

Welcome to the Labor and Employment Spring Seminar: 2018 Public Sector Legal Update



May 4, 2018

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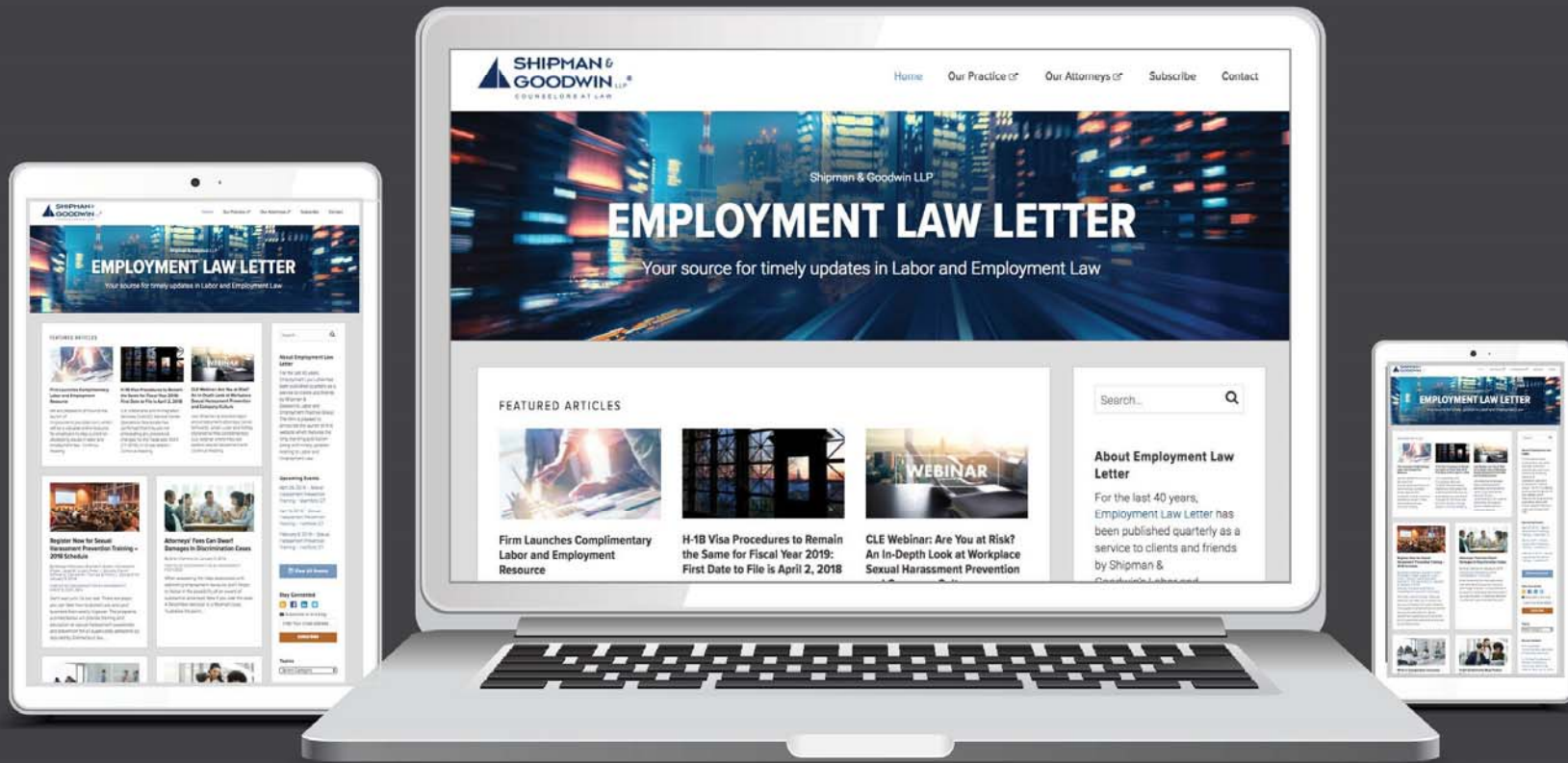
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Addressing Employee Claims of Harassment and Hostile Work Environment: The Graduate Course



Presented By
Linda L. Yoder
Gabriel J. Jiran
Keegan Drenosky



Harassment in Today's Workplace

- Why do we still need to discuss sexual harassment claims in 2018?
- Employers can play a critical role in combating workplace harassment

Old Claims of Harassment

What if you don't learn about inappropriate conduct/illegal activity until years later?



Potential Problems

- “Victim” may no longer be an employee
 - ◆ Witnesses and evidence may no longer be available
 - ◆ How long is too long?
- Default = investigate and remedy any inappropriate conduct

Regulation of Off-Duty Misconduct



Is There a Nexus?

- Tension between employee privacy, free speech and employer's interests
- Discipline ***may be appropriate*** if
 - ◆ The off-duty misconduct harms the employer's reputation or is contrary to its interests
 - ◆ It renders the employee unable to perform his/her duties or appear at work
 - ◆ It leads to a reluctance of other employees to work with him/her

Who Does the Investigation?

Investigations by Supervisors

- Can the manager or department head conduct the investigation?
- What resources does the investigator need?
 - ◆ Support from Human Resources?
 - ◆ Support from an attorney?
- Is the investigator independent?
 - ◆ Was the investigator involved in the conduct?
 - ◆ Is the investigator a close friend of the employee?

Implications of Using an Attorney

- Attorney-Client privilege
 - ◆ Protects communications between an attorney/client
 - ◆ Designed to encourage full disclosure to an attorney in order to facilitate legal representation
 - ◆ Disclosure of the communication to a third party may waive the privilege
- **Ensure** that the attorney does not become a witness in subsequent litigation
 - ◆ Have a supervisor with the attorney in meetings and witness interviews

Other Considerations

- The Fair Credit Reporting Act (15 USC 1681)
 - ◆ Requires certain notification to a person when an outside agency is preparing a report which the employer will use to evaluate a person for hire, promotion, reassignment or retention
- Should law enforcement be involved?
 - ◆ Consider threats of workplace violence

What if the Investigation is Inconclusive?

- Even if inconclusive results, take steps to ensure that misconduct does not reoccur
- ***Consider***
 - ◆ Ongoing monitoring
 - ◆ Change in reporting structure
 - ◆ Workplace training on employer's policies and underlying issue of complaint



Appropriate Level of Response?

- Perform an objective investigation before jumping to conclusions and taking action
- Punishment is not “one size fits all”



Should You Go Public?

- If you provide a report to some employees, count on everyone seeing it
- Any other ways to communicate the results?
 - ◆ General findings and employer's remedies
- Protect the employer's interests from complainant, accused and public scrutiny



Confidentiality Concerns

- As a general rule, maintain confidentiality of investigation records on a “need to know” basis
- **NEVER** promise employees confidentiality
 - ◆ May not be possible
 - ◆ Prohibited by the NLRB
 - ◆ If not privileged, public sector employers’ investigation reports may be public documents subject to FOIA

Preventing Workplace Harassment

What Are The Risk Factors?

- Per a recent EEOC Report
 - ◆ Homogenous workplaces
 - ◆ Workplaces with many young employees
 - ◆ Isolated work environments
 - ◆ Decentralized workplaces
 - ◆ Workplaces that tolerate alcohol consumption

Key Objectives

- Committed and engaged leadership
- Consistent and demonstrated accountability
- Comprehensive anti-harassment policies
- Reliable and accessible complaint procedures
- Regular, interactive training that is tailored to your specific workplace

Questions?



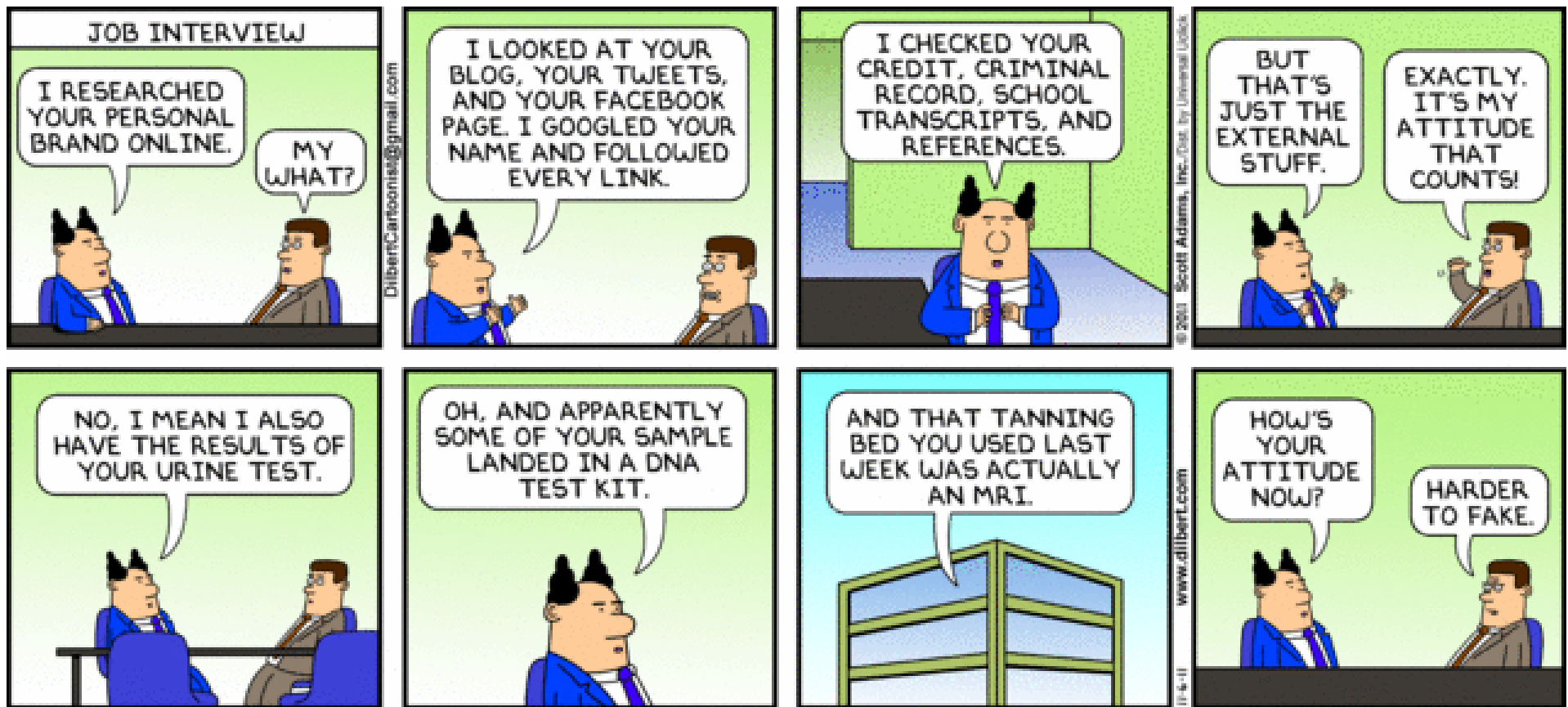
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Guardian of Your Own Galaxy: Making Informed Decisions on Hiring (Legally) and Sharing Information (When Appropriate)



Daniel A. Schwartz
Jessica Richman Smith
Melika S. Forbes

Today's Job Interview



We'll Cover...

- Relevant Laws
- Do's and Don'ts (and Sometimes)
 - ◆ Special Rules and Exceptions
- Social Media Screenings
- Reference Checks
- Personnel Files
- FOIA
- Questions

Relevant Laws

- Criminal background checks, including mandatory checks for certain employees (e.g., C.G.S. §§ 31-51i, 10-221d, 17a-247a-247d, 19a-80, 19a-87b, 29-156a, 29-161q)
 - ◆ School personnel
 - ◆ Childcare providers
 - ◆ Security personnel (applicable only to any person, firm, company, partnership, or corporation engaged in the business of providing investigative or security services)
- Employment history checks - schools (C.G.S. 10-222c, 20 U.S.C. § 7926)
- Registry checks (DCF, DDS, sex offender)
- Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and related CT law (C.G.S. § 31-51tt)
- Social media/internet (C.G.S. § 31-40x)
- Stored Communications Act (18 U.S.C. § 2701 et seq.)
- Drug and alcohol testing (C.G.S. § 14-261b)
- Polygraph tests (C.G.S. § 31-51g)
- Genetic information inquiries (C.G.S. § 46a-60(a)(11))
- State and federal nondiscrimination laws (e.g., Title VII, ADA, ADEA)

Do (As Appropriate)...

- Background checks
 - ◆ Criminal
 - ◆ Employment history (schools)
 - ◆ Credit
 - ◆ Registry (DCF, sex offender)
 - ◆ Drug and alcohol
- Reference checks

Sometimes Ask...

- Were you previously arrested, charged, or convicted?
 - ◆ Okay after initial application
 - ◆ Okay if required by law (e.g., school district employers)
- Will you provide your credit history?
 - ◆ Okay if credit report is “substantially related” to the job
- Will you take a polygraph test?
 - ◆ Okay if employer is the Connecticut Department of Correction or Police Department

Don't Ask!

- Can I access your personal online account?
- Could you please access your personal online account in my presence?
- Will you accept our Facebook “friend” request?
- Do you have any erased records of arrest, criminal charges, or convictions?
- Will you provide genetic information?

Personal Online Accounts: Important Exceptions

- Inapplicable to state or local law enforcement agency conducting a pre-employment investigation for law enforcement personnel
- Other relevant considerations
 - ◆ Accounts used for employer's business purposes or provided by virtue of the employment relationship
 - ◆ Devices paid for in whole or in part by employer
 - ◆ Certain employer investigations may require access to accounts
 - Compliance with state and federal statutory law and regulatory requirements
 - Compliance with prohibitions on work-related employee misconduct based on specific information
 - Employee, without the employer's consent, transferred proprietary information, confidential information or financial data to personal online account may be discharged or disciplined

Special School District Rules

- Have you ever been convicted of a crime?
- Are there any criminal charges pending against you?
- Are you included on the DCF registry (or out-of-state equivalent)?
- Employment history checks pursuant to statute
- Sex offender registry checks (recommended)

Employment History Checks (Schools)

- For positions involving direct student contact:
 - ◆ Require certain statements from applicant
 - ◆ Conduct a review of applicant's employment history by contacting former employers from past 20 years to
 - Solicit specific information regarding abuse, neglect, sexual misconduct
 - "obtain information and recommendations that may be relevant to the applicant's fitness for employment"
 - ◆ Request certain information from SDE
 - ◆ May employ/contract with an applicant for no more than 90 calendar days pending the district's review of statutory information, provided certain conditions are met

Remember When...

Michael J. Meyer

Relocating to New Jersey
Phone: (555) 555-5555 • Mobile: (555) 555-5555 • E-mail: email@email.com

GENERAL MOTORS CERTIFIED / ASE MASTER CERTIFIED TECHNICIAN *Offering 6 Years' Cadillac Specialization Experience*

Well qualified ASE Master and General Motors (GM) Certified Technician with 6 years of experience in a fast-paced, high-volume dealership – A.S. degree in GM Automotive. Extensive Cadillac drivability, electrical, and transmissions experience. Motivated, hard working, reliable, and productive; proven ability to deliver high quality work and excellent customer satisfaction. Areas of strength include:

- | | |
|---|---|
| <input type="checkbox"/> Drivability / Engine Performance | <input type="checkbox"/> Manual Drive Train & Axles |
| <input type="checkbox"/> Engine Repair | <input type="checkbox"/> Heating / Air Conditioning |
| <input type="checkbox"/> Electrical / Electronic Systems | <input type="checkbox"/> Brake Systems |
| <input type="checkbox"/> Automatic Transmission / Transaxle | <input type="checkbox"/> Suspension & Steering |

Qualification Highlights

- Produce an average 60 flat rate hours weekly performing GM automotive diagnostic analysis, repair, and maintenance; work as the only Cadillac, drivability, automatic transmission/transaxle, and diesel experienced technician on the dealership's GM team.
- Maintain an excellent customer satisfaction rate with virtually zero comebacks. Interface professionally and communicate easily with customers, service writers and co-workers; known for integrity in customer dealings.
- Upsell 20+ hours of work each month; accurately assess problems and needs and provide adequate information and advice for customer decision-making.
- Trained and certified in all GM and Cadillac specific courses; maintain up-to-date, working knowledge of all new scan tools and GM computer systems, such as SI2000, Tech Link Online, and Tech II.
- Achieved ASE Master Technician certification, EPA Certified A/C Qualified Technician standing, and licensing as a Washington State Certified Inspector.
- Assist service manager and writers by locating required bulletins and warranty information and responding to customers' telephone inquiries on technical problems.

Work History

GENERAL MOTORS TECHNICIAN

Memorex Motors (Cadillac, Pontiac, Chevy, Geo, and Nissan dealer) – Seattle, WA, 1994 - 2000

AUTOMOTIVE CENTER ASSOCIATE

Sears Auto Center – Englishtown, NJ, 1993 – 1995

ASSISTANT AUTOMOTIVE TECHNICIAN

Robert's Complete Auto Repair – Barrington, NJ, 1993

Education

A.S., General Motors Automotive, with Dean's List Honors

Washington Technical College – Seattle, WA – 1996

Certified in all GM / Cadillac courses, GM Training Center – Dedham, MA, 1994 – Present

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There's No Turning Back!

- According to a CareerBuilder study, 70% of employers use social media to screen job candidates before hiring them, up from 60% in 2016 and 11% in 2006*
- Why? Cheap, fast, convenient
- But also helpful?



*See <https://www.businessnewsdaily.com/2377-social-media-hiring.html>

Scenario

Emma Employer receives ten applications for an open position with the town. Emma notices that four of the applicants have “foreign” last names, and decides to look up the LinkedIn profiles for these individuals. Her search reveals that each of the four applicants self-identify as Latinx. She then reviews the resumes and supporting material of all ten applicants, and invites only six to the next round of the process. Coincidentally, none of the four applicants she viewed on LinkedIn was invited to the next round.

- ◆ Was Emma’s use of LinkedIn legally permissible?
- ◆ Should Emma have used LinkedIn in this manner?

Social Media Screenings

- Tempting to informally screen applicants based on social media accounts—however, caveat emptor!
 - ◆ State law provides some privacy protection for employees
 - Does not expressly prohibit informal review/checks of social media account
 - Reward v. Risk:
 - ❖ Informal checks may reveal information about an applicant’s protected characteristics
 - ❖ Anti-discrimination laws apply to online data



Profiles May Tell Us Something

- A quick review can be a better predictor than standardized tests
- Yields an “unvarnished” look at character and personality
- But there are drawbacks
 - ◆ Too much/too little
 - ◆ Accuracy
 - ◆ Privacy interests

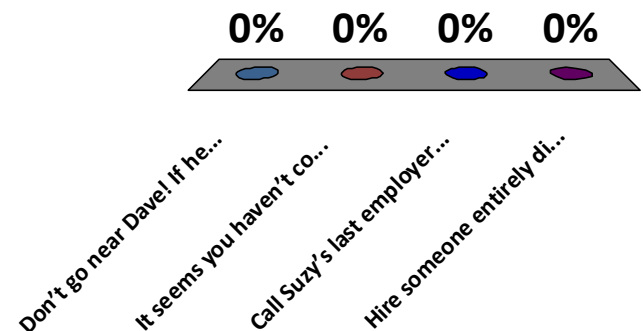
**CHARACTER
COUNTS!**[®]

Hypo: Dave or Suzy?

You are the HR Director for the Town of Nutmeg, and you are hiring for a position supporting the Town's Director of Finance and Operations. The position will involve complex back office work requiring oversight of certain financial information. You've narrowed down the applicant pool and you are interested in two applicants, but you have some concerns about each applicant. Dave was convicted of a DWI and had his license suspended for a couple months, but he provided two glowing letters of recommendation. Suzy has extensive experience in operations and finance, but her last employer won't say anything about her other than her dates of employment, her position, and her salary. You also noticed based on a Facebook profile picture she posted a couple days ago that she looks newly pregnant, although she didn't look pregnant during the interview a few weeks ago. What should you do?

You Should:

1. Don't go near Dave! If he can't be trusted to drive sober, he can't be trusted with the Town's important financial information. Once a criminal, always a criminal. It looks like Suzy is the one.
2. It seems you haven't completed your due diligence yet. Before you decide, run a credit report and call a few more former employers for each applicant.
3. Call Suzy's last employer and see if you can figure out whether Suzy is pregnant. After all, you can't have someone start in a new job only to go on maternity leave a few months later, but you know you can't ask Suzy directly.
4. Hire someone entirely different. You recall interviewing Becky who has several years of HR experience and no operations experience, but she's better than your other options. After all, she can be trained!



Social Media Screenings: Best Practices

- Don't conduct informal screenings on applicants
 - ◆ Very easy to learn about protected classes. Social media may contain information about race, sexual orientation, age, religion, disability, etc.
 - ◆ Avoid using protected characteristics as a basis for decision
- If you wish to conduct social media screenings...
 - ◆ Use a contracted third-party or non-decision maker based on pre-determined non-discriminatory guidelines
 - Provide training
 - ◆ Develop a policy and/or procedures—conduct searches consistently for all similarly situated applicants
 - ◆ Have strong agency purpose for intrusions
 - Tailor screening to needs and use least intrusive means available

Social Media Screenings: Best Practices

- ◆ Conduct after an in-person or video interview
- ◆ Consider informing applicants and obtaining consent
- ◆ Consider asking applicants about adverse information before making a decision on information that may be unreliable
- ◆ Avoid pretext (i.e., “friending” to gain access to private pages/content) or deceptive intrusion (e.g., viewing private pages/content through another person’s page who has access to private spaces)
- ◆ Safeguard information with appropriate care

References: Do's and Don'ts



When Prospective Employers Come Knocking...

- Under the Connecticut Personnel Files Act (C.G.S. § 31-128f), absent the consent of the employee, employers generally may only verify the employee's:
 - ◆ Dates of employment
 - ◆ Title or position and wage or salary
- The Connecticut Supreme Court has recognized that statements made by employers in an employment reference that is authorized by the employee are subject to a qualified privilege when made:
 - ◆ In good faith
 - ◆ Without an improper motive or malice

[Miron v. Univ. of New Haven Police Dep't, 931 A.2d 847, 854 \(Conn. 2007\)](#)



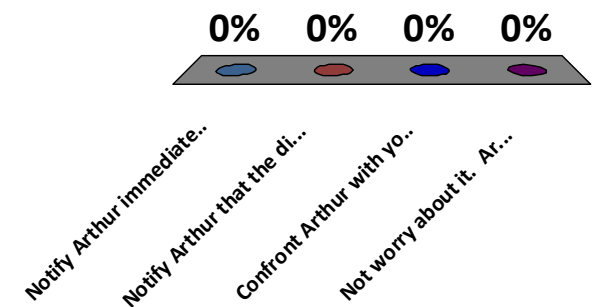
Hypo: To Hire or Not to Hire?

The Nutmeg Board of Education decided to hire Arthur Applicant before completing the entire employment history check. Ultimately the background check revealed that Arthur had been disciplined by his previous school district employer for an incident in which two students were injured. Arthur's non-teaching duties required him to monitor the hallway outside his classroom between periods. However, Arthur struggled to get his classroom set up in between periods and he typically used that time to set up his lesson for his next class, as did many Nutmeg High teachers. One day a fight broke out right outside his classroom door, and Arthur, being inside his classroom setting up his next lesson instead of in the hallway, did not intervene until two students were injured. One of the injured student's parents filed a DCF report that Arthur and other staff had neglected the student by failing to supervise the students. While DCF did not substantiate that allegation and closed this case, Arthur subsequently received a written reprimand for not monitoring the hallway between classes.

Arthur did not disclose this fact on his application. What should you do about Arthur?

You Should:

1. Notify Arthur immediately that he will not be hired for a permanent position with the district. Arthur will just be a liability that the district cannot afford to assume.
2. Notify Arthur that the district will be terminating his employment immediately. In violation of his legal obligations, Arthur failed to disclose that he had been subject to an investigation for neglect by DCF and had been disciplined by his former employer.
3. Confront Arthur with your concerns about his employment history and see what he has to say before deciding how to proceed with his employment. Despite this one uncharacteristic lapse in judgment in his former district, Arthur came with glowing recommendations and he is otherwise a great fit for the district's needs.
4. Not worry about it. Arthur was not required to disclose this incident on his application, and since it was a one-time lapse in judgment, it should have no impact on Arthur's candidacy for permanent employment in your district.



Best Practices for Reference Checking

- Decide on the best time to conduct reference checks
- Get authorization to request/provide information
- Decide what information to request/provide and inform employees
- Centralize references in a single administrator
- Talk to references directly

What Can/Should You Do With All This Information?

- Generally, employers have discretion
- Applicants who knowingly provide false information or knowingly fail to disclose required information are subject to denial of employment
 - ◆ But you should give them an opportunity to respond to records checks that are inconsistent with information the applicant previously provided before denying employment or withdrawing an employment offer
- Special rules for school districts
 - ◆ Cannot hire applicant who does not provide required information
 - ◆ Cannot hire applicant who has been terminated/resigned from employment if applicant has been convicted of violating law requiring mandatory reporting of abuse, neglect, and sexual assault of a student by a school employee, when the allegation has been substantiated

When May Employers Be Liable?

- Beware of liability under claims for negligent hiring:
 - ◆ Breach of duty to exercise due care in hiring which negligently causes the harm allegedly suffered by plaintiff
 - ◆ Foreseeability is key: Did the employer know or should it have known of the employee's propensity for tortious conduct at the time of the employee's hiring?
- Example: In considering a claim for negligent hiring in a case involving the hiring of a person with a criminal record who murdered the plaintiff's spouse, the Court concluded that "[i]t is not reasonably foreseeable that a person convicted of burglary, larceny and disorderly conduct will later commit assault, battery and murder." *Baker v. Spinney*, No. CV075001737S, 2008 WL 2502609, at *3 (Conn. Super. Ct. June 2, 2008).
- Note: It is Connecticut public policy "to encourage, or at least not discourage, employers to hire persons with criminal records. To hold otherwise would lead to increased difficulty of such persons in finding employment and rehabilitating themselves." *Id.* at *4.

Personnel files: Do's and Don'ts



Public Employee: Personnel Files

- No statutory definition of *personnel file* under laws governing public records
 - ◆ State guidance requires the retention of certain “personnel records”
 - ◆ No requirement to maintain such records in a specific physical location
 - ◆ FOIC has determined that *personnel file* is not a physical location
 - Instead, refers to categories of information relating to an employee and his/her employment

Personnel Files: Records That May Be Included

- Recruiting and screening documents (e.g., applications, resumes, cover letters and educational transcripts, etc.)
- Records relating to job offer, promotion, demotion, transfer, rate of pay
- Records relating to employment practices (e.g., letters of recognition, signed policy acknowledgments, training records, awards, written agreements, etc.)
- Records relating to performance (e.g., goal-setting records, summative performance evaluations, formal observations, improvement plans documentation, etc.)
 - ◆ Any written employee rebuttal should be included
- Disciplinary notices (e.g., warnings, suspension notices, letters or memos addressed to the employee, etc.)
- Non-medical leave requests
- Records related to employment separation (e.g., termination notices, COBRA notification, final accounting and exit interviews)
- Any other relevant record that must be retained pursuant to OPRA's retention schedule

Personnel Files: Records That Should Not Be Included

- Medical records
- Criminal history records
- Disability records (e.g., accommodation requests, FMLA requests, verification documents, etc.)
- Drug and alcohol testing records
- Insurance records (e.g., enrollment forms, benefit claims, doctor's notes, etc.)
- Investigation records (e.g., witness statements, preliminary or final reports)
- Immigration records (e.g., I-9 forms)
- Workers' Compensation records
- Payroll records (e.g., W-4s, withholding forms, garnishments and child support)
- DCF-related records

Best Practices and Guiding Principles

- Keep confidential records separate from personnel files
- Maintain personnel files securely at the central/main office
- Designate a custodian of records
- Develop personnel files policies and procedures regarding the maintenance and disclosure of information contained in personnel files

The FOI Act: What is Not Protected?

- General rule: everything
- Employee evaluations (except teachers)
- Disciplinary records (including teacher disciplinary records and parent complaints)
- Salary information
- Job applications for successful candidates
- Attendance information
- Settlement agreements by public agencies with an employee or personal services contractor, notwithstanding any agreement to the contrary

The FOI Act: What is Protected?

- Information concerning the purely private affairs of a public employee (e.g., marriage troubles)
- Social Security numbers
- Tax deductions
- Unlisted telephone numbers
- Personal bank account information
- Family status
- Records of teacher performance and evaluation (but not disciplinary records), except teachers may consent
- Records related to ethics complaints
- Criminal conviction records
- The home addresses of certain public employees, including municipal police or firefighters, judges and prosecutors (but not, e.g., the high school principal)
- Job applications of unsuccessful candidates

The FOI Act: What *May* Be Protected?

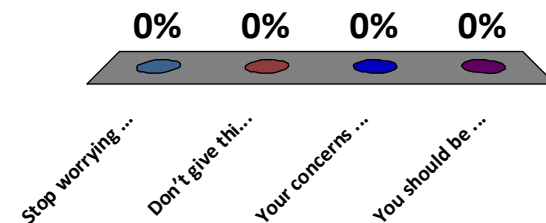
- Personnel or medical files and similar files the disclosure of which would constitute an invasion of personal privacy
 - ◆ Does the requested information pertain to a legitimate matter of public concern?
 - ◆ Would disclosure of the information be highly offensive to a reasonable person?
- Employers must follow the appropriate statutory procedure
- Examples of matters that are not “of legitimate public concern”:
 - ◆ A complaint against a state trooper alleging an improper relationship with complainant’s wife
 - ◆ The identity and home address of a complainant in a sexual harassment investigation
 - ◆ (Maybe) addresses of employees who have taken significant steps to maintain the confidentiality of such information

Hypo: Catch-22

As the HR Director for the Town of Nutmeg, you have concluded your investigation of a matter involving Cory Custodian. You substantiated allegations that Cory left a cafeteria floor wet in the middle of the day, which caused another employee to slip and fall and break her ankle. As part of your investigation, you took copious notes, you wrote a few drafts of an investigative report (but no final yet), and you are about to draft a letter of discipline in which you will suspend Cory for exercising poor judgment in fulfilling his duties. The administration is concerned about the Town's liability in connection with this matter, and you are worried about what will become of all the documentation you have created in connection with your investigation. For starters, there is one serial FOIA-er, FOIA Fred, whose day job seems to be ferreting out problems with Town government, and you are concerned that Fred will get a hold of your paperwork and make matters worse for everyone. What should you do?

You Should:

1. Stop worrying so much. Your personal notes and drafts are protected from disclosure under FOIA, and you can control the message you convey in the letter of discipline.
2. Don't give this another thought. All investigative files are exempt from disclosure under FOIA, and you can simply issue a verbal reprimand to Cory in lieu of a disciplinary letter.
3. Your concerns are legitimate. If news of this incident gets out and Fred asks for a copy of Cory's personnel file, he will see everything on this incident – notes, drafts, and the disciplinary letter. It would be best to discard all documentation you created except for the disciplinary letter.
4. You should be very concerned. Even if certain records are exempt from disclosure under FOIA, they may be subject to discovery in a civil lawsuit. You ought to call Cory's union rep and negotiate a separation agreement that will dispose of this matter without the need for further documentation.



Questions?



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The Effective Use of Separation Agreements



Rebecca Rudnick Santiago
Peter J. Murphy
Benjamin P. FrazziniKendrick

Agenda

- When Should Employers Think About Entering into Separation Agreements?
- Separation Agreement Provisions
- Confidentiality and Non-Disparagement Clauses
- Mutuality of Waivers
- Freedom of Information Act Considerations
- Workers' Compensation Considerations
- How to Structure the Agreement

When Should Employers Think About Entering into Settlement Agreements



Consider Using a Separation Agreement When:

- The employee is in a protected class(es)
- The employee has recently engaged in protected activity
- The employee has a pending worker's compensation claim
- The employee is a poor performer, but there are concerns with the documentation of the grounds for termination

Consider Using a Separation Agreement When:

- A termination may result in a financially and administratively costly termination proceeding
- The employee has already asserted a claim
- The employee is likely to assert a claim
- The employee is a long-term employee
- The employer may be willing to provide additional benefits to the employee, beyond those to which the employee would otherwise be entitled, to obtain claim waivers for any other reason

Benefits of an Agreement

- Helps to resolve employment situations that are detrimental or distracting to the office or department
- Helps to resolve pending or contemplated claims by the employee
- Solidifies the terms and conditions of the employee's departure on terms beneficial to the employer
- Eliminates the risk of legal claims against the employer
- Helps to decrease risk of bad publicity or disparagement (subject to Freedom of Information Act ("FOI") restrictions)

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Separation Agreements Establish:

- Employee's last date of employment and pay
- Employee's date to return all company property
- The benefits the employee will receive, such as health insurance, and date on which such benefits will end
- An acknowledgment that, without agreeing to the separation agreement, the employee would not be entitled to the benefits set forth therein

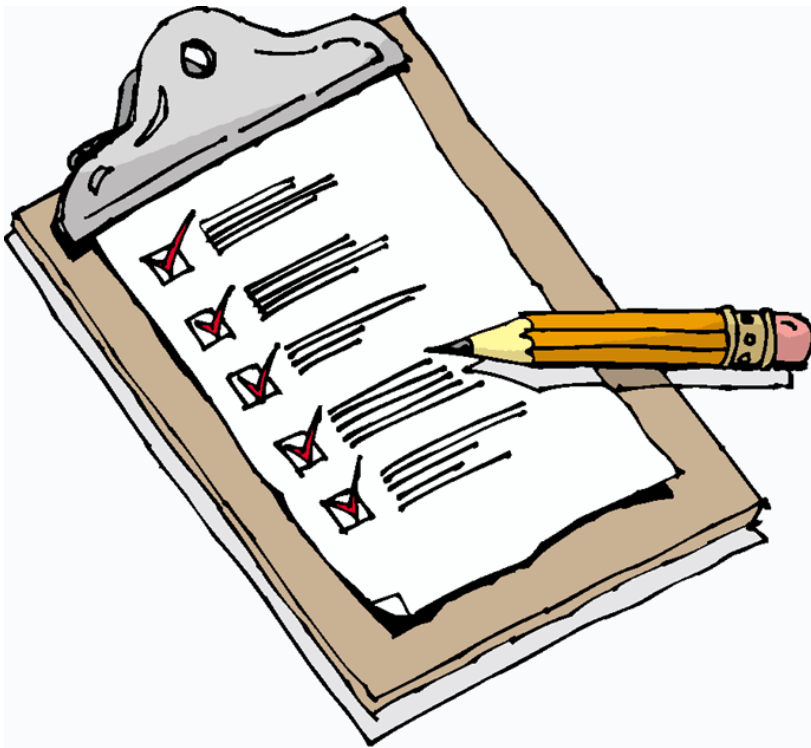
Settlement Provisions

- A release or waiver of claims
- Statement that if employee files a charge with the EEOC or CHRO, he/she will recover no damages in the process
- Agreement that employee will pay employer's attorney's fees if employee later tries to sue the employer
- A confidentiality provision
- A non-disparagement provision
- A no-rehire provision

Settlement Provisions

- A merger clause stating that the agreement is the sole and total agreement between the parties
- A provision requiring the employee to cooperate with the employer in connection with any current or future investigation, litigation, arbitration
- A severability provision rendering the agreement legally enforceable even if a provision is not
- An indemnification provision requiring the employee to repay any payments received from the employer should the employee commence or prosecute any action or proceeding against the employer

Considerations to Make the Waiver Legal and Defensible



Knowing and Voluntary Waiver

- Courts and the EEOC consider the following factors to determine if knowing and voluntary:
 - ◆ Whether it was written in a manner clear and specific enough for the employee to understand based on his education and business experience
 - ◆ Whether it was induced by fraud, duress, undue influence, or other improper conduct by the employer
 - ◆ Whether the employee had sufficient time to read and think about the advantages and disadvantages of the agreement before signing it

Knowing and Voluntary

- ◆ Whether the employee consulted with an attorney or was encouraged/discouraged from doing so
- ◆ Whether the employee had any input in negotiating the terms of the agreement
- ◆ Whether the employer offered the employee consideration that exceeded those benefits to which the employee was already entitled by law or contract
- These or similar statements can be included in an employee acknowledgment section

The U.S. Equal Opportunity Commission: Understanding Waivers of Discrimination Claims in Employee Severance Agreements, July 15, 2009, available at https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html



ADEA and OWBPA Considerations

- The ADEA and the OWBPA (which amended the ADEA) require additional safeguards for a waiver of claims to be “knowing and voluntary.”
- Different, and more extensive, than the consideration for other statutory waivers.

ADEA and OWBPA Require the Following:

1. Must be written in a manner that can be clearly understood
2. Must specifically refer to ADEA/OWBPA
3. Must advise the employee in writing to consult an attorney before accepting the agreement
4. Must provide the employee with at least 21 days to consider the offer
5. Must give an employee seven days to revoke his/her signature
6. Must be retroactive only; no prospective waiver allowed
7. Must provide the employee with a payment or benefits beyond those to which the employee is already entitled

ADEA and OWBPA Considerations

- Even if the waiver includes the above seven elements, it may still be invalid if it was obtained by fraud, undue influence, or “other improper conduct to coerce the employee to sign it, or if it contains a material mistake, omission, or misstatement.”

See Understanding Waivers of Discrimination Claims in Employee Severance Agreements, U.S. EEOC, July 2009, available at https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

**Are there any
prohibited waivers?**



Rights That Cannot Be Waived

- The right to file a claim with the EEOC or CHRO (except can waive right to damages)
- The right to testify, assist, or participate in an investigation or hearing conducted by the EEOC or other such agencies
- Rights under the Workers' Compensation Act
- Rights under pension plans
- Right to file for unemployment
- Right to indemnification under Conn. Gen. Stat. §§ 10-235 and 7-465

Confidentiality and Non-Disparagement Clauses



Confidentiality Provisions

- Yes, agree to keep terms confidential!
- Exceptions for forced disclosure of information:
 - ◆ Response to subpoenas, an investigation by the EEOC, or an action to enforce the terms of the agreement itself
- Exceptions for permissive disclosure:
 - ◆ E.g., disclosure to family or professional advisers (e.g., attorneys and accountants)

Confidentiality Under FOIA

- Conn. Gen. Stat. 1-214a states that:
 - ◆ “[a]ny agreement entered into by any public agency . . . with an employee . . .
 - ◆ “providing for the termination, suspension or separation from employment of such employee . . . ,
 - ◆ “that contains a confidentiality provision that prohibits or restricts such public agency from disclosing the existence of the agreement or the cause or causes for such termination, suspension or separation . . . ,
 - ◆ “shall be subject to public disclosure under this chapter.”

Confidentiality Under FOIA

- Even if subject to disclosure under the FOIA, confidentiality agreement beneficial because:
 - ◆ Restricts the employee's ability to widely broadcast the terms of the agreement
 - E.g., Facebook, the local blog, etc.
 - ◆ No affirmative obligation by employer to publish it

Limiting Post-Employment Comments



Non-Disparagement

- Provides assurance that employee will not disparage or “trash talk” their company or supervisors after they leave
 - ◆ Violation can lead to termination of benefits provided under the separation agreement (e.g., no more insurance benefits)
 - ◆ Consider using a liquidated damages provision to ensure employee’s compliance
- Use caution when considering an employee request for a non-disparagement provision, as it can be hard to control all employees or board members. If necessary, limit only to certain employees.

Non-Disparagement

- Consider using agreement that all reference checks will be submitted to one representative of the employer, or agree to the use of a “neutral letter of reference” for the terminated employee.
- Under Conn. Gen. Stat. § 10-222c(e), prohibits local and regional boards of education, governing councils state or local charter schools, operators of interdistrict magnet schools, and supervisory agents of a nonpublic school from, among other things, entering into any agreement for resignation or termination, severance agreement, or any other contract or agreement that:
 - ◆ “Has the effect of suppressing information relating to an investigation of a report of suspected abuse or neglect or sexual misconduct by a current or former employee;”
 - ◆ “Affects the ability of the local or regional board of education, council, operator or supervisory agent to report suspected abuse or neglect or sexual misconduct to appropriate authorities;” or
 - ◆ “Requires the local or regional board of education, council, operator or supervisory agent to expunge information about an allegation or a finding of suspected abuse or neglect or sexual misconduct from any documents maintained by the board, unless after investigation such allegation is dismissed or found to be false.”

Mutuality of Waivers

Mutuality of Waivers

- Generally, employers will want to avoid waiving claims against an employee as the employer may have no idea what the potential claims could be until after the employee has left.
- An employee may be terminated for one reason, but subsequent to the termination, the employer may discover the employee engaged in additional wrong doing and, potentially, criminal activity. The employer will want to retain the right to pursue legal actions against employees in such cases.

Workers' Compensation Considerations

Workers' Compensation Considerations

- Under Conn. Gen. Stat. § 31-296, any settlement of substantive claims needs Commissioner approval
- Without approval by the Commissioner, any waiver of a person's rights with respect to workers' compensation is invalid, even if such waiver is included as part of an employee's termination agreement. *MacDermid, Inc. v. Leonetti*, 310 Conn. 195, 210 (2013)
- You can waive § 31-290a retaliation claims, however, in a separation agreement

Structuring the Separation Agreement

Benefit Continuation

- No requirement to continue benefits, but can be big incentive for employee
- If you offer extended benefits:
 - ◆ Identify clear date of termination of benefits (with COBRA eligibility to follow)
 - ◆ Clarify employee's obligations for premium payments
 - ◆ Ensure insurer allows former employees to remain on policy
 - ◆ Consider early termination clause (e.g., if employee finds a new job with benefits, insurance obligations cease)
 - ◆ Consider immediate termination of benefits, but employer subsidizing a portion of COBRA costs

Unemployment Considerations

- No prohibition against receiving severance and unemployment.
- Severance pay may reduce or eliminate entirely the amount of unemployment benefits an employee receives. See <https://www.ctdol.state.ct.us/progsupt/unemplt/claimant-guide/uc-288.pdf>.
- The limitation is not applicable, however, where the employee had to sign a waiver of his right to sue his employer under a discrimination statute or a waiver of his right to bring a wrongful discharge suit. See http://www.ctdol.state.ct.us/uiTax/EmployerGuide/UI_Claim_Procedures.htm
- Employers can agree not to contest unemployment in a separation agreement. If you intend to contest, note in agreement that employer reserves right to contest.

Questions?



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A Safe Space: Managing School and Workplace Security in Today's World



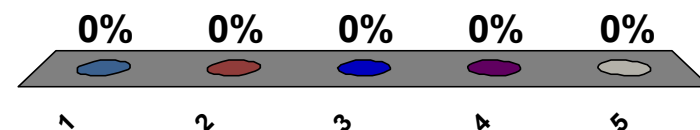
Lisa Banatoski Mehta
Richard A. Mills
Peter J. Maher

WHY?



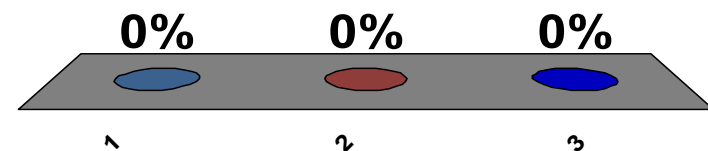
When Was The Last Time You Had A Fire Drill?

1. In the past month
2. In the past six months
3. In the past year
4. More than a year ago
5. I can't remember having one



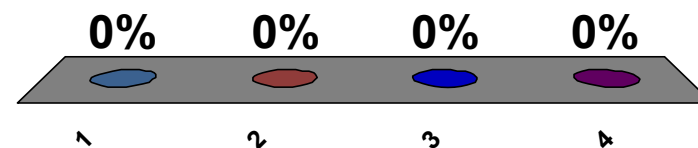
Have You Ever Had A “Lock Down” Or Emergency Incident Drill?

1. Yes
2. No
3. I don't know



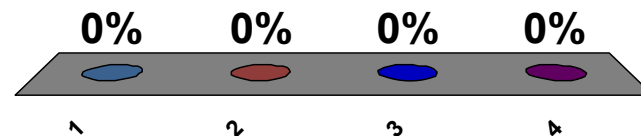
Do You Have An Emergency Response Plan?

1. Yes
2. No
3. Maybe
4. I don't know



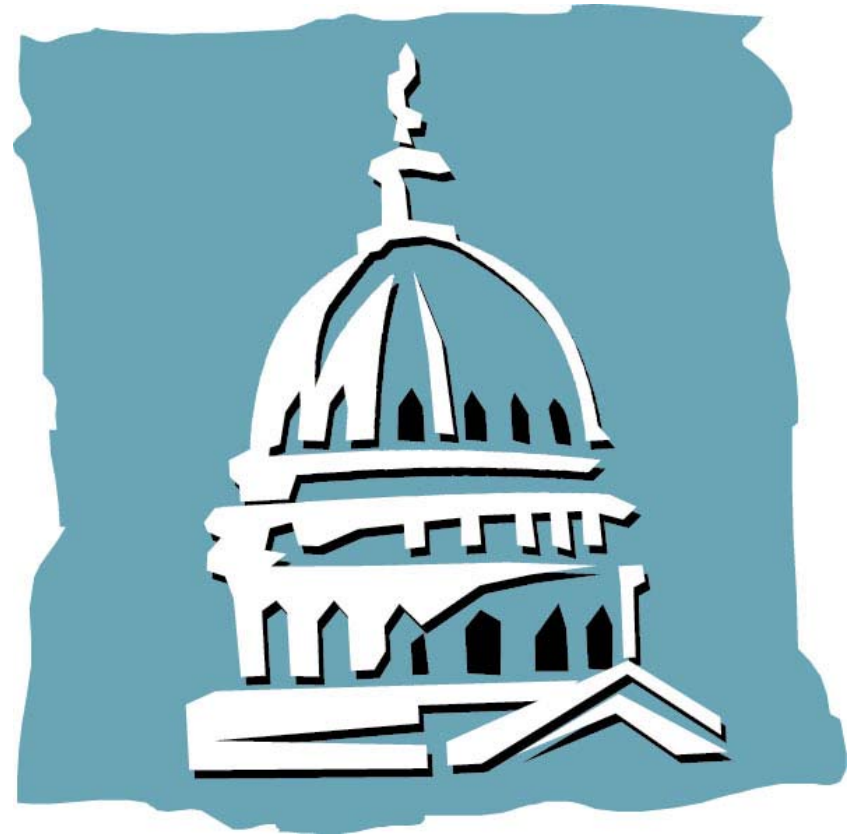
If You Have An Emergency Response Plan, When Was It Last Reviewed Or Revised?

1. In the past month
2. In the past six months
3. In the past year
4. More than a year ago



Federal Legislative Efforts

- Gun control
- School safety programs and training
- Federal law enforcement assistance
- Grants for security improvements



Presidential Executive Orders

(Obama Administration)



- Communication to health care providers about threats of violence, firearms, and gun safety
- Incentives for COPS Hiring Grants
- May 2013 issuance of model Emergency Management and Response Plans
- Best practices regarding student discipline
- Coverage of mental health and substance abuse services by insurance plans

Presidential Action

(Trump Administration)



- Focus has been on prevention and response to violence against law enforcement officials
- Parkland Discussions and focus on armed personnel in schools
- Declaration of May, 2018 as National Mental Health Awareness Month

Available Resources

- Connecticut Department of Emergency Services and Public Protection

<http://www.ct.gov/despp/site/default.asp>

- Federal Bureau of Investigations

<https://www.fbi.gov/about/partnerships/office-of-partner-engagement/active-shooter-resources>

- Federal Department of Homeland Security

www.dhs.gov/active-shooter

- Federal OSHA

<https://www.osha.gov/SLTC/workplaceviolence/>

- Federal Department of Labor

<https://www.dol.gov/oasam/hrc/policies/dol-workplace-violence-program.htm>

- Ready.Gov

<https://www.ready.gov/active-shooter>

(includes additional plans and materials on Emergency Management and Response)

Breaking News

- Earlier this week on May 2, 2018, the National Fire Protection Association released what the Association is calling “the world’s first active shooter/hostile event standard with guidance on whole community planning, response and recovery.”

<https://www.nfpa.org/News-and-Research/News-and-media/Press-Room/News-releases/2018/NFPA-releases-the-worlds-first-active-shooter-hostile-event-standard>

School Security and Safety Standards

- Enacted in 2013 for the 2014-2015 school year
- DESPP and SDE required to develop and update annually school security and safety standards (“all-hazards approach”), including, among others:
 - ◆ An organizational command structure based on the federal National Incident Management System (NIMS) and Incident Command System (ICS)
 - ◆ Vulnerability assessments for schools every 2 years
 - ◆ Employee training on school security and safety plans and violence prevention

School Security and Safety Plans

- Each BOE must have a school security and safety plan for each school based on the State's school security and safety standards (may be one for each school or a district plan with a section for each school)
- Plans must be reviewed annually, submitted to DESPP/DEMHS and annexed to the municipality's Local Emergencies Operations Plan
 - ◆ By November 1 of each year, must submit to DESPP/DEMHS (1) updated pages; (2) form stating no changes; or (3) revised plan if major changes
- State templates available for schools and municipal officials



School Security and Safety Committees

- Each BOE must establish a committee for each school, to assist with development/administration of security/safety plans. May be combined with other committees (such as the safe school climate committee), provided all committee membership requirements are met
- The committee must consist of:
 - ◆ A local police officer
 - ◆ A local first responder
 - ◆ A teacher employed at the school
 - ◆ An administrator employed at the school
 - ◆ A mental health professional (i.e., school counselors, school social workers, school psychologists, school nurses, etc.)
 - ◆ A parent/guardian of a student enrolled in the school
 - ◆ Any other person the Board deems necessary
 - School nurse, custodian, property manager, local emergency management director, local public health director, IT manager, transportation coordinator



Mental Health First Aid Training

- Administered by State Commissioner of Mental Health and Addiction Services
- Required for safe school climate coordinators
- BOE may require teachers, nurses, counselors and other employees to participate
- Advisable for municipal and other public agency employees



School Security Infrastructure Grants

- A school security infrastructure competitive grant program was established and extended through FY 2017-2018
 - ◆ Reimburses towns for certain expenses incurred during the development, improvement and maintenance of security infrastructure and the training of school personnel on security infrastructure made after January 1, 2013
 - ◆ Projects must meet school safety infrastructure criteria
- Proposed legislation would extend this grant through the FY 2018-2019. See S.B. 454

Preventive Measures During the Hiring Process

- Pre-employment screening
- Background checks
- Drug and alcohol testing
- Similar control over subcontractors



Application to Municipal and Other Public Agency Employers

- Though not required (yet)...
 - ◆ Advisable to adopt safety plans and procedures
 - ◆ Utilize Health and Safety Committees to assist with workplace and security planning as appropriate
 - ◆ Consider conducting mental health first aid training and advertise EAP availability

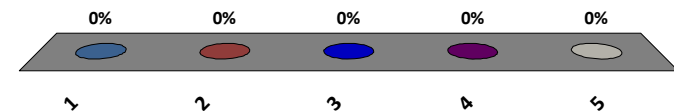


Far Afield?

The volunteer “director” of the local little league is passionate about the condition of the Town’s fields which are maintained by the Town’s Public Works employees. He routinely “pops by” to give his “two cents” to the Town crew about how they should be maintaining the fields. These interactions are becoming increasingly hostile towards the Town crew. When he is told by the Town Manager that he needs to cease these interruptions during the work day and direct his comments or feedback to the Town Manager and the Director of Public Works, the Little League Director becomes irate. He repeatedly calls the Town Manager’s office and makes inappropriate comments and veiled threats about how “hard he can swing his bat” and how “he hopes that nothing will get in the way!”

What Can/Should The Town Do?

1. Nothing, coaches are all talk
2. Tell the Town crew to be careful
3. Issue a cease and desist letter
4. Contact the police
5. Apply for a restraining order

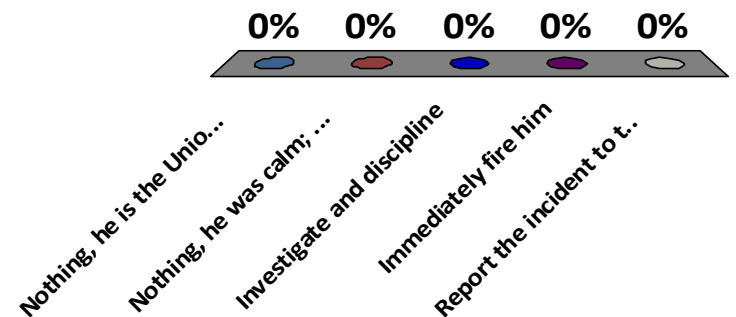


“News Flash”

A group of employees are in the lounge watching the news during lunch. “Breaking News” appears on the screen and the anchor reports on a reported workplace shooting. The Union President walks in and calmly makes a comment about how “he’s thought about doing that” and points his hands like a gun at his coworkers.

What Can/Should The Town Do?

1. Nothing, he is the Union President
2. Nothing, he was calm; and must be joking
3. Investigate and discipline
4. Immediately fire him
5. Report the incident to the Police

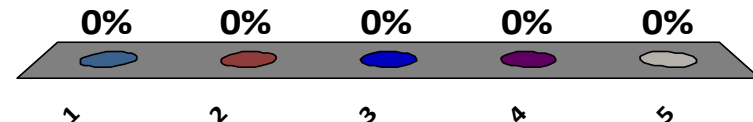


Divine Intervention

A Caucasian male employee named, S. Patrick Day, has been working for you for one year with a satisfactory performance record. Suddenly, he seems not to be himself. He has withdrawn, grown a thick red beard and is dressing differently. He is often seen reading the newspaper and watching CNN on his iPhone. He seems preoccupied by ongoing conflicts in the world and ISIS. When asked by a coworker, he states that he has “seen the light” and he is going to take matters into his own hands. You are concerned.

What Can/Should You Do?

1. Nothing, he hasn't threatened anyone yet and you don't want to seem paranoid
2. Steer clear of S. Patrick Day
3. Report your concerns to HR
4. Call the Police
5. All of the above

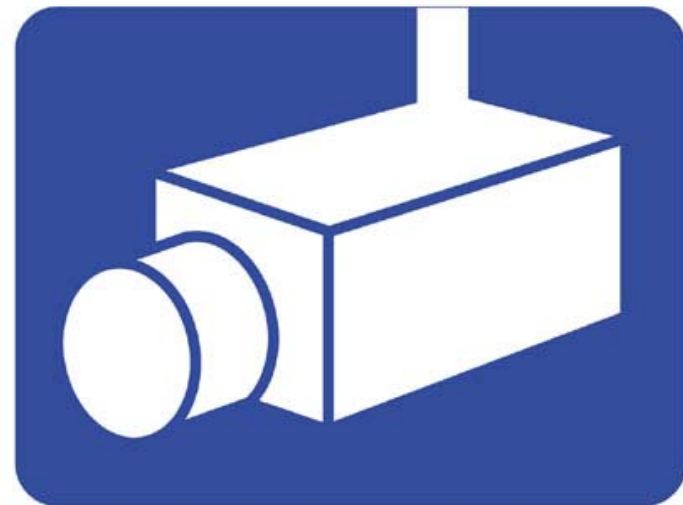


Preventive Measures In Policies

- Prohibit violence, harassment, and substance abuse
- Ban weapons
- Eliminate privacy expectations
- Train and educate employees
- Create an emergency response plan and a safety committee
- Limit employee and visitor access

Preventive Measures In Building Security

- Changes to physical structure of building
- Surveillance
- Electronic keypads
- Bullet-proof glass
- Metal detectors



Training and Education of Employees

- Identifying, reporting, and responding to situations
- Conflict resolution
- Communication and interpersonal skills
- De-escalation techniques
- Threat assessment teams

Addressing the Violent or Potentially Violent Employee

- Investigate
- Use administrative leave, medical examinations, and assistance programs
- Searches, seizures, and surveillance
- Discipline and discharge



Questions?



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Strategy Session: Latest Developments in Collective Bargaining



Kevin M. Roy
Jessica L. Ritter
Christopher E. Engler

Basics of Bargaining: Applicable Laws

- Municipal Employee Relations Act (“MERA”), Conn. Gen. Stat. § 7-467 et seq.
- Teacher Negotiation Act (“TNA”), Conn. Gen. Stat. § 10-153a et seq.
- State Employee Relations Act (“SERA”), Conn. Gen. Stat. § 5-270 et seq.

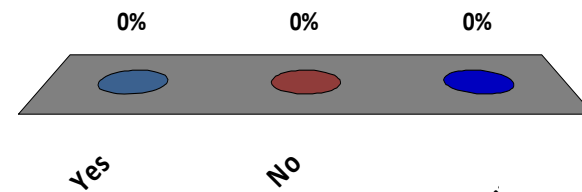
Negotiations

- Select spokesperson(s)
- Establish ground rules
- Exchange initial proposals
 - ◆ Economic
 - Union makes initial salary/wage proposal
 - Employer makes initial insurance proposal
- Negotiate
 - ◆ Accept; Reject; Counter-propose; or Invite further discussion on each proposal



Are ground rules required by law before negotiations can begin?

1. Yes
2. No
3. Under TNA but not MERA or SERA



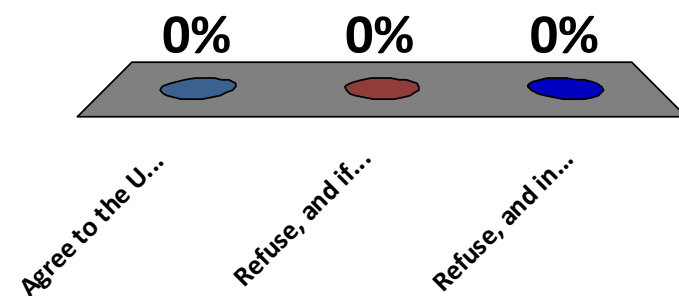
Under TNA but not MERA or SERA

Test Your Knowledge

- At the outset of negotiations, you and the Union are discussing ground rules.
- The Union refuses to accept your proposed ground rule to keep negotiations confidential. Instead, it insists on the right to go to the press with updates on negotiations.

How do you respond?

1. Agree to the Union's demands because FOIA makes negotiations public anyway
2. Refuse, and if necessary proceed to negotiations without ground rules
3. Refuse, and insist on going to interest arbitration



Preparing for Negotiations

- Determine applicable timelines
 - ◆ TNA: Commence at least 210 days prior to budget submission date
 - ◆ MERA: Commence at least 120 days prior to contract expiration date
- Prioritize issues
 - ◆ Review prior bargaining history, if any, between the parties
 - ◆ Determine whether language has lead to grievances or managerial and/or operational obstacles
 - ◆ Confer with supervisors and department heads to determine managerial and/or operational obstacles
 - ◆ Consider budgetary constraints

Preparing for Negotiations

- **Conduct wage/benefit survey**
 - ◆ Review benefits and work rules for other bargaining units and other non-unionized employees
 - For municipal employers, consider both Board and Town employees
 - ◆ Consider whether private sector trends may also be helpful
- **Collect bargaining unit demographic data**
 - ◆ Unit members' positions, seniority, medical benefit coverage, accrued benefits (sick, personal, vacation, etc.) and absenteeism rate (disaggregated, if appropriate)

Preparing for Negotiations

- Gather cost data
 - ◆ Wages, overtime costs, medical benefits, leave benefits and other contractual economic benefits
- Evaluate prevailing labor market conditions on a regional, state and national basis
 - ◆ Use appropriate comparables (geographic location, size relative wealth and resources, state aid and rankings)
- Assess the employee relations climate
 - ◆ Is it workable, adversarial, or collaborative?

Scope of Bargaining

- **Mandatory Subjects → “MUST”**
 - ◆ Ex: Wages/salaries; hours; benefits; leave provisions; work load; subcontracting or other conditions of employment
- **Permissive Subjects → “MAY”**
 - ◆ Ex: qualification, selection criteria and process for a new position; teacher evaluation; or bargaining unit determination for non-certified staff
- **Illegal Subjects → “NO WAY”**
 - ◆ Ex: benefits or other conditions relating to non-unit members; language that conflicts with legal requirements; or parity language

Legal Update – *Janus v. AFSCME*

- Challenge to the constitutionality of agency fees
- Seeks to overturn *Abood v. Detroit Bd. of Educ.* (1977)
- Argued February 26, 2018, decision expected June 2018

Test Your Knowledge

- You receive a letter from a union asking you to discuss the likely impacts of the *Janus* case.
- The Union asks that you agree in advance to provide the Union with current information regarding every bargaining unit employee's membership and dues payment status.
- The Union also asks that the parties agree on a joint message explaining the implications of the *Janus* case.
- Finally, the Union proposes to become the records custodian for union dues.

How will you respond?

- Considerations
 - ◆ Are you required to respond?
 - ◆ Are you required to make any preemptive changes?
 - ◆ Are you required to negotiate these items – either midterm or at your next negotiations?

Stages of Collective Bargaining

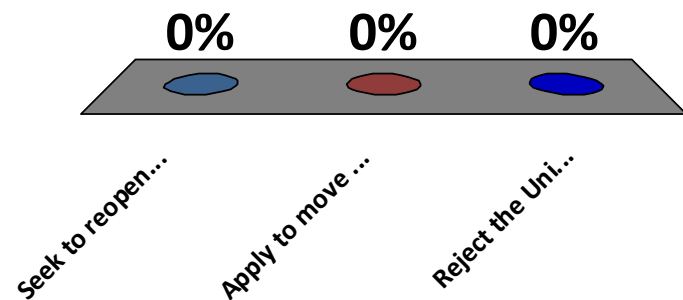


Test Your Knowledge

- The union representing the Town's clerical employees has proposed moving to the State Partnership Plan 2.0. This is the Town's smallest bargaining unit.
- The Town's insurance consultant concludes that the Town would see significant savings if this unit moved to the Partnership Plan.
- The Town's other unions just signed 3- or 4-year contracts, all of which included a standard HDHP-HSA plan.
- The Board of Education is adamantly opposed to the Partnership Plan.

What are the Town's options?

1. Seek to reopen the contracts with the other Town bargaining units
2. Apply to move just the clerical group to the Partnership Plan
3. Reject the Union's proposal because the Board of Education would not agree to move its employees to the Partnership Plan



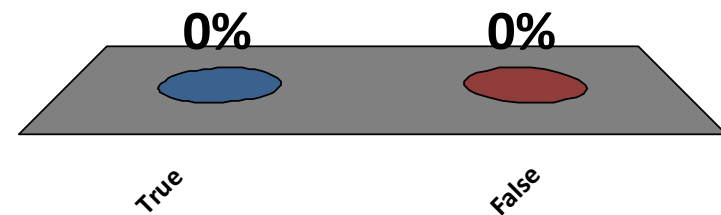
Test Your Knowledge

- The employer is required to give employees paid time off to work in order to allow for participation in the negotiations process.



True or False?

1. True
2. False



During Negotiations

- No obligation to compromise or make concessions
- Respect the Union's role
 - ◆ Acknowledge legal constraints
 - ◆ Recognize that the Union has a responsibility to its members—it must represent the interests of the unit
 - Duty of fair representation
 - Perceived duty to protect members from themselves
 - ◆ Recognize that the local union is part of a larger organization
 - Restrictions under Union constitution/bylaws and institutional policies
 - Union politics

During Negotiations

- Evaluate union proposals
 - ◆ Be sure to cost out economic proposals
 - ◆ Compile data to refute proposals
- Seek common interest, where possible
 - ◆ Consider potential compromises and accommodations
- Be mindful of timelines!

During Negotiations

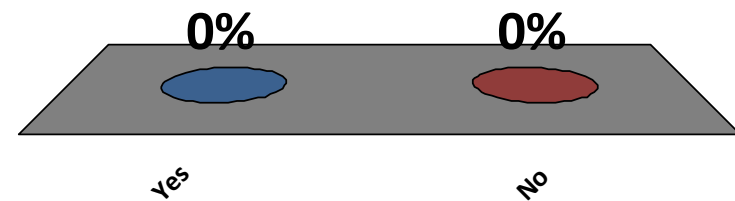
- If contractual disputes are fully resolved by the parties, then the parties' agreement...
 - ◆ Must be reduced to writing (usually in a tentative agreement)
 - ◆ Must be ratified by the parties
 - ◆ Approval by the municipality's legislative body?
 - TNA → Once a board ratifies, the contract must be filed with the Town Clerk
 - ❖ The municipality's legislative body has 30 days from the filing to vote on whether to "reject" the contract
 - ❖ If "rejected," then the contract must be submitted to arbitration
 - MERA → Once a board ratifies, there is no requirement that the municipality approve or review the agreement unless local charter provides otherwise

Test Your Knowledge

- After a particularly difficult 7 rounds of negotiation between the Nutmeg BOE and the Custodial Union, the parties are no closer to an agreement.
- The Superintendent (duly authorized to sign off on behalf of the Board) has an off-the record conversation with the Union President alone. The two are able to work out a full deal and sign off on a tentative agreement.
- The Union objects to the validity of the TA.

Is the agreement valid?

1. Yes
2. No



Duty to Bargain in Good Faith

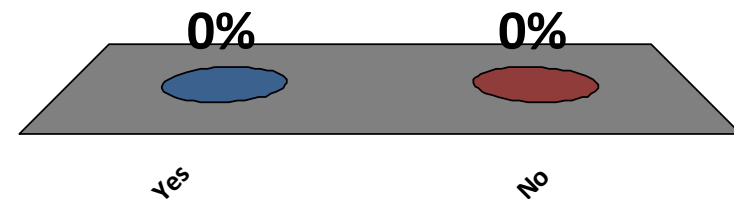
- Board obligated to negotiate only with the designated representatives of the bargaining unit
 - ◆ May not engage in “direct dealing”
 - ◆ Must provide information relevant to the collective bargaining process
- Meet at reasonable times
- Confer in good faith on *mandatory* subjects of bargaining
- Execute a written contract incorporating any agreement reached
- No obligation to compromise one’s position or make concessions

Test Your Knowledge

- The Town of Shipman and the Shipman Police Union are unable to resolve contractual disputes on their own during negotiations.
- Given the contentious nature of their negotiations, a terrible budget crisis and poor unit morale, the parties determine that there's no way to get their respective constituents to ratification so decide separately that the only way to settlement is binding arbitration.

Are the parties required to mediate before going to binding arbitration?

1. Yes
2. No



Mediation

- If contractual disputes are not fully resolved by the parties during negotiations, then...
 - ◆ TNA: Within 50 days of the commencement of negotiations, the parties are required to participate in mediation
 - Mediator selected by mutual agreement
 - ◆ MERA: Provides that disputes must be mediated prior to arbitration
 - Mediator appointed by the State after 50 days of bargaining or earlier by mutual agreement
 - ◆ SERA: Parties “may initiate arbitration” after 90 days or “after a reasonable period of negotiation”

Mediation

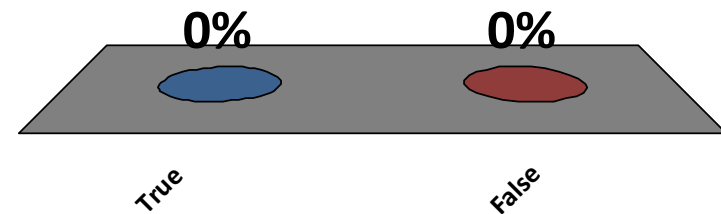
- Mediator has no power to compel agreement, does not make recommendation or write a report
- Agreement during mediation?
 - ◆ If mediation results in agreement, then the same ratification procedures apply
 - ◆ If there is no agreement, then the parties move to arbitration and those procedures apply

Test Your Knowledge

- An interest arbitration panel's written decision is final and binding, i.e., there is no opportunity for rejection by the municipality or review by a court.

True or False?

1. True
2. False



Effective Strategies for Interest Arbitration

- Pre-arbitration preparations
- Selecting and structuring the issues
- Consideration of statutory factors
- Last best offers
- Post-award issues



Test Your Knowledge

- Your employer has learned that approximately \$350,000 in state and federal aid has been cut from your budget.
- The only way to make up the difference is to seek concessions from the unions representing your employees.

What are your options?

- Considerations
 - ◆ Are you in negotiations?
 - ◆ Are you in the middle of a contract term?
 - ◆ Will you seek similar concessions from all bargaining units?

Questions?



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