasonable accommodation so that the employee does not break work rules in the future (i.e., may have to modify employee's future work schedule so s/he can get morning treatments without being tardy).

VIII. CONNECTICUT PAID SICK LEAVE ACT

A. Applies to any employer (defined as a person, firm, business, educational institution, nonprofit agency, corporation, LLC or other entity) if it has at least **50 employees** working within Connecticut on its payroll on October 1 annually. Manufacturers (classified in Sectors 31-33 in the North American Industrial Classification System) and nationally chartered 501(c)(3) organizations that provide recreation, child care and educational services (such as the YMCA) are **exempt**.

B. Any part-time or full-time "**service workers**" paid on an **hourly basis or classified as non-exempt** are eligible to take paid sick leave under the Act after they have completed **680 hours of employment** after January 1, 2012 (if hired prior to January 1, 2012) or from date of hire after January 1, 2012 **and** worked at least an average of **10 or more hours per week** for the employer in the most recent complete calendar quarter. Day or temporary workers (who perform work on a per diem or occasional or irregular basis) are not eligible.

C. There are 68 different categories of eligible "service workers" specifically identified as covered by the Act based on the definitions contained in the Bureau of Labor Statistics Standard Occupational Classification System ("SOC").[1]

[1] The categories of "service workers" covered under the Act are as follows: Food Service Managers; Medical and Health Services Managers; Social Workers; Social and Human Service Assistants; Community Health Workers; Community and Social Service Specialists, All Other; Librarians; Pharmacists; Physician Assistants; Therapists; Registered Nurses; Nurse Anesthetists; Nurse Midwives; Nurse Practitioners; Dental Hygienists; Emergency Medical Technicians and Paramedics; Health Practitioner Support Technologists and Technicians; Licensed Practical and Licensed Vocational Nurses; Home Health Aides; Nursing Aides, Orderlies and Attendants; Psychiatric Aides; Dental Assistants; Medical Assistants; Security Guards; Crossing Guards; Supervisors of Food Preparation and Serving Workers; Cooks; Food Preparation Workers; Bartenders; Fast Food and Counter Workers; Waiters and Waitresses; Food Servers, Nonrestaurant; Dining Room and Cafeteria Attendants and Bartender Helpers; Dishwashers; Hosts and Hostesses, Restaurant, Lounge and Coffee Shop; Miscellaneous Food Preparation and Serving Related Workers; Janitors and Cleaners, Except Maids and Housekeeping Cleaners; Building Cleaning Workers, All Other; Ushers, Lobby Attendants and Ticket Takers; Barbers, Hairdressers, Hairstylists and Cosmetologists; Baggage Porters, Bellhops and Concierges; Child Care Workers; Personal Care Aides; First-Line Supervisors of Sales Workers; Cashiers; Counter and Rental Clerks; Retail Salespersons; Tellers; Hotel, Motel and Resort Desk Clerks; Receptionists and Information Clerks; Couriers and Messengers; Secretaries and Administrative Assistants; Computer Operators; Data Entry and Information Processing Workers; Desktop Publishers; Insurance Claims and Policy Processing Clerks; Mail Clerks and Mail Machine Operators, Except Postal Service; Office Clerks, General; Office Machine Operators, Except Computer; Proofreaders and Copy Markers; Statistical Assistants; Miscellaneous Office and Administrative Support Workers; Bakers; Butchers and Other Meat, Poultry and Fish Processing Workers; Miscellaneous Food Processing Workers; Ambulance Drivers and Attendants, Except Emergency Medical Technicians; Bus Drivers; or Taxi Drivers and Chauffeurs.

D. Qualifying sick leaves under the Act can be taken for any **illness, injury or health condition of the service worker or his/her spouse or child or for preventative medical care** for the same. A service worker who is the **victim of family violence or sexual assault** may also take paid leave for medical care and for other reasons related to the family violence or sexual assault (such as to obtain services from a victim services organization; to relocate due to the violence and/or assault; or to participate in any civil or criminal proceedings related to the violence and/or assault).

E. Beginning January 1, 2012 (or for service workers hired after that date, when employment begins), service workers will be entitled to **immediately** accrue at a rate of **one hour for each 40 hours worked** (regular or overtime hours), up to a maximum of 40 hours of paid sick leave for each year.

F. Service workers who do not use their entire allotment of paid sick leave benefits in one calendar year **may carry over up to 40 accrued hours to the next year** (but may not use more than 40 hours in each year).

G. If an employer terminates a service worker, whether voluntarily or involuntarily, it is considered a break in service. If the employer later rehires the service worker, it need not recognize any previously accrued unused hours of paid sick leave unless it agrees to do so.

H. The 40 hours of sick leave must be paid at a rate equal to the service worker's normal hourly rate or the minimum wage under Connecticut law, whichever is greater. Service workers whose wage rates vary must be paid the average hourly wage he/she earned in the pay period prior to the period in which he/she takes sick leave.

I. An employer is **not** obligated to pay accrued sick leave benefits upon a service worker's termination unless the employer provides for such payment in its policies or in a collective bargaining agreement.

J. The Act operates as a floor below which employers subject to the Act may not fall. However, **an employer will be deemed fully compliant with the Act if the employer offers any form(s) of paid leave benefits that satisfy the minimum 40 hours of paid sick leave under the Act**. For these purposes, other paid leave benefits might include paid vacation, personal days or other paid time off. To get "credit" for compliance under the Act for having existing paid leave policies, employers must ensure such policies are not predicated on longer eligibility provisions, do not mandate different accrual methods and do not restrict the use of paid time in any manner that is inconsistent with the types of leave mandated by the Act.

K. Employers may require service workers to provide up to **seven days notice** of the need to take paid sick leave under the Act if the need for leave is **foreseeable**; if the leave is **not foreseeable**, then the service worker must give notice **as soon as practicable**.

L. Employers may require documentation from a health care provider for leaves taken for three or more consecutive days for leave taken due to the illness, injury or health condition, or for preventative medical care, for the service worker or his/her spouse or child. Employers may require a court record or documentation from a victim services organization or the police or counselor for leave taken due to family violence or sexual assault issues.

M. **Employers are required, as of January 1, 2012, to provide notice, at the time of hiring, regarding the service worker's entitlement to sick leave**, and to specifically advise service workers that employers are prohibited from retaliating against them (as further described below) and that the service worker has a right to file a complaint with the Connecticut Department of Labor for violations of the Act (as further described below). Employers may comply with this notice obligation by posting a notice (in both English and Spanish) in a conspicuous location incorporating these requirements.

N. The Act prohibits employers from taking retaliatory action or otherwise discriminating against **employees** because the employee requests or uses paid sick leave or files a complaint with the Connecticut Department of Labor regarding leave under the Act. **Note that the anti-retaliation provision applies more broadly to any employee of an employer** who is covered by the Act, not just the service workers who are entitled to take leave under the Act. The Act **does not prohibit disciplinary action** against any service worker who takes leave for a purpose other than those specified in the Act.

O. Complaints for violations of the Act will be handled by the Connecticut Department of Labor, which is empowered to hold hearings, and which may assess a **civil penalty of $500.00** for a violation of the retaliation and discrimination provisions, and a **civil penalty of $100.00** for each violation of the substantive provisions (or notice provision) of the Act. The Labor Commissioner is also empowered to require an offending employer to **rehire or reinstate an employee and to pay back wages and benefits.**

IX. WORKERS' COMPENSATION

A. Grants benefits to employees who suffer work-related injuries, illness or death without regard to fault or negligence on the part of the employer or employee.

B. Liability for such injuries is limited under the law.

C. Employers must complete a First Report of Injury form for work-related injuries and notify their workers' compensation insurance carrier.

D. Employers must provide "light duty" work where available to an employee who is unable to perform his usual work but is not totally incapacitated.

E. Employers are not required to provide any leave time (or any defined amount of leave time) to enable employees with work-related injuries to return to their jobs (but most do).

F. Employers with 25 or more employees must establish workplace safety committees consisting of management and workforce representatives.

X. WITNESS AND CRIME VICTIM LEAVE

- Employees who are crime victims or witnesses must be permitted reasonable time off to attend a court proceeding or participate in a police investigation relating to their criminal cases.

- Crime victim and witness leave can be unpaid, unless the employee chooses to use any available paid time off for such leave or the law otherwise requires payment for any such leave taken.

- A crime victim is defined as an employee who: (a) suffers direct or threatened physical, emotional or financial harm as a result of a crime; or (b) is an immediate family member or guardian of a homicide victim or a minor, physically disabled or incompetent person who suffers such harm.

- An employer may not take adverse actions against any employee for having a restraining order issued on the employee's behalf in a domestic violence case or having a protective order issued on the employee's behalf by a court of any state.

- An employer cannot take any adverse action against any employee because he/she obeys a legal subpoena to appear in court as a witness in any criminal proceeding, or because such employee is a crime victim, provided that the employee gives the employer reasonable notice of the need to appear in court.

- Any leave time allotted under this policy can run concurrently with any leave time afforded under any of the employer's other policies for which the employee may be eligible.

XI. FAMILY VIOLENCE VICTIM LEAVE

- Employees who are victims of family violence must be permitted to take up to twelve (12) days of leave during any calendar year in which the leave is reasonably needed for one or more of the following reasons: (1) to seek medical care or counseling for physical or psychological injury or disability; (2) to obtain services from a victim services organization; (3) to relocate due to the family violence; or (4) to participate in any civil or criminal proceeding related to or resulting from such family violence.

- Such leave can be unpaid, unless the employee chooses to use any available paid time off for such leave or the law otherwise requires payment for any such leave taken.

- Employees who seek such leave need to provide at least seven (7) days' notice of the need for such leave if foreseeable, or notice as soon as practicable if the need for such leave is not foreseeable. The employer may require certification from the employee, and/or an agent of a victim services organization, and/or the Judicial Branch's Office of Victim Services or the Office of the Victim Advocate, and/or a licensed medical professional or other licensed professional form whom the employee has sought assistance with respect to the family violence certifying that the employee is a victim of family violence. Any such certification provided must be maintained in a confidential manner and can only be disclosed as required by law or to protect the employee's safety in the workplace, provided that the employee is given notice prior to any such disclosure.

- The employer cannot discriminate or take adverse actions against any employee for being a victim of family violence or for having to attend or participate in a court proceeding related to a civil case in which the employee is a family violence victim.

- Any leave time allotted under this policy is in addition to any leave time afforded under any of the employer's other policies for which the employee may be eligible.

XII. PREGNANCY DISABILITY LEAVE

- The employer must provide any pregnant employee with a reasonable leave of absence during any period of time when she has been certified by her health care provider as being disabled from the pregnancy (regardless of whether or not the employee is eligible for FMLA).

- While the length of any such pregnancy disability leave may vary depending on individual circumstances, it is generally expected to be no longer than six (6) weeks.

- Employees can be expected to provide the employer with as much advance notice as possible if they intend not to return to work following their pregnancy so that appropriate staffing decisions can be made.
- Pregnancy disability leaves of absence can be without pay except that employees may be required to use any accrued paid time off during a leave.

- While on a leave of absence, employees do not need to accrue additional paid time off. The employer needs to continue to provide health insurance benefits coverage (if applicable) during a pregnancy disability leave of absence as long as the employee continues to pay her share of the applicable premiums.

- Any leave time allotted under this policy can run concurrently with any leave time afforded under any of the employer's other policies for which the employee may be eligible (such as FMLA).

XIII. EMERGENCY SERVICES PERSONNEL LEAVE

- An employer may not discharge, or cause to be discharged, or in any manner discriminate against any employee who is an active volunteer firefighter or member of a volunteer ambulance service or company because such employee is late arriving to work or absent from work as a result of responding to a fire or ambulance call prior to or during the employee's regular hours of employment.

- Employees are required to: (a) submit to the employer a written statement signed by the chief of the volunteer fire department or the medical director or chief administrator of the ambulance service or company, as the case may be, notifying the employer of the employee's status as a volunteer firefighter or member of a volunteer ambulance service or company; (b) make every effort to notify the employer that the employee may report to work late or be absent from work in order to respond to an emergency fire or ambulance call prior to or during the employee's regular hours of employment; (c) If unable to provide prior notification to the employer of a late arrival to work or an absence from work in order to respond to an emergency fire or ambulance call, submit to the employer a written statement signed by the chief of the volunteer fire department or the medical director or chief administrator of the volunteer ambulance service or company, explaining why the employee was unable to provide such prior notification; and (d) at the employer's request, submit a written statement from the chief of the volunteer fire department or the medical director or chief administrator of the volunteer ambulance service or company verifying

that such employee responded to a fire or ambulance call and specifying the date, time and duration of such response.

XIV. THE IMPACT OF DRUG TESTING IN ADDRESSING DRUG AND ALCOHOL USE IN THE WORKPLACE

A. Overview

Drug and alcohol use on the job and the job-related effects of drug and alcohol use off the job have become prominent concerns of many employers. A number of employers have adopted programs to test employees and job applicants for drug or alcohol use. Under these programs, persons who test positive are either disciplined or induced to undergo treatment.

Drug testing is not considered a medical examination under the ADA. Thus, employers may conduct drug testing to the extent authorized by state or federal law without violating the ADA.

Since drug and alcohol testing is highly regulated at both the state and federal levels, employers need to be aware of how and when it is appropriate to test and/or discipline an employee or applicant for drug or alcohol use, and the impact of state and federal laws upon the issue of controlling drug and alcohol use by such persons. Failure to strictly adhere to all regulatory testing requirements subjects an employer to civil liability, including punitive damages, attorney fees and court costs.

B. Consent to Alcohol or Drug Testing

It is well settled that a drug or alcohol test predicated on the knowing and voluntary consent of an individual would not violate any law. Accordingly, employers should strive to predicate any drug or alcohol test on the consent of the individual involved. Under Connecticut law, the potential loss of employment in the event that the employee refuses to submit to an alcohol or drug test does not invalidate an employee's consent. A written consent signed by the employee is preferable, for example: "I understand that my employer suspects that I am under the influence of drugs/alcohol. I knowingly and voluntarily consent to a drug/alcohol test." Similar written consents to drug testing should precede pre-employment drug testing and random drug or alcohol testing.

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