
 **EMPLOYMENT LAW FACT OR MYTH?**


- "This is an employment-at-will state. We can fire you at any time, and for a good reason, a bad reason or no reason at all."
- "If I pay her a salary, she is FLSA Exempt."
- "Just treat everyone the same and you'll never go wrong."
- "I have the right to see my file."
- "I demand my break right now."
- "I'm working in a hostile environment - my boss is being really mean to me."
- "Sure, it got a bit raunchy at happy hour last Friday, but my boss wrote me up for sexual harassment ... they can't do that - it was after hours!"

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 **EMPLOYMENT LAW FACT OR MYTH?**


- "My boss is bullying me - that's harassment, and I'm filing a complaint with HR."
- "My First Amendment rights of free speech were violated."
- "I was discriminated against because my boss didn't like me."
- "They can't make me submit to a drug test - that's an invasion of my privacy!"
- "My boss wanted to make me work overtime, and I refused - then she fired me illegally."
- "Just sit at your desk for your lunch break and do homework. If the phone rings, you can answer it, but we'll buy your lunch to make up for the occasional call."

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 **IMPORTANT LEGAL DEFINITIONS TO KNOW**


- **Tort Claim** - A tort is an act or omission by a party that gives rise to injury or harm (damages) to another and amounts to a violation of civil law for which courts impose liability. Plaintiff files a tort action charging employer that s/he has been harmed by an employment action.
- **Discrimination**: Unfair treatment of or action taken against a person based solely on the basis of a protected class/characteristic.
- **Constructive Discharge** - also known as constructive dismissal or constructive termination, is a modified claim of wrongful termination. Wrongful constructive dismissal occurs when, instead of firing the employee, the employer wrongfully makes working conditions so intolerable that the employee is forced to resign.
- **Disparate treatment** - Intentional or invidious discrimination by an employer or supervisor - Treating a class of persons unequally in a manner that is malicious, hostile, or damaging.
- **Disparate impact** - A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of a protected class of people.

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 **IMPORTANT LEGAL DEFINITIONS TO KNOW**


- **Express contract** - a legally binding agreement, the terms of which are all clearly stated either orally or in writing. An express contract must contain an offer made by one of the parties, and acceptance of that offer by the other party.
- **Implied contract** - A type of enforceable contract that's implied from the circumstances or parties' conduct, instead of a contract that's explicitly made.
- **Oral contract** - Where a conversation can be the basis for an implied contract, which can come about through implication and suggestion.
 - The employment policy manual states that once employees have worked at the company for 3 months, they become "permanent" employees.
 - Oral promises of job security, promotion, pay increase, etc.
- **Prima facie evidence** - Evidence that - unless rebutted - would be sufficient to prove a particular proposition or fact. Hence, the importance of having **DOCUMENTATION** that is accurate, complete, and temporally proximate to the event or action being documented.

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 **IMPORTANT LEGAL DEFINITIONS TO KNOW**


- **Wrongful Termination** - or wrongful discharge, is a situation in which an employee has been terminated by the employer, where the termination breaches one or more terms of the contract of employment, or a statute provision or rule in employment law. Being terminated for any of the following may constitute wrongful termination:
 - **Discrimination:** The employer cannot terminate employment because the employee is a “protected class.”
 - **Retaliation:** An employer cannot fire an employee because the employee filed a claim of discrimination or is participating in an investigation for discrimination. “Retaliation” is forbidden under civil rights law.
 - **Reporting a Violation of Law to Government Authorities:** also known as whistleblower law, an employee who falls under whistleblower protections may not be fired for reporting an employer’s unlawful or similar activity that is protected by the law.
 - **Employee’s refusal to commit an illegal act:** An employer is not permitted to fire an employee because the employee refuses to commit an act that is illegal.
 - **Employer is not following the company’s own termination policy and procedures:** In some cases, an employee handbook or company policy outlines a procedure that must be followed before an employee is terminated.

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 **IMPORTANT LEGAL DEFINITIONS TO KNOW**


- **Respondeat Superior (Latin, Let the Master Answer)** - A common-law doctrine that makes an employer liable for the actions of an employee when the actions take place within the scope and course of employment.
- **Strict Liability** - In tort law, strict liability exists when a defendant (the employer) is liable for committing an action, regardless of what his/her intent was when committing the action. Impact vs. Intent of an action.
- **Joint Liability** - When two or more parties are named as responsible for a tort claim. The plaintiff can join both parties the lawsuit.
- **At-will Employment** - Either party, at any time, may terminate employment without prior notice. Strength of At-will doctrine depends on legal jurisdiction, and which exceptions are recognized by States.
 - *NOTE: Public sector entitled to due process rights prior to discipline*
- **Vicarious Liability** - An employer can be liable for the acts or omissions of its employees, provided it can be shown that they took place in the course of their employment.

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 **THE “AT-WILL” EMPLOYMENT DOCTRINE**

- At-will employment refers to an employment agreement stating that employment is for an indefinite period of time and may be terminated either by employer or employee. If an employment is at-will, such an agreement would typically be expressly included in the relevant employment contract.
 - At-will also means that an employer can change the terms of the employment relationship with no notice and no consequences. For example, an employer can alter wages, terminate benefits, or reduce paid time off.
 - Employment relationships are presumed to be “at-will” in all U.S. states except Montana. The U.S. is one of a handful of countries where employment is predominantly at-will.
 - The at-will presumption is a default rule that can be modified by contract. For example, a contract may provide for a specific term of employment or allow termination for cause only.

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 **THE “AT-WILL” EMPLOYMENT DOCTRINE**

Common Law Exceptions to “At-Will” - Even if an employment agreement contains an at-will provision, there are three (3) major common law exceptions to the “at-will” presumption. These exceptions vary by state - NM recognizes all three exceptions.

1. **THE PUBLIC POLICY EXCEPTION** - The public policy exception bars an employer from terminating employees in violation of well-established public policy of the state. States that recognize the public policy exception vary in how broadly or narrowly it is construed. NM views it broadly. Four categories:
 - Refusing to perform an act that state law prohibits.
 - Reporting a violation of the law.
 - Engaging in acts that area in the public interest.
 - Exercising a statutory right.

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POMS THE “AT-WILL” EMPLOYMENT DOCTRINE

Public Policy (Statutory) Exceptions to “At-Will” Doctrine *continued*

1. **Illegal Discrimination** - Federal and state discrimination statutes prohibit employers from basing employment decisions on an employee’s protected class
2. **Protections for an Employee’s Off-Duty Activities** - Some states have enacted legislation to protect employees from adverse employment action resulting from legal off-duty activities. (e.g., *smoking*)
3. **Retaliation** - Federal and/or state laws prohibit employers from firing employees in retaliation for engaging in legally proper, necessary, or desirable activities. Example of protected activities include claiming minimum wage or overtime compensation, engaging in union activities, opposing unlawful discriminatory practices, filing for workers’ compensation, and “whistleblowing.”
4. **Whistleblowing** - While most states provide whistleblower protection for public sector employees, protection for private sector employees is more limited. (e.g., NM has enacted whistleblower statutes that protects private sector employees who report safety violations.

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POMS THE “AT-WILL” EMPLOYMENT DOCTRINE

2. **THE IMPLIED CONTRACT EXCEPTION** - The implied contract exception means that an employee may have an expectation of a fixed term or even indefinite employment based on something the employer or supervisor has done.
 - This can take the form of employer’s statements - e.g., an oral statement by a supervisor or manager (Respondeat Superior)
 - An employer’s practice of only firing employees for cause, or
 - An assertion in the employee handbook that specific termination procedures will be followed.

Employers can protect themselves by using a clear and unambiguous disclaimer on written materials stating that its policies and procedures do not create contractual rights.

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POMS THE “AT-WILL” EMPLOYMENT DOCTRINE

3. **THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING** - Under this exception, an employer typically may not terminate an employee in bad faith or terminate an employee when the termination is motivated by malice.
 - Judicial interpretations of this covenant have varied from requiring just cause for termination to prohibiting terminations made in bad faith or motivated by malice.
 - Examples of bad faith terminations include an employer firing an older employee to avoid paying retirement benefits, terminating an older employee to hire a less expensive replacement, or terminating a salesman just before a large commission on a completed sale is payable.

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POMS THE “AT-WILL” EMPLOYMENT DOCTRINE

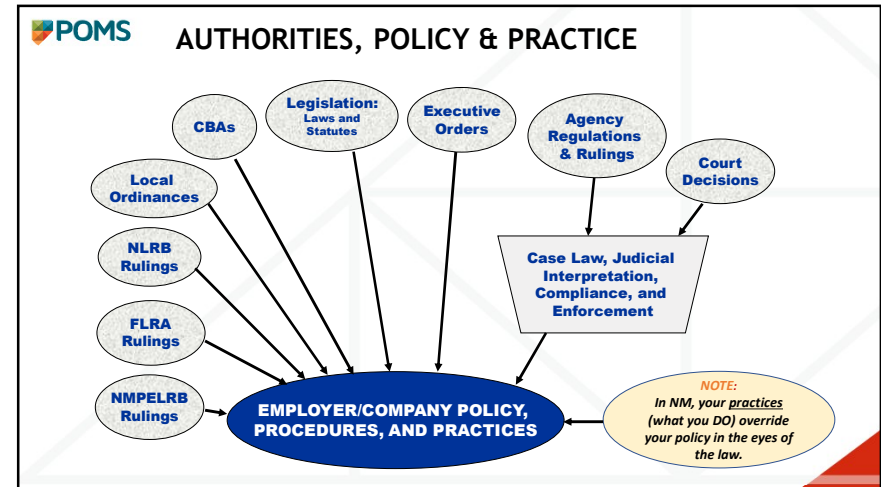
Promissory Estoppel - Promissory estoppel is a doctrine in contract law that stops a person (employer) from going back on a promise even if a legal contract does not exist. The harm happens when the employee suffers a loss when they relied on the employer’s promise, and the promise wasn’t kept.

- The following elements must be present for the doctrine of promissory estoppel to be enforceable:
 1. Employer made a significant promise to cause the employee to act on it
 2. Employee relied on the promise
 3. Employee suffered significant damage by relying on the promise
 4. Fulfillment of the promise is the only way the employee can be compensated
- *Imagine an individual who receives and accepts a job offer, quits his current employment, and then relocates his family to the city where the new job is located. Before his first day with the new employer, he is terminated. An individual in this situation may have a promissory estoppel claim.*

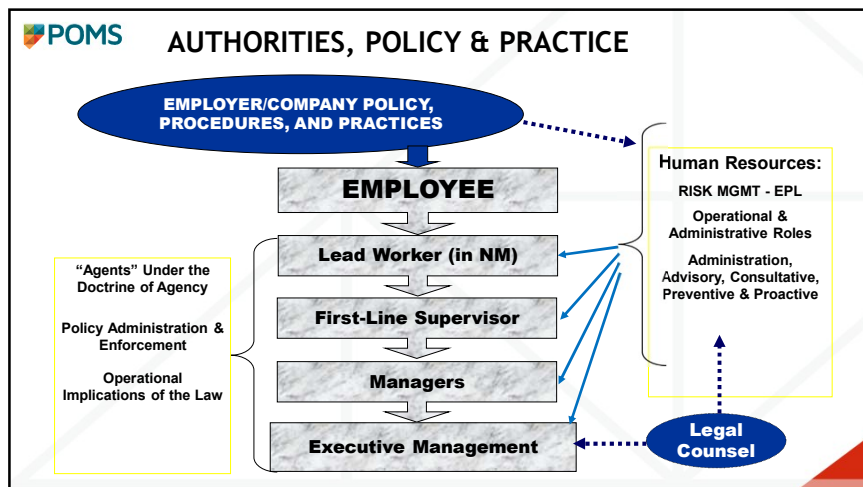
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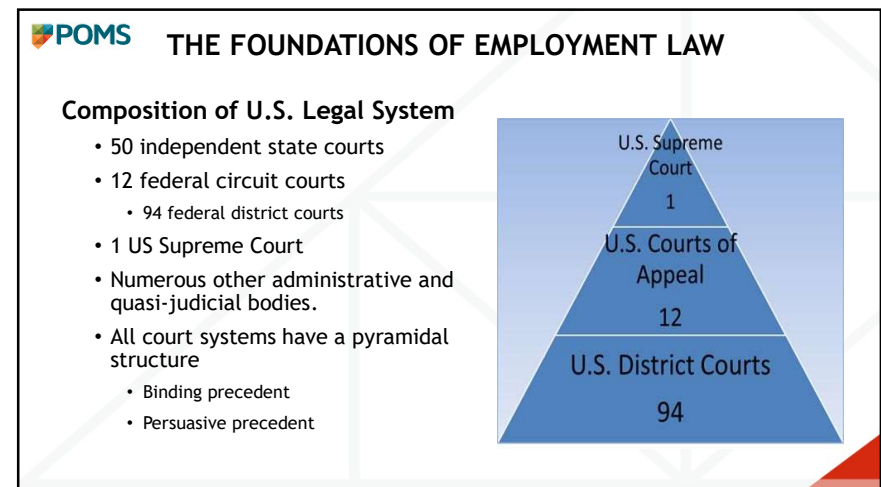
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THE FOUNDATIONS OF EMPLOYMENT LAW

13 District Courts, Many Municipal and Magistrate Courts

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THE FOUNDATIONS OF EMPLOYMENT LAW

- The Tribal Court Clearinghouse is a project of the Tribal Law and Policy Institute.
 - The Tribal Court Clearinghouse is designed as a resource for tribal justice systems and others involved in the enhancement of justice in Indian country. Among the features on this site are a tribal court message forum and Mentors Circle, links to tribal codes and constitutions, and law review articles specific to tribal courts and Native American nations. <http://www.tribal-institute.org/>
- The NM Tribal Court Handbook - The UNM School of Law maintains this resource for all Tribal courts in the state: <http://lawschool.unm.edu/tlj/handbook/index.html>

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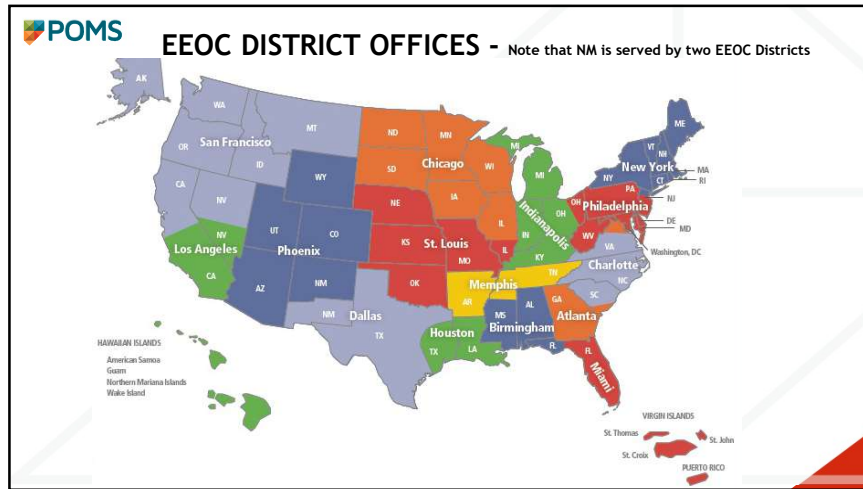
THE FOUNDATIONS OF EMPLOYMENT LAW

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THE FOUNDATIONS OF EMPLOYMENT LAW

- **Common Law System vs. Civil Law System**
 - **Common Law System** - the rule of law is built up case by case by judges; therefore the law is found in their published opinions.
 - **Civil Law System** - the rule of law is based upon the comprehensive statutes and codes written by a legislative body.
- **Application and interpretation of federal labor & employment law**
 - Equal Employment Opportunity Commission (EEOC) - Compliance, Investigation, enforcement, mediation, adjudication)
 - U.S. Department of Labor
 - National Labor Relations Board (*private sector, NEA, NTA, influence PEBA*)
- **Application and interpretation of NM labor & employment law**
 - N.M. Human Rights Bureau (Compliance, Investigation, enforcement, mediation, adjudication)
 - N.M. Department of Workforce Solutions
 - Public Employee Labor Relations Board (*State & Local Government & Local Labor Boards, some jurisdiction over NEA & NTA*)

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WHAT IS “LIABILITY” IN EMPLOYMENT?

- Liability under the common law in employment situations falls under personal injury tort law.
 - A tort is defined as an intentional action that harms another person, business, or group for which there is a legal remedy.
- The 4 essential elements needed for a plaintiff to prove a liability claim are:
 1. Duty to do or not do something (commission or omission of an act),
 2. Breach of that duty,
 3. Proximately caused, and
 4. Damages to the employee plaintiff
- Generally speaking, an employer will be held liable for the actions of their employee if that employee was:
 - Performing their job duties;
 - Conducting company business; and/or
 - Otherwise acting on behalf of their employer when an incident took place.



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 **EMPLOYER VICARIOUS LIABILITY**

Imputed Liability - Respondeat Superior



- Under the theory of respondeat superior, (“*the master answers for the slave*”) business/employer is responsible for acts engaged in by an employee while “*in the scope of their employment.*”
- If an employee,
 - is at fault for an accident (or an incident); and
 - was doing work for the employer at the time of the accident/incident (“acting within the scope of employment”); then
 - The employer may be held liable for damages arising from the accident/incident.
- An employee is an agent for the employer to the extent that the employee is authorized to act for the employer and is partially entrusted with the employer’s business.
 - This is where potential **personal liability** arises for a supervisor or manager
 - Are you acting within the scop of your employment? Following the law, following your policies, etc.?

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 **EMPLOYER VICARIOUS LIABILITY** 


- **Doctrine of Agency & Respondeat Superior**
 - Under the FLSA, the “employer” is “any person acting directly or indirectly (an “agent”) in the interest of an employer in relation to an employee.”
- **Employers are vicariously liable** under the doctrine of “**respondeat superior**” for the negligent acts or omissions by their employees in the course of employment.
 - In “vicarious liability,” the employer could be held liable for any damages or injuries resulting from an employee’s negligent actions
 - Under common law this language has been taken to support liability against any agent or employee with supervisory power over other employees.
- Because **managers and supervisors (and in NM, “lead workers)** act to represent the interests of the employer in relation to the employee, they are viewed under the law as “**agents**” of the employer, acting on behalf of the employer.

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 **EMPLOYER VICARIOUS LIABILITY** 

- So, an employer is vicariously liable for the wrongful acts causing harm to an employee, by its managers, supervisors, and lead workers (“agents” of the employer) committed within “the course and scope of employment.”
- The same is true if a manager, supervisor, or lead worker **does not act** where required to act by law - failure to fulfill their “**affirmative duty**” under the law. (e.g., reporting suspicion of harassment, discrimination, unsafe working conditions, etc.)
- Where alleged violations of federal and state employment laws are concerned, **managers, supervisors, and lead workers may also be held personally liable** for back wages, interest, liquidated damages, and the employees’ attorneys’ fees.

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 **EMPLOYER DEFENSES AGAINST VICARIOUS LIABILITY**

- The key to the employer reducing liability under respondeat superior is found in the words “within the scope of employment.”
 - If the employer can show that the employee was acting outside the scope of their employment, the business can mitigate its liability exposure, and may have no liability.
- Defending a respondeat superior claim typically involves one of the following:
 1. Establishing that an employee committed an intentional wrong, which makes it unlikely that they were acting within the scope of employment.
 - The employer can subrogate their liability to the employee (including a manager or supervisor) who (1) did something they weren’t supposed to do, and/or (2) did not do something they knew they were supposed to do.
 - Key questions here - Did the employee KNOW what they were supposed to do, but didn’t do it (negligence); or Did the employee KNOW that they were NOT supposed to do, yet did it anyway?
 2. Establishing that the employer had a policy, work rule, or other guidance prohibiting employees from doing whatever it was that the employee was doing that resulted in an accident; OR establishing expectations about what the employee was supposed to do.
 - This defense usually works best, but it has some clear limitations.

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POMS THE BURDEN OF PROOF IN EMPLOYMENT CASES

- The initial burden of proof in most employment claims is on the employee (or plaintiff) in the form of the initial claim/charge against the employer.
- Plaintiffs typically must prove, by a preponderance of the evidence, that they have been wronged and are entitled to damages. “Preponderance of the evidence” simply means “more likely than not,” a 51 percent to 49 percent calculus that the evidence and argument advanced by the plaintiff is more credible than that advanced by the defendant.
- This initial burden on the plaintiff is a light one and is usually easily satisfied.
- Once a claim/charge is “justified” by the plaintiff to the court (or other body), the burden of proof will shift to the employer and other named defendants to disprove the claim/charge.
 - **NOTE:** In cases involving a company’s termination of an employee “for cause” pursuant to an employment contract, however, that standard burden of proof allocation is reversed. The company, not the employee, has the burden to establish that its termination of the executive was justified. The company has the burden of proof.

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POMS YOUR ROLE AS A LEADER & SUPERVISOR

- Supervisors play critical roles in the organization and represent the organization both from a practical and a legal perspective.
- Supervisors act as agents of the organization in the eyes of the law.
- A supervisor:
 - Represents the organization;
 - Ensures that company policies are followed;
 - Manages employee relations;
 - Manages expectations; and
 - Ensures compliance.
- Supervisors are the eyes and ears of the employer - at all times. Supervisors need to be “on” constantly and remain vigilant that all systems continue to work properly.

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POMS YOUR ROLE AS A LEADER & SUPERVISOR

- The role of a supervisor/leader in any organization is to:
 - Improve performance of the individual, work groups/teams, and the organization.
 - Provide and communicate clear expectations
 - Improve conduct and behaviors so that employees perform at their best for the employer.
 - Provide support & expertise to employees - coach
 - Find solutions & solve problems
 - Make needed corrections
- The most important job you have as a leader is to ...
 - **HELP THE PEOPLE YOU ARE RESPONSIBLE FOR, TO BE SUCCESSFUL IN THEIR JOBS**



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POMS LEGAL DUTIES AND RESPONSIBILITIES OF MANAGERS, SUPERVISORS, AND LEAD EMPLOYEES

Supervisors and managers have a shared responsibility with HR in making sure that their interactions and relations with employees comply with:

- **Laws and regulations at federal, state, and local employment levels.**
 - E.g., OSHA - providing a safe and healthy workplace
 - Remember the “doctrine of agency”
- **Any third-party requirements, regulations, etc. (e.g., Certifying bodies)**
- **All organizational policies, work rules, protocols, and other guidance.**
 - Again, remember the “doctrine of agency”
 - If a policy isn’t working for you - consult HR
- **Remember ... your most important job as a supervisor is to help the employees you are responsible for, to be successful in their jobs.**

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POMS LEGAL DUTIES AND RESPONSIBILITIES OF MANAGERS, SUPERVISORS, AND LEAD EMPLOYEES

- **Address/Resolve Issues/Concerns in a Timely Manner**
 - Consult with Human Resources to ensure compliance
 - Document what you have done and report to HR
- **Risk management in HR and Employment Practices**
 - Interviewing, hiring, retention, safety, security, proper supervision, etc.
 - Performance management, discipline, termination of employment
- **Ensuring that Employee Rights are Protected**
 - Must be mindful that the rights of employees can never be compromised without the potential for legal repercussions.
- **Fulfilling your Duties and Responsibilities as a Management Employee**
 - Following all policies, work rules, protocols etc. yourself - you are a role model
 - Doing your “affirmative duty” under the law

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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

- **Negligent Supervision** - An employer and its supervisors are responsible for providing adequate supervision to employees to ensure they have the skills and information to properly and safely perform their duties. The following legal doctrines are major points to bear in mind:
 - **Duty to Train** - Employers have a duty to train people to properly perform their jobs and fulfill their responsibilities so that they can function with the training that they have received. Also includes things like:
 - Includes things like providing clear performance expectations and standards, and ensuring that employees have the skills and knowledge needed to do their job
 - **Negligent Hiring** - An employer has a duty to select and retain only competent and safe employees, which requires adequate pre-employment investigation into the prospective employee’s background.
 - **Negligent Retention** - This is closely related to negligent hiring. Liability can arise if during the course of employment, the employer knew or should have known of problems with an employee indicating unfitness or danger and the employer fails to take appropriate corrective action, such as investigating, reassigning, or discharging the problem employee.

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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

- **Negligent Operation** - Misuse of equipment or supplies, or the use of sub-standard equipment may result in liability. Equipment must be kept in good working order and adequate maintenance and repair procedures should be in place, used, enforced, and well documented.
- **Negligent Security** - Claims can be based on an employer’s obligation to provide employees with a safe place to work, and its affirmative duty to protect employees from foreseeable harm. Security guards must be physically, mentally and emotionally competent to actually provide security - a uniform and a badge alone are not sufficient.
- **Assault & Battery** - This is also a security issue. Battery is a physical attack, and assault is the threat of the possibility of an imminent battery. The question of whether a supervisor must physically intervene depends on the circumstances in each situation. Generally, try to peacefully intervene to break up a confrontation. Concerning self defense, proceed no further than necessary to calm or stop the conflict. If physically involved, self defense probably stops when you are enjoying getting in some good hits. 😊

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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

- **Negligent Failure to Warn** - Employers have a duty to warn employees of known or foreseeable dangers they may encounter during their employment. Employees not fluent or literate in materials and equipment safety sheets and other warnings must be trained in their language. Hazards that the employer should know or have known about, and which were not adequately dealt with, can lead to liability, so risk analysis is essential to eliminate hazards.
- **Misleading or Negligent Reference** - Most companies require that any references must go through human resources. As a supervisor, manager or executive, you speak for the company and there is no such thing as a personal reference. Always check on company policy on giving references. A couple of major dangers are:
 - Failure to give known unfavorable important information if favorable information has been given. If any detail is given, it must be complete.
 - The employee was okay when working for you, but subsequently became a problem or a danger.

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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

- **The Breach of Public Policy Torts** - A breach of public policy occurs when an employer takes an adverse employment action against an employee or retaliates against an employee for speaking and/or writing about a matter that is protected by public policy, such as:
 - performing a legal duty in furtherance of public policy,
 - exercising a legal right, (such as “Whistleblowing”) and/or
 - refusing to commit an act contrary to public policy, such as:
 - public safety or health
 - public money,
 - corruption or ethics violations, etc.

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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

- **Defamation** - This used to be called libel (written) or slander (spoken). Defamation occurs when:
 - a person publicly and knowingly or negligently states a fact about another person that is false and harmed the good reputation that other person,
 - the statement was understood publicly to be defamatory,
 - the statement proximately caused actual injury to that other person’s reputation,
 - and the person making such statement abused his privilege to publish the communication.



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POMS IMPUTED AND PERSONAL LIABILITY - TORTS

Additional Tort-Based Claims Limiting “At-Will” Employment - At-will employees may also bring claims against their employers for the following torts:


1. **Intentional interference with a contract.**
 - Tortious interference occurs when one person intentionally damages someone else’s contractual (express or implied) or business relationships with a third party, causing economic or other harm.
 - This claim may be made in the employment context when a supervisor or co-worker with an improper motive successfully induces the employee’s dismissal. E.g., “constructive discharge”
 - This tort is not recognized in all jurisdictions, but it is recognized in New Mexico and California, among other states.
2. **Intentional infliction of emotional distress (IIED)** - The tort of intentional infliction of emotional distress occurs when one acts abominably or outrageously with intent to cause another to suffer severe emotional distress, such as issuing the threat of future harm. The tort of intentional infliction of emotional distress has these four elements:
 1. the defendant must act intentionally or recklessly;
 2. the defendant’s conduct must be extreme and outrageous; and
 3. the conduct must be the cause ...
 4. of severe emotional distress.

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POMS SOURCES OF TORT RISK: EMPLOYMENT PRACTICES LIABILITY

The risk exposure from employment practices that violate statute, regulation, policy, or rule such as:

- Hiring practices
- Training
- Coaching
- Policy and procedure development
- Workplace harassment and discrimination
- Termination procedures
- Safety
- Security
- Disability management
- Conducting employment interviews



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POMS SOURCES OF TORT RISK: EMPLOYMENT PRACTICES LIABILITY

The risk exposure from employment practices that violate statute, regulation, policy, or rule such as:

- Recruiting and selecting new employees
- Orienting new employees
- Compensating employees
- Training and developing employees
- Managing benefits
- Maintaining workplace safety and security
- Evaluating employee performance
- Overseeing counseling and corrective action
- Termination of employees




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POMS SOURCES OF TORT RISK: EMPLOYMENT PRACTICES LIABILITY

The risk exposure from employment practices that violate statute, regulation, policy, or rule such as:

- Applicant tracking
- Pre-employment background and reference checks
- Pre-employment interviews
- Pre-employment testing
- Orientation and training
- Employee recordkeeping
- Drug and alcohol testing
- Workplace discrimination and harassment
- Employee investigations
- Performance appraisals



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LEGAL LANDMINES FOR MANAGERS AND SUPERVISORS

POMS

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POMS EMPLOYMENT PRACTICES LIABILITY: COMMON PITFALLS

- Video - **“Legal Landmines for Supervisors”**
 - Failure to Properly Document
 - Failure to Train
 - Failure to Keep Evidence
 - Grade Inflation
 - Failure to Consult Human Resources
 - Inappropriate Electronic Messages
 - Inconsistent Treatment
 - Inappropriate Talk About Ex-employees
 - Uncontrolled References



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POMS EMPLOYMENT LAW BASICS YOU NEED TO KNOW

Protected Leave Laws -

Managers & supervisors may not fire or refuse to hire, limit employment opportunities, benefits or pay, or otherwise discriminate based on:

- **Family and Medical Leave Act (FMLA)** - Employees who are eligible for leave under the Family and Medical Leave Act (opens in new tab) (FMLA) may take time off from work for the birth of their child, to adopt a child, or to care for their own or a specified family member's serious health condition. If the family member is called to active duty in the armed forces, the employee may also be entitled to qualifying exigency leave under the FMLA.
 - Employers are required to initiate the FMLA designation process within five days of believing that an employee may qualify for FMLA leave - remember that YOU are the employer!
- **The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)**- protects veterans and reservists from discrimination and retaliation for taking time off to serve in the armed services.
- Plus, many other federal and state laws ...

Managers should treat employees who have taken or plan to take any kind of protected leave no differently from employees who have not taken such leave. This also means that managers may not penalize employees in any way for taking protected leave.

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POMS EMPLOYMENT LAW BASICS YOU NEED TO KNOW

Compensation and Overtime -

Managers and supervisors may require employees to work extra hours at times, especially when facing a deadline or time-sensitive project. Managers often need to keep track of how many hours employees work, and make sure they permit employees to take any break times mandated by state and federal law.

- **The Fair Labor Standards Act (FLSA)** sets the federal minimum wage and requires that covered employees are paid time-and-a-half if they work overtime (more than 40 hours per week). Note that there may be additional state law equivalents - California is one.
- Plus, other federal and state laws ...

Some workers are “exempt” employees. HR and other compliance personnel are usually responsible for determining which employees are exempt, according to specified legal criteria they must meet three tests to qualify as exempt.

This means that managers need to be in-the-know as to which employees are not exempt from these laws before assigning extra work hours or modifying break times.

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POMS EMPLOYMENT LAW BASICS YOU NEED TO KNOW

Health and Safety Laws -

Managers & supervisors need to ensure that workplace health and safety is a top priority.

- **The Occupational Health and Safety Act (OSHA)** requires employers to provide a safe workplace, including any necessary compliance training for managers and employees. The “General Duty Clause” requires an employer to furnish to its employees:
 - *“employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees...”*
- **Workers Compensation (WC) Laws** - If workers are injured during work despite all the best safety precautions, they may be eligible for worker’s compensation, which could include time off to recover or even permanent disability.
- Plus, other federal and state laws ...

Managers must not discourage workers from using proper safety precautions or penalize workers for refusing to work in unsafe conditions or for exercising their right to worker’s compensation. No matter what other production goals or quotas managers may have, there’s no excuse for cutting corners when it comes to worker safety.

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POMS EMPLOYMENT LAW BASICS YOU NEED TO KNOW

- What’s important here is that managers and supervisors are aware of the major employment rights workers have. If managers know the basic concepts, for example, that there are protected characteristics and activities, they are more likely to take care when a workplace situation implicates these rights.
- Managers and supervisors do **not** need to memorize every protected characteristic or know the intricacies of FMLA law, for example. That’s HR’s job.
- What you do need to know is that employees must be treated fairly and equally based on their work; that certain workplace absences are protected; to be mindful when assigning work outside of regular work hours; to foster a safe work environment; and not to retaliate or appear to retaliate when workers do exercise their rights.

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POMS TITLE VII OF THE CIVIL RIGHTS ACT

Purpose:

- To prohibit job discrimination in the workplace

Overview:

- Title VII of the Civil Rights Act covers an employer who has fifteen (15) or more employees and prohibits discrimination against any individual on the bases of race, religion, color, sex (including pregnancy and gender identity), sexual orientation, parental status, national origin, age, disability, family medical history or genetic information, political affiliation, military service, or any other non-merit based factor. The law also protects individuals from harassment in the workplace.

Supervisor Responsibilities:

- Supervisors must treat all employees and applicants consistently and equally, without regard to their race, color, religion, gender, national origin or any other characteristics that are protected under law.
- Supervisors are not to base any employment decisions on these protected characteristics, cannot deny opportunities to an individual because of their characteristics, and cannot retaliate against an employee.
- Supervisors are to treat all employees respectfully and avoid unwanted/unwelcomed behavior that constitutes harassment.

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POMS THE FAIR LABOR STANDARDS ACT (FLSA)

Purpose:

- To establish a minimum and overtime wage for nonexempt employees

Overview:

- The Fair Labor Standard Act (FLSA) establishes standards for minimum wage (The 2013 federal minimum wage is \$7.25 per hour), overtime pay (one-and-one-half-times the regular rate of pay), and child labor, and defines which employees are considered exempt and non-exempt for the purposes of carrying out the law. The law also addresses what work time needs to be paid, including waiting, on-call, training/meetings, and travel time, as well as rest periods, employment recordkeeping, meals, and breaks.

Supervisor Responsibilities:

- Supervisors must ensure that employees are paid properly in accordance with the law's provisions and for all hours that they work (particularly overtime).
- Supervisors are often responsible for managing and making sure that all work hours of non-exempt employees are recorded and verified.
- In addition, supervisors must understand which employees are exempt and non-exempt and should work with HR before making changes to their employees' essential duties, which could affect their exemption status.

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POMS THE FAMILY AND MEDICAL LEAVE ACT (FMLA)

Purpose:

- To provide job-protected leave for family and medical reasons

Overview:

- The Family and Medical Leave Act (FMLA) entitles employees who have worked at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Supervisor Responsibilities:

- When employees request (*or if you have reason to believe the employee may need*) medical leave or time off to address medical issues, supervisors must refer them to HR. Supervisors also must listen for requests that would meet the FMLA criteria (such as references to a health condition or family member's health condition) since employees don't need to use the words "FMLA leave" to gain protection under the law.
- Supervisors are to maintain contact with employees on leave and remain informed of changes to their condition or leave and communicate those changes to their HR department. While employees are on leave, supervisors must be cognizant of employment actions (termination, discipline, etc.).
- Supervisors are strictly prohibited from contacting the employee's health care provider.
- Finally, supervisors also need to follow privacy, confidentiality, recordkeeping, and other FMLA-related responsibilities that their organization has in place.

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POMS THE AMERICANS WITH DISABILITIES ACT (ADA, ADAAA)

Purpose:

- To provide job-protected leave for family and medical reasons

Overview:

- The Family and Medical Leave Act (FMLA) entitles employees who have worked at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

Supervisor Responsibilities:

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POMS AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

Purpose:

- To discourage treating employees or applicants less favorably because of their age

Overview:

- The Age Discrimination in Employment Act (ADEA) prohibits employment discrimination against anyone at least 40 years of age in hiring, promotions, wages, benefits or terminations.

Supervisor Responsibilities:

- Supervisors must never take a person's age or proximity to retirement into account when making employment decisions such as assignments, hiring, firing, pay, benefits, or promotions, training programs, and other terms and conditions of employment.
- Supervisors must never assume that older workers can no longer do a particular task or job, communicate in a way that implies bias, replace older workers with younger ones for illegitimate reasons, or discipline older workers more harshly.

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POMS EQUAL PAY ACT (EPA)

Purpose:

- To discourage paying those who perform the same job differently based on gender

Overview:

- The Equal Pay Act (EPA) prohibits sex-based wage discrimination between men and women in the same establishment who perform jobs that require substantially equal skill, effort and responsibility under similar working conditions.

Supervisor Responsibilities:

- Although supervisors are often not responsible for deciding compensation, in collaboration with their HR department, supervisors should ensure that employees of both genders are paid equally if they are in the same job, and should take any complaints of pay discrimination to HR.
- When faced with an employee inquiry regarding different pay for the same job title or role, supervisors should be prepared to point to varying levels of responsibility, duties, skill requirements, or education requirements.

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POMS OCCUPATIONAL SAFETY & HEALTH ACT (OSHA)

Purpose:

- To help ensure safety as well as to prevent illnesses and injuries in the workplace

Overview:

- The Occupational Safety and Health Act (OSHA) is the primary federal law which governs occupational health and safety in the workplace. It ensures that employers provide employees with a safe and healthy work environment free from recognized hazards, such as exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold stress, or unsanitary conditions.

Supervisor Responsibilities:

- Supervisors must provide employees with a work environment that is free of recognized hazards that could cause serious physical harm, and also need to comply with occupational safety and health standards.
- Supervisors may also be responsible for ensuring that employees receive safety training, assessing hazards in the work area, determining the type of protective equipment needed, investigating incidents and inspecting equipment, and reporting all accidents and injuries that employees have at work.

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POMS PREGNANCY DISCRIMINATION ACT (PDA)

Purpose:

- To prohibit job discrimination on the basis of pregnancy, childbirth and related medical conditions

Overview:

- The Pregnancy Discrimination Act (PDA) prohibits sex discrimination based on pregnancy or a pregnancy related condition. Women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. This law applies to employers with 15 or more employees.
- If an employer does not have a leave policy, female employees are entitled to take leave for a "reasonable period of time" for pregnancy and childbirth.
- Note that the FMLA often dovetails with the PDA with respect to leave benefits.

Supervisor Responsibilities:

- Supervisors should treat pregnant employees the same as other employees with temporary disabilities on the basis of their ability or inability to work. This includes requests for accommodations in order to perform the essential duties of the job.
- For example, if you provide light duty for an employee who can't lift boxes because of a bad back, you must make similar arrangements for a pregnant employee.
- Similar to other laws, supervisors should not discriminate against pregnant employees in terms of hiring, firing, compensation, training, benefits, and other terms and conditions of employment.

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POMS NATIONAL LABOR RELATIONS ACT (NLRA)

Purpose:

- To protect private sector employees' rights to collectively bargain and engage in concerted activities

Overview:

- The National Labor Relations Act (NLRA) defines the rights of employees and employers, including their right to collectively bargain and engage in concerted activities such as grievances, strikes, etc. for the purpose of collective bargaining or other mutual aid and protection.
- The NLRA also gives employees the right to discuss the conditions and terms of employment with other employees; e.g., wages, benefits, organizational culture, voicing complaints about treatment by the employer or a supervisor, etc. This includes the right to discuss these issues on social media, for example.

Supervisor Responsibilities:

- Supervisors need to understand employees' rights relative to the NLRA, specifically to engage in collective bargaining and protected concerted activities (such as complaints about unfair labor practices).
- Supervisors are prohibited from taking adverse action against employees who engage in such activities, such as discrimination, retaliation, interference, or restraint.

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POMS GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

Purpose:

- To prohibit discrimination of employees or applicants because of genetic information

Overview:

- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits discrimination against employees or applicants because of genetic information and it prohibits employers from using genetic information to make employment decisions.

Supervisor Responsibilities:

- If supervisors inadvertently become aware of an employee's family medical history or information about a medical condition in an employee's family through the process of FMLA or other medical leave, this information cannot be used to discriminate against the employee.
- Under GINA, supervisors are also prohibited from harassing an employee or retaliating against an employee because of their genetic information.

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POMS RETALIATION PROTECTIONS & WHISTLEBLOWING

Purpose:

- To protect employees' rights in the workplace and protect them from retaliation by the employer.

Overview:

- Federal, state and municipal laws all provide employees with a number of rights. For example, employees in the workforce have the legally protected right to exercise legal rights including but not limited to:
 - Receive equal pay for equal work;
 - Complain of racial harassment in the workplace;
 - File a workers' compensation claim;
 - Seek retirement benefits;
 - Complain of unsafe working conditions;
 - File a charge with a civil rights enforcement agency, whether at the federal, state or perhaps municipal level; and
 - Take family and medical leave in accordance with applicable laws.

Supervisor Responsibilities:

- A supervisor should be mindful of communicating any complaints received in a timely manner so that an employer may respond adequately. Because federal laws containing anti-retaliation provisions have a variety of dates by which an employee needs to file a complaint with an agency, failure by a supervisor to address or escalate a complaint may result in an employee seeking compensation through an agency or in the courts.
- An employer and supervisor is prohibited from retaliating against employees for exercising these and other rights.
- Retaliatory action consists of an employer taking an **adverse employment action** against an employee because of that employee's exercise of a protected right or that employee engaging in a protected activity. The action must be materially adverse - serious enough that it would deter a reasonable person from engaging in a protected activity.

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POMS RETALIATION PROTECTIONS & WHISTLEBLOWING

Adverse Employment Actions:

- An action is an adverse employment action if a reasonable person would have found the action to be materially adverse, which means it might have dissuaded a reasonable worker from taking exercising their legal rights.
- Adverse employment action may include, but not be limited to, the following:
 - Termination;
 - Discipline;
 - Demotion;
 - Reassignment;
 - Undeserved negative performance ratings;
 - A less distinguished title;
 - A material loss of benefits;
 - Negative job references;
 - Change of job duties such as significantly diminished material responsibilities; or
 - Placement of an employee on administrative leave.

Supervisor Responsibilities:

- A supervisor is empowered to either take or recommend all of these actions. Therefore, a supervisor must ensure that whatever action is taken is done so for a lawful reason, and that the employee's protected action is not a motivating factor for the decision.
- A complaint need not be a formal one or a written one in order to trigger retaliation protections. For example, an oral complaint regarding wage and hour issues protects an employee from retaliation.

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SPECIAL ISSUES FOR PUBLIC SECTOR & UNIONIZED EMPLOYERS

POMS

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POMS ISSUES IN PUBLIC SECTOR EMPLOYMENT LAW

- Job Security - the Public Sector job is a Property Right
 - The right to due process (Loudermill Hearing Rights)
- Union Membership / Representation
- Veterans Preference Act
- Progressive Discipline
- Access to Personnel Records
- Employee Receipt of Gifts
- Intellectual Property Compensation Cap
- Limitations and Procedures in Buyout Agreements
- Limitations on Severance Pay
- Compensatory Time
- The Hatch Act - (Political activity)



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POMS ISSUES IN PUBLIC SECTOR EMPLOYMENT LAW

- **Just Cause**
 - Reasonable justification for taking an employment-related action.
- **Constructive Discharge** (*also in Private Sector*)
 - An employer deliberately makes working conditions intolerable for an employee in an attempt to get (to force) that employee to resign or quit.
- **Due Process**
 - The means used for individuals to explain and defend their actions against charges or discipline.
- **Distributive Justice**
 - Perceived fairness in the distribution of outcomes.
- **Procedural Justice**
 - Perceived fairness of the process used to make decision about employees.

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POMS SPECIAL PUBLIC SECTOR & UNION EMPLOYEE RIGHTS

Garrity Rights.


- Public employees cannot be forced, under clear threat of discipline, to violate the principles of self-incrimination.
- This decision established what have come to be called "Garrity Rights" for public employees.
- The *Garrity* rule is similar to *Miranda* rights for citizens.
- However, the burden is on the employee to assert his/her *Garrity* rights.

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**POMS PUBLIC SECTOR EMPLOYERS:
LOUDERMILL RIGHTS: PRE-DISCIPLINARY HEARING**

Loudermill Rights. A 1985 U.S. Supreme Court decision, *Cleveland Board of Education v. Loudermill*, established what are called "*Loudermill Rights*" for public employees.

- Loudermill says that public employees have a property interest in their employment. You may not take something of value away from them without providing "due process."
- Will also apply to employers in Montana, and
- Employers who by policy or contract (e.g. a CBA) have granted due process right to employees.



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POMS LOUDERMILL RIGHTS LAW AND LEGAL DEFINITION

- The term '*Loudermill rights*' refers to those employee rights which state that most public employees have a property right in their jobs.
 - Pursuant to such rights, an employee cannot have their property (job) taken away or impacted (e.g., imposing severe discipline) by the government without being provided due process.
 - It also gives the employees a right to pre-termination hearing that gives them the opportunity to present their side of the story before the employer makes a decision on discipline.
- The term '*Loudermill rights*' comes from the case *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (U.S. 1985), decided by the Supreme Court of the United States in 1985.
 - The decision laid out that most public employees have property interest in their jobs and are therefore allowed due process rights if they are severely disciplined or fired.
 - Loudermill rights include providing a Loudermill letter to the employee - i.e. specific written notice of the charges and an explanation of the employer's evidence so the employee can provide a meaningful response and an opportunity to correct factual mistakes in the investigation and to address the type of discipline being considered.

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POMS COMMON LAW STANDARDS IN EMPLOYMENT LAW

"DUE PROCESS" CONSIDERATIONS:
(Public Sector, Montana, or Granted by Policy or Contract)

1. Did the process meet the "due process" requirements that:
 - The person must be given notice;
 - The person must be given the opportunity to be heard; and
 - The final decision is made by a neutral decision-maker.
2. How have precedents been handled in the organization for similar problems warranting corrective action/discipline?
3. Is a complaint process available and known to employees?
4. Was the complaint process used?
5. Was retaliation used against the employee in any way?
6. Was the decision to discipline made based on objective facts?
7. Would the actions and processes be viewed as "fair" and "equitable" by a third party or entity?

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POMS COMMON LAW STANDARDS IN EMPLOYMENT LAW

“DUE PROCESS” PROCEDURES:
(Public Sector, Montana, or Granted by Policy or Contract)

1. An unbiased tribunal *(group of people chosen to examine a case)*.
2. Notice of the proposed action and the grounds asserted for it.
3. Opportunity to present reasons why the proposed action should not be taken.
4. The right to present evidence, including the right to call witnesses.
5. The right to know opposing evidence.
6. The right to cross-examine adverse witnesses.
7. A decision based exclusively on the evidence presented.
8. Opportunity to be represented by counsel.
9. Requirement that the tribunal prepare a record of the evidence presented.
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision.

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POMS SPECIAL UNION EMPLOYEE RIGHTS

Weingarten Rights. All five of the following conditions must be met before an employee is entitled to Union representation at an investigatory interview:

1. The meeting is being conducted by one or more management (employer) representatives; and
2. Management (employer) representatives are conducting an examination (asking questions) in connection with an investigation; and
3. The employee is in the bargaining unit; and
4. The employee reasonably believes that the examination may result in disciplinary action; &
5. The employee requests Union representation.

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POMS THE TOP TEN LEGAL MISTAKES SUPERVISORS MAKE


1. Mishandling Employee Complaint Issues
2. Failing To Apply Policies, Procedures, And Employee Discipline Consistently
3. Failing To Give Constant Feedback (Good And Bad) To Employees And Failing To Document Problems
4. Failing To Conduct Honest And Effective Performance Reviews
5. Failing To Follow And Understand The Ever-Changing Wage & Hour Laws
6. Creating A Perception Of Retaliation
7. Failing To Manage And Resolve Conflict Before It Escalates Into Workplace Violence Or Litigation
8. Failing To Promptly Recognize Requests for Leave (e.g., FMLA), and Reply To Leave And Accommodation Requests (ADAAA)
9. Careless Use Of E-Mail
10. Failing To Keep Good Records

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POMS SUMMARY AND TAKEAWAYS


- **Workplace laws reflect a balance between three competing objectives:**
 1. Managerial efficiency
 2. Employee rights
 3. Social aspirations of the law
- **Employees need to remain mindful that the employer has certain rights within the workplace. For example:**
 - Employee expectations of privacy in the workplace.
 - Reasonable searches of property, workspace, etc.
 - The right to establish grooming requirements for their personnel.
 - Extensive backgrounds checks.
 - There are restrictions on what employees can do and say within the workplace.
 - Employees must remember that the First Amendment does not unilaterally protect all free speech during the course of their work responsibilities.

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 **SUMMARY AND TAKEAWAYS**

- Employers need to remain mindful that employees have certain rights within the workplace. Examples include:
 - Employees should only be discharged following good faith efforts to correct performance; those efforts should be documented
 - The employee has whistleblower protection under specific circumstances and is protected against retaliation for exercising those rights.
 - There is legislation prohibiting discrimination in an organization's hiring and other employment practices
 - Employers must pay a fair wage, one that is equitable for the organization's employees.
 - The employer is responsible to provide a safe work environment.
 - The employer is responsible to provide an environment that does not promote a hostile, abusive, or harassing work environment.

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 **SUMMARY AND TAKEAWAYS**

- Each area of law has conditions, exceptions and grey areas.
- **Legal statutes tend to be broad and vague.**
 - Court decision tend to deal with specific cases in order to set precedent.
- **What are managers and supervisors to do?**
 - The basis for judgment in all situations is the intent of the law.
 - The values that provide the underlying foundation for statutes and legal precedent.
 - Always engage the organization's human-resource and legal resources and address any areas of concern on a case-by-case basis.
- **If you have ANY DOUBTS about what you are doing or should be doing, ASK BEFORE YOU ACT.**

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**YOU MUST CHOOSE...
BUT CHOOSE WISELY**


LEARN LEAD

YOU MAKE THE CHOICE TO BE A LEADER



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