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POMS & ASSOCIATES HR & EMPLOYMENT WEBINAR SERIES

TIME TO REVIEW AND UPDATE YOUR EMPLOYMENT POLICIES

Get Ready for 2024

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16 NOVEMBER 2023

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TODAY'S PRESENTERS

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His experience in HR management is in the public, private for-profit, and private non-profit sectors, having served in executive and other management positions. He received his BA in English Literature and Education at Bucknell University, and his EMBA & Ph.D. from the University of New Mexico. He has taught graduate school in business and management for over 30 years as a Lecturer on the faculty of the UNM Graduate School of Public Administration, teaching in the areas of human resource management, leadership, organizational behavior, strategy and change, and NPO management.

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Danny W. Jarrett, Ph.D., SPHR is the office managing principal and the litigation manager of the Albuquerque, New Mexico, office of Jackson Lewis P.C. He is a New Mexico native and has been certified as a specialist in labor and employment law by the New Mexico Supreme Court Board of Legal Specialization since August of 2008. Danny previously served as vice-president and corporate counsel for a national healthcare company. His duties included managing all operations of a multi-state company with over 400 employees, overseeing all human resources functions, and organizing corporate restructuring.

Danny's legal practice focuses on counseling and representing employers, government entities and Native American tribal organizations regarding labor and employment disputes. His experience involves Title VII and Title IX of the Civil Rights Act, the ADA, the FLSA, the FMLA and Davis-Bacon Act wage issues. He has successfully represented clients before the NLRB, the EEOC, and the WCA. He has negotiated many collective bargaining agreements, on behalf of management, with various unions, and has represented management's interests in union organizational campaigns

While attending law school, he served as a staff editor of The New Mexico Law Review. He attended the University of New Mexico as the recipient of a Presidential Scholarship. Danny was an elected member of the Board of Bar Commissioners of the State Bar of New Mexico and has also served as an elected board member and as chair of the Bar's Employment and Labor Section and its Indian Law Section.

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SHOULD YOU EVEN HAVE AN EMPLOYMENT POLICY MANUAL?




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AXIOM #1: VERY IMPORTANT

- If you and your managers, supervisors, and lead workers don't have the **ABILITY** or the **WILL** to enforce your policies ...
- Then **don't include them in your Employment Policy Manual ...**
- ... Unless it is a policy required by law. THEN you have no choice but to enforce the policy.
- Be sure to train your management employees about their **affirmative duty to enforce and uphold policy** as written!




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EMPLOYMENT POLICY MANUALS:

- Set out and communicate your organizational culture, and values
- Must be easy for employees to understand
- Are driven by legal compliance
- Set expectations
- Communicate employer expectations of employees
- Clarify employee expectations of employer
- Consider terminology you want to use, and what it says about you:
 - Employee vs. team member
 - "Manager" vs. "Supervisor"
 - First or third person?
 - Singular "they"
- Consider an Employee Handbook of 30 pages or less



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WHY EMPLOYMENT POLICIES ARE IMPORTANT


- They set clear expectations and guidelines for your employees
- Legal Compliance/Protections - Strengthens defense in litigation
 - Protects against discrimination and unfair treatment claims
 - Explains applicable laws & regulations
- Communicates values and expectations for how things are done at your organization
- Advises Employees of Benefits Available
- Advises Employees of Rights and Responsibilities
- Supports consistent treatment of staff, fairness and transparency
- Helps management to make decisions that are consistent, uniform and predictable
- Establishes basis for taking corrective action and disciplinary action
- Documents and communicates best practices appropriate to the organization
- Helps Guide Your Managers, Supervisors, and Leads in their roles - duty to enforce

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POMS DISADVANTAGES OF EMPLOYMENT POLICY MANUALS

“A poorly done employment policy manual, one that is out of date, or one that isn’t followed, is the plaintiff attorney’s best friend.”

- A bad policy manual/handbook or one that is misapplied may do more harm than good
- If not strictly followed, may give rise to breach of express or implied contract, misrepresentation or promissory estoppel claims
- Failure to apply policies uniformly may support claims of discrimination or retaliation
- Can create legal rights where none exist



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POMS DON'T LET YOUR POLICIES BE EXHIBIT “A” IN COURT

- Too often, policies themselves are inconsistent with the way business is actually conducted, or they mistakenly imply that workers have certain rights. Examples:
- Poorly written progressive discipline policies that suggest an employee will be fired only for good cause. Such language can erase a worker’s employment at will status and the employer’s right to fire the person for any reason.
- Even a statement about an initial “probationary period” can suggest that workers are virtually guaranteed continued employment after a certain period of time.
 - The term, “probationary period” should ONLY be used in the public sector; NEVER use it for private for-profits or non-profits

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POMS DON'T LET YOUR POLICIES BE EXHIBIT “A” IN COURT


- Examine what is in writing vs. what actually happens “on the job” - In New Mexico and many other jurisdictions, courts have said that “employment practice” becomes your de facto employment policy.
- Provide training to supervisors, and other members of management. If they are not properly trained, no Manual will provide any protection and in fact may be the basis for upholding an employee’s claim against a company.
- Don’t “wing it.” Many employers write policy manuals, distribute them, and then fail to read and follow them when making important employment decisions. Read your policy manual and follow it.
- Don’t just put it on the shelf. Policy manuals should be reviewed and updated *at least* annually for legal compliance and to ensure that you’re following your own policies.
- Beware templates and do-it-yourself software package at the local Office Wiz store. Unfortunately, those one-size-fits-all packages don’t adequately reflect state or local law and are often poorly drafted.
- Have your policies reviewed by your employment law attorney - not by your divorce lawyer.



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POMS DON'T LET YOUR POLICIES BE EXHIBIT “A” IN COURT

1. Can you say that 100% of your managers and supervisors understand and follow the Employment Policy Manual?
2. Do your managers and supervisors all consistently enforce and uphold employment policies and procedures?
 - The Doctrine of Agency
3. Are your organizational and management practices always consistent with your written employment policy?
4. Is your Employment Policy Manual *always* clear, so that there are no areas that cause you or your supervisory staff difficulty?
5. Does your anti-harassment policy prohibit all forms of illegal harassment, and not just sexual harassment?



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POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT

6. When you update your Employment Policies, do you ensure that ALL copies are properly updated, particularly those used by managers and supervisors?
7. Do you have safety policies and procedures?
8. Have you updated your policies at all during the past year?



Let's just say that the answers to these 8 questions all should be an unequivocal "YES!"

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POMS DON'T LET YOUR POLICIES BE EXHIBIT "A" IN COURT

- Policies are developed for the many, not the few - when you bring a policy into force you are establishing a standard that will apply broadly across the organization - not just to a few individuals who may be causing problems.
- Policies are rules or standards to be followed consistently and reduce a managers' flexibility to treat each situation as unique.
- It can be difficult to change policies once they have been implemented and become part of your organization's culture and ways of working
- Be sure that any policies you implement, address a real need and are in line with what your company values and how work should be accomplished.
- You also need to ensure managers have the skills and resources to be able to implement and monitor the policy.



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POMS LEGAL PITFALLS - BEWARE!

- Examine what is in writing vs. what actually happens "on the job"
 - In NM and many other jurisdictions, courts have said that "employment practice" over-rides your employment policy.
- Provide training to supervisors, and other members of management. If they are not properly trained, no policy will provide any protection and in fact may be the basis for upholding an employee's claim against a company.
- Make sure that ALL copies of employment policy manuals are current - particularly ones that managers and supervisors have.
- Not keeping your employment policies current is an invitation to risk exposure, and litigation

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POMS LEGAL PITFALLS - BEWARE!

- In most jurisdictions within the US, employment is presumed to be "at will" - either the employer or employee can terminate the employment relationship "*at any time, for any reason or for no reason at all.*"
- Exceptions to "at will" provide employers with "due process rights" in the State of Montana and in Public Sector employment
- Plaintiff's attorneys will try to find ways around the employment at will doctrine based on:
 1. **Public policy exception** (most states have some form);
 2. **Implied covenant of good faith and fair dealing** (minority view); and
 3. **Express or implied written or oral contract.**
- The "strength" of the "at will" doctrine varies among jurisdictions.

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POMS POLICY MANUALS AS CONTRACTS - BEWARE!

- Most states have recognized that provisions in an employment policy manual may give rise to implied assurances of continued employment and hence to an implied-in-fact contract.
- Contract terms are construed against the drafter of the document.
 - Thus, ambiguities are construed against the employer.
- Contracts are usually considered to be ambiguous if the language can reasonably be construed in more than one sense and the construction cannot be determined within the four corners of the document.



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POLICY AND ADMINISTRATIVE ISSUES

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POMS NOMENCLATURE OF EMPLOYMENT POLICIES THAT I USE

- **Employment Policy Manual (EPM)** is the official policy document that carries the force of law - it is the authoritative statement of policy.
- **On-Line Master EPM** managed by HR - accessible to all employees
- **“Control” Print Copies** - 3-Ring Binders that key managers have in their offices for reference and use by employees
 - “Controlled” by HR to ensure properly updated & current
 - Start each policy on a new page for easy replacement to update policies
- **Master EPM Archive** - Record of past policies with effective dates
- **Employee Handbook** is a SUMMARY of your employment policies, procedures, and work rules. That can be distributed in hard copy.
 - The Handbook can also include basic information that employees need to know about your organization

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POMS SAMPLE POLICY MANUAL ORGANIZATION (Abridged)

| | |
|--|---|
| <p>Front Matter</p> <ul style="list-style-type: none"> • Table of Contents • Welcome • About the Organization • Purpose and Use of Employment Policy Manual <p>1. General Information</p> <ul style="list-style-type: none"> • Employment At Will • Limitation on Employee Expectation of Privacy in the Workplace <p>2. Commitment to Diversity</p> <ul style="list-style-type: none"> • EEO & Non-Discrimination • Harassment, Discrimination, and Retaliation Prevention • Reporting and Anti-Retaliation • ADA/AA Disability Accommodation <p>3. General Employment Standards & Practices</p> <ul style="list-style-type: none"> • Promotions, Transfers, & Demotions • Training & Introductory Period • Performance Management | <p>4. Workplace Conduct & Behavior</p> <ul style="list-style-type: none"> • Expectations of Conduct & Behavior • Corrective and Disciplinary Action • Personal Appearance, Grooming & Hygiene • Attendance & Punctuality <p>5. Organizational Property & Information Technology</p> <ul style="list-style-type: none"> • Protection of Business Records, Equipment, & Assets • Non-Disclosure of Confidential & Proprietary Information • Care of Organizational Property & Equipment • Computer Use • Theft, Misappropriation, Fraud <p>6. Time Off and Leaves of Absence</p> <ul style="list-style-type: none"> • Holidays • Paid Leave (Annual Leave, Sick Leave) • FMLA • Personal Leave Without Pay • Military Leave • Jury Duty or Witness Service Leave • Bereavement Leave |
|--|---|

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POMS SAMPLE POLICY MANUAL ORGANIZATION *(Abridged)*

| | |
|---|--|
| <p>7. Pay Practices</p> <ul style="list-style-type: none"> Employee Classifications (FLSA, FT-PT, Type & Status) Work Schedules Flexible Work Arrangements On-Call and Call-Back Pay <p>8. Employee Benefits</p> <ul style="list-style-type: none"> Benefits Overview <ul style="list-style-type: none"> Don't Include Details of Benefits Refer to HR for Current Benefits Info Employee Training & Prof Development Educational Assistance Program <p>9. Environmental Health and Safety</p> <ul style="list-style-type: none"> General Safety Rules Workplace Violence Prohibited Weapons in the Workplace Workplace Bullying and Abusive Conduct Accident or Near Miss Reporting Drug-Free Workplace | <p>10. Workplace and Employee Security</p> <ul style="list-style-type: none"> Security and Loss Prevention Inspections, Searches & Surveillance Visitors and Security <p>11. Leaving Employment</p> <ul style="list-style-type: none"> Separation from Employment (Types) <ul style="list-style-type: none"> Voluntary Resignation Retirement Involuntary Termination Job Abandonment Failure to Return to Work from Leave Within Allotted Time Return of Company Property Exit Interviews References/Verifications of Employment <p>Receipt / Acknowledgment of Receipt of Employment Policy Manual</p> |
|---|--|

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POMS EXTERNALLY DRIVEN POLICIES: Jurisdictional

- Externally driven policies are usually expressed as laws, regulations, or ordinances formulated and enforced by government on the federal, state, or local (county or municipal) level. For example:
 - Federal** - Fair Labor Standards Act, FMLA, and on, and on ...
 - State** - Anti-discrimination laws, NM "Victims of Domestic Violence Act," Workers Comp, Wage & Hour laws, Voting, CA Paid Leave laws, etc.
 - Local** - Minimum wage ordinances, anti-discrimination ordinances e.g. Cincinnati ordinance prohibiting discrimination on the basis of "Appalachian Descent"
- Recommend that you append, reference, or otherwise incorporate policies into your EPM that reflect requirements from all jurisdictions that apply to you.

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POMS EXTERNALLY DRIVEN POLICIES: Industry-Specific

- Many industry-specific policies are also externally driven, expressed as laws formulated and enforced by government. For example:
 - Federal Contractors** - AAP, paid leave, hiring practices, etc.
 - Medicaid-Funded Entities** - DRA Medicaid Fraud, Whistleblower
 - USDOT-Covered CDL Drivers** - Drug Free Workplace, driver safety
 - Tree Service Companies** - OSHA ANSIZ133.1 Standard for Tree Care Safety
 - Healthcare Organizations** - OSHA Infection controls, HIPAA, etc.
 - Schools** - Title IX, FERPA, Mandatory Reporting, Staff-Student Boundaries, etc.
- Again, recommended that you append, reference, or incorporate such industry-specific policies in EPM.

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POMS INTERNALLY DRIVEN POLICIES: Nature of Organization

- Internally driven policies are based on the nature of the organization, and dependent on a number of variables. For example:
 - Federal or State Government Contractors** - AAP, paid leave, hiring practices, etc.
 - Organizations Preparing and Serving Food** - FDA FSMA regulations, OSHA, USDA
 - Number of Employees** - laws and regulations often apply to organizations based on the number of employees e.g., FMLA, ADA, COBRA, etc.
 - Public v. Private Sector Employers** - "probationary period" vs. "introductory and training period," "comp time," Loudermill rights, etc.
 - Unionized v. Non-Unionized Employers/Departments/Classes of Employees** - CBAs, Weingarten Rights, etc.

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POMS EMPLOYMENT POLICIES AND HR ADMINISTRATIVE PROCEDURES

What is a Policy? The Rules.

- Policies are “The Rules” that govern the operation of your organization and those who work for it.
- They are designed to tell you the rules that need to be followed, and that shows the intention to do some thing.
- Policies often will allow for some “management prerogative” in enforcement.
- An employment policy is a business rule that includes things like no smoking, no drinking, and other business practices like dress codes, vacation policy, or your company’s codes of conduct.
- Policies evolve as the business, and legal environment grows and changes.
- Organizations need to be more regimented about how often employment policies are revisited and updated.
 - *Example: A company might have a policy that mandates preventative maintenance be performed on all manufacturing equipment so that workers are not at risk and downtime is avoided.*
- A common problem we see is that sections of the personnel policies become so detailed and specific that they virtually outline the procedures, especially for disciplinary actions, grievances and appeals of adverse actions.

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POMS EMPLOYMENT POLICIES AND HR ADMINISTRATIVE PROCEDURES



- **Different “levels of Policies” you may need:**
 - Organization-wide
 - Department / Team
 - Program-specific
 - Labor-Management Relations - CBAs contractual “policy”
- Work rules are specific applications of policies that typically apply to department, job classification, or program-specific matters related to conduct, or behavior.
- Write work rules for a specific job category or location such as service, clerical, front desk, grounds.
 - *Example: Proper Notice for Absence or Tardiness:* Employees must call their immediate supervisor or designated contact within <X> minutes of their beginning work time (may be different times for different departments).

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POMS EMPLOYMENT POLICIES AND HR ADMINISTRATIVE PROCEDURES

Differences Between Policy and Procedure


- Procedures are established or official way of doing something, in order to comply with a policy. A series of steps taken to accomplish an end.
- Procedures explain how to fulfill a company’s policies in more specific detail, often dictating “what” must be done and “who” is responsible.
 - *Example: If it was policy that all employees must receive 20 hours of safety training annually, a procedure would provide detail about how those hours are to be allocated and attained.*

| Policies | Procedures |
|---|--|
| Have widespread application | Have a narrower focus |
| Are non-negotiable, change infrequently | Are subject to change and continuous improvement |
| Are expressed in broad terms | Are a more detailed description of activities |
| Are statements of <i>what</i> and/or <i>why</i> | Are statements of <i>how, when</i> and/or <i>who</i> & sometimes <i>what</i> |
| Answer major operational issues | Detail a process |

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Handling Multi-State Jurisdictions



- When separate, employees compare
- When selecting “the best” policy, less comparison, maybe even celebration
- Make sure all “notification” policies are included in the handbook body
- All state-required benefits not included in the body should be in an addendum

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KEY POLICIES, AND UPDATES FOR 2023-24



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NLRB Decisions and General Counsel Initiatives

Labor Relations in 2023 and Beyond

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The Labor Landscape in 2023

- So far in 2023 we have witnessed continued increases in employee activism, protected concerted activity, union organizing activities, and *many* Board decisions. Here's what the numbers tell us.
 - Union representation petitions were up by 3% in Fiscal Year 2023. ULP charges increased by 10%.
 - Highest total number of cases filed since FY 2016
 - The average union win rate for representation petitions in FY 2023 was 76%.
 - There is a very real youth movement. Younger employees have different workplace issues, which unions can exploit.
 - Many unions are implementing new organizing strategies with the use of new technology.
 - We can expect a more labor friendly Labor Board continuing into 2024.

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Organizing Activity Keeps Rising



- Over **2,500** petitions filed during FY 2023
- FY 2022 already saw a **53%** petition increase and a **19%** ULP increase (up from 1,638 petitions filed in FY 2021)
- Dramatic increase in Employer-filed petitions after being asked to voluntarily recognize a union

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Board Cases

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Major 2023 Board Decisions (so far)

- Employer Discipline** → Returning to "setting-specific" standards for employee abusive conduct cases in connection with protected activity
- Severance Agreements** → Reinstating standard restricting certain confidentiality and non-disparagement clauses in departing employees' severance agreements
- Independent Contractors** → Returning to stricter independent contractor standard making it easier for individuals to be classified as employees
- Advocacy for Non-employees** → Returning to prior precedent that protects statutory employees advocating on behalf of non-employee, such as interns or independent contractors

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Major 2023 Board Decisions (so far)

- Work Rules & Handbook Policies** → Adopting a new legal standard for assessing lawfulness of work rules and abandoning the categorical approach in favor of a case-by-case approach
- Duty to Bargain During Negotiations** → Expanding an employer's duty to bargain with employees following expiration of a labor contract and during initial collective bargaining negotiations
- Protected Concerted Activity** → Returning to the "totality of the circumstances" test for determining when individual employee action constitutes protected concerted activity
- Bargaining Orders** → Adopting a new framework to order employers to bargain with unions. If an employer files an RM petition rather than recognize a union that shows evidence of majority support, and then commits ULP warranting setting aside election, the employer will be ordered to bargain with the union

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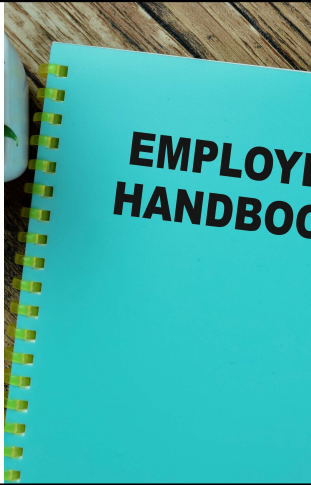
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Stericycle

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Stericycle, Inc. – A New Work Rules Standard

- On August 2, 2023, the Board overturned the Trump Board's *Boeing* decision, adopting a new legal standard for assessing the lawfulness of work rules and abandoning the categorical approach.
 - Employee friendly standard
 - Case by case assessment
- Work rules now will be "presumptively unlawful" if they have a "reasonable tendency" to chill employees from exercising their organizing rights or if they have a coercive meaning.
- A two-step analysis will determine whether the rule or policy is unlawful.



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Two-Step Analysis

Board GC must prove an employee could reasonably interpret the rule to have a chilling effect on protected activity. If the GC meets this burden, rule is presumptively unlawful

- Look at the specific wording of the rule, specific industry, workplace context, etc.
 - Through the lens of an economically dependent employee on their employer who contemplates engaging in Section 7 activity
- Employer may rebut the presumption by proving the rule advances a legitimate and substantial business interest that cannot be advanced with a more narrowly tailored rule

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Impact on Handbooks


- In essence, *Stericycle* will make many handbook rules unlawful if the work rule or policy has a "reasonable tendency" to chill employees from exercising their organizing rights.
- The "reasonable tendency" test is very subjective
 - "could" it be interpreted to limit employee rights? (rather than "would")
 - rule interpretation is not from the standard of a reasonable employee, but from the viewpoint of an employee "economically dependent" on the employer
- And – due to the *Cemex* decision – there is a possibility that an improper policy could lead to a bargaining order (thus circumventing the process for a secret ballot election).

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Cemex

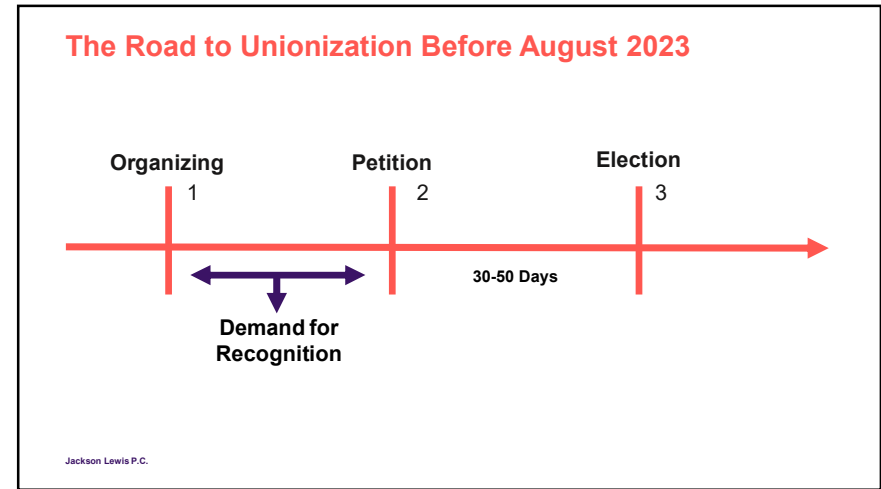
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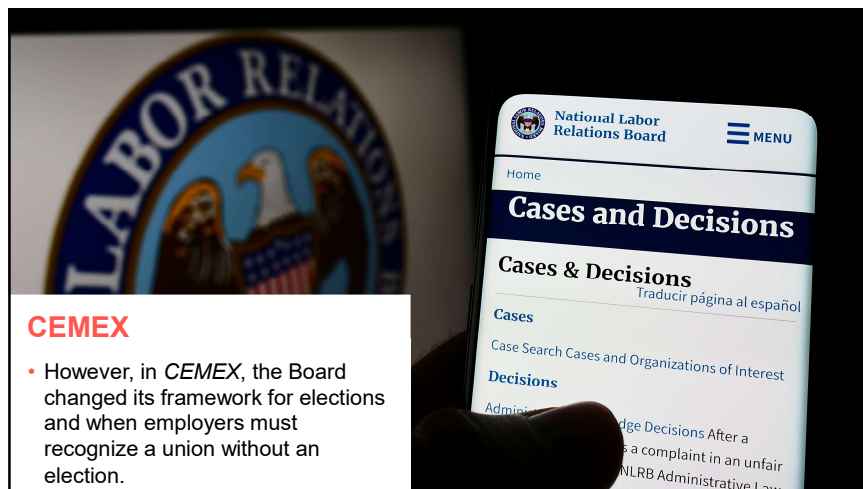
The Path to Representation: Before

- For decades, if an employer declined voluntary recognition, the union seeking representative status almost always had to petition the NLRB for an election.
- In the meantime, the employer could share its position, and provide information to employees about the union and unions generally.

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CEMEX

- However, in *CEMEX*, the Board changed its framework for elections and when employers must recognize a union without an election.

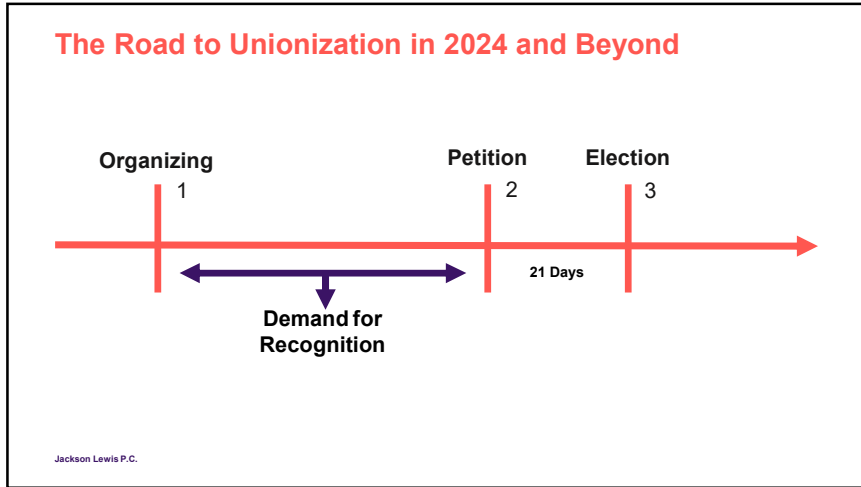
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Cemex – Part 1

- If a demand for recognition is made, an employer must either:
 - Recognize the union and begin bargaining – with no election; OR
 - The employer must file a petition for an election within two weeks.
- If the Employer fails to act, the Board will order the Union certified and require bargaining.
- Also, much shorter election cycle time
 - 21 days from petition to election

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RM Petitions

| UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD | | DO NOT WRITE IN THIS SPACE | |
|---|--------------|--|---|
| RM PETITION | | Case No. | Date Filed |
| INSTRUCTIONS: Unless e-Filed using the Agency's website, e-file this form , submit an original of this Petition to an NLRB Office in the Region in which the employer concerned is located. The petition must be accompanied by a certificate of service showing service on all parties named in the petition of the following: (1) the petition; (2) Statement of Position form; and (3) Description of Proceedings in Certification and Decertification Cases (Form NLRB 4812). The petition must also be accompanied by evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. However, if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. | | | |
| 1. PURPOSE OF THIS PETITION: RM-CERTIFICATION OF REPRESENTATIVE. One or more individuals or labor organizations have presented a claim to the Employer/Petitioner to be recognized as the representative of employees of the Employer/Petitioner or the Employer/Petitioner has a good faith uncertainty about majority support for an existing representative. If a charge under Section 8(b)(7) of the Act has been filed involving the Employer/Petitioner named in this petition, this statement shall not be deemed made. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act. | | | |
| 2a. Name of Employer/Petitioner: | | 2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code): | |
| 3a. Employer/Petitioner Representative - Name and Title: | | 3b. Address (if same as 2b - state same): | |
| 3c. Tel. No. | 3d. Cell No. | 3e. Fax No. | 3f. E-Mail Address |
| 4a. Type of Establishment (factory, mine, wholesaler, etc.): | | 4b. Principal Product or Service: | |
| 5a. Description of Unit Involved: Included: | | | 5b. City and State where unit is located: |
| Excluded: | | | 5c. Number of Employees in Unit: |
| Address a charge alleging a violation of Section 8(b)(7) is pending, check EITHER item 7a or 7b, whichever is applicable. | | | |
| <input type="checkbox"/> 7a. A labor organization made a demand for recognition on the Employer/Petitioner on (Date) | | | |
| <input type="checkbox"/> 7b. The Employer/Petitioner has a good faith uncertainty about majority support for an existing representative. | | | |
| 6a. Name of Recognized or Certified Bargaining Agent - Name: | | 6b. Affiliation, if any: | |
| 6c. Address: | 6d. Tel. No. | 6e. Cell No. | 6f. E-Mail Address |
| | 6g. Fax No. | | |
| 9. Date of Recognition or Certification: | | 10. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year): | |
| 11. Is there now a strike or picketing at the Employer's establishment(s) involved? <input type="checkbox"/> If so, approximately how many employees are participating? | | | |
| 12. Organizations or individuals other than those named in item 5, which have a contractual with the Employer/Petitioner or represent employees of the Employer/Petitioner or demanded recognition as representatives and other organization and individuals known to have a representative interest in any employees in the unit described in item 5 above. (If none, so state) | | | |

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Cemex – Part 2

- If the company is found to have engaged in an unfair labor practice during the campaign (any ULP), there will be no “re-run” election, which was normally the remedy. Instead, the Board will order the union in.
- Old Rule
 - ULP that is demonstrated to have an impact on the election will result in a new election
 - Only ULPs that are so severe as to prevent any opportunity for a fair and impartial election will result in *Gissel Bargaining Order*
- New Rule
 - Essentially any ULP = Bargaining Order
- Expect a lot of ULP Charges

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ULP

| UNITED STATES OF AMERICA NATIONAL LABOR RELATIONS BOARD | | DO NOT WRITE IN THIS SPACE | |
|---|--|--------------------------------|------------|
| CHARGE AGAINST EMPLOYER | | Case | Date Filed |
| INSTRUCTIONS: File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring. | | | |
| 1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT | | | |
| a. Name of Employer: | | b. Tel. No.: | |
| | | c. Cell No.: | |
| | | f. Fax No.: | |
| d. Address (Street, city, state, and ZIP code): | | g. e-mail: | |
| | | h. Number of workers employed: | |
| 1. Type of Establishment (factory, mine, wholesaler, etc.) Identify principal product or service: | | | |
| The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (6) (and subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are practices affecting commerce within the meaning of the Act and the Postal Reorganization Act. | | | |
| 2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices): | | | |
| 3. Full name of party filing charge (if labor organization, give full name, including local name and number): | | | |
| 4a. Address (Street and number, city, state, and ZIP code): | | 4b. Tel. No.: | |
| | | 4c. Cell No.: | |
| | | 4d. Fax No.: | |
| | | 4e. e-mail: | |
| 5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization): | | | |

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**Stericycle and Cemex:
An Uncertain New World**

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The Intersection

- Failure to file petition after denying recognition = NLRA violation.
- That and other NLRA violations (e.g., unlawful handbook rules) may result in an order to recognize union without an election.
 - Triggering violation could be an overly broad employee handbook policy implemented years before the election

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But there's more...

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Prohibiting “captive audience” meetings and similar employer campaign conduct

- Employer “captive audience” meetings and similar mandatory meetings would violate the Act
- The GC argues that compulsory employee attendance discourages the employees from refusing to listen to employer speech

54

Awarding employees with the pay they would have received in a collective bargaining agreement where employers unlawfully refuse to bargain

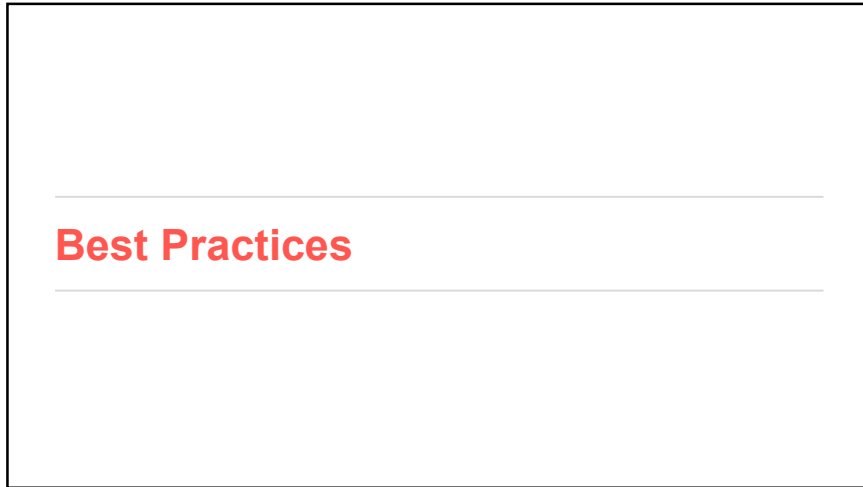
- The GC argues Board's current practice of ordering prospective relief – like a bargaining order – does not go far enough, and should be supplemented by orders for compensatory relief, like the pay employees could receive through that bargaining

55

Expanding union's right to access an employer's property

- Solicitation by non-employee union representatives
- Prohibiting non-employee union representatives from the premises on a discretionary basis

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Work Rules Going Forward

- Under *Stericycle*, work rules that were once lawful may no longer be considered lawful under the current Board
- Employers should be sure to:
 - Review workplace rules, policies, and practices for compliance with labor law
 - Review for the impact on the working environment and culture, and consider changes to adopt best practices and/or practices unique to your workforce
 - Review for other legal vulnerabilities, including overtime issues, meal periods, and disability / leave compliance
 - Consider the practical implications of changing policies and practices to comply with labor law
 - Review public statements – including property signage and social media statements – for legal compliance

Jackson Lewis P.C.

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Best Practices

- Employers will need to carefully review policies and conduct a risk assessment weighing the business interests in maintaining each rule and the impact it may have if the Board finds it unlawful
- Effective management training and a careful review of handbook policies will be needed.
- Plans for responding to demands for recognition are needed.
- Prevention is the best medicine – the time to work on employee engagement is now.
- Jackson Lewis offers training for supervisors and other leaders to ensure understanding and consistent application of employer handbook policies.
 - Legal issues loom larger now; reach out to your legal counsel with any questions

Jackson Lewis P.C.

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A slide with a dark teal background. At the top, there is a photograph of two green street signs against a blue sky with white clouds. The top sign says "Policy" with "AV" in the top right corner. The bottom sign says "Procedure" with "ST" in the top right corner. Below the photo, the text "KEY POLICIES, AND UPDATES FOR 2023-24" is written in white, all-caps. At the bottom left, there is a logo for "POMS" with a small icon to its left. The bottom right of the slide is a solid red bar.

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POMS AT-WILL EMPLOYMENT

- **Is it clear that all employment is at-will?** (Private sector employers other than Montana)
 - Employees operating under the terms of a contract or collective bargaining agreement would require separate documents.
- **Does the language used explain the concept?**
 - Workers should understand that at-will arrangements give both workers and companies the right to terminate employment at any time with or without reason.
 - However, employers cannot fire on the basis of a protected category such as race or disability.
- **Do you mention the courtesy of two weeks' notice before quitting?**
 - Leaving immediately is becoming increasingly popular, especially among Millennials.
 - Make people aware of any possible *future* repercussions, such as forfeiting the possibility of future employment with the organization.
 - Be careful about having immediate consequences - can erode "at-will"

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POMS SOCIAL MEDIA

- **Do you adequately cover relevant topics?**
 - It's important to include guidelines on confidentiality of company/client information, posting on work time or devices, and staying away from harassing colleagues.
- **Who can post on official company sites?**
 - You may wish to limit who comments/posts on company sites and pages.
 - In addition, you may wish for employees who comment on company social media posts to disclose their employment with the company.
- **Does your language leave the impression that the company is trying to prohibit employees from talking about work?**
 - Remember that the National Labor Relations Act enables employees to converse freely with each other about employment and working conditions, including topics like pay, hours, and treatment.

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POMS HYBRID OR REMOTE WORK POLICIES

- Organizations that don't already have hybrid or remote work policies should develop them for their 2023 employee handbooks. Having these policies in place is vital for protecting the company from unnecessary risk and exposure, improving employee performance and experience, and ensuring the organization gets all its equipment back when employees move on. A telework policy should address these items:

| | |
|---|---|
| <ul style="list-style-type: none"> • How employees deliver work • How meetings are conducted, including technologies used and dress codes • Expected working hours and scheduling • Expectations for employee availability and response times | <ul style="list-style-type: none"> • Rules for cyber safety • Technologies and equipment employees will use • The return of equipment when employees move on • Inclement weather procedures, especially whether employees will still work if the headquarters is closed |
|---|---|

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POMS HYBRID OR REMOTE WORK POLICIES

- **Who is eligible to telecommute, and under what circumstances?**
- **What technology is required, and who will pay for it?**
- **Do employees have set hours to be online while telecommuting, and is there any flexibility in scheduling?**
- **What security measures does the company have in place and expect telecommuting employees to follow when working outside of the office?**
- **Is it clear that telecommuters must display the same professional behavior when working online as when in the office?**
 - Ensure employees know improper conduct such as bullying coworkers on company chat platforms is subject to disciplinary measures.
- **Note that supplementary handbook material may prove useful when presenting work-from-home policies during the COVID-19 pandemic.**

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POMS HEALTH AND SAFETY

- **Has your handbook kept pace with relevant legislation**, such as federal law requiring employers to provide reasonable time and space accommodations for breastfeeding mothers?
- **Are elements of the Family and Medical Leave Act** spelled out in a way that workers know how the information pertains to your workplace?
- **Do you make it clear that sick people are expected to stay at home for their own good and that of their fellow employees?**
- **Do you have general policies concerning communicable diseases, and pandemic responses?**
 - Regarding COVID-19, is information presented about testing, quarantining, contact tracing, and returning to the office? Are leave policies spelled out in detail?
 - What screening procedures are in place at the office, and what hygiene rules are employees expected to follow?
- **Again, a separate supplement with greater detail** could be beneficial when presenting information directly related to the pandemic.

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POMS WORKPLACE VIOLENCE PREVENTION

- You can be sure your workers are still thinking about the many workplace shootings that have happened recently, and likely are wondering what safety measures you have taken to protect against a similar attack or workplace violence.
- **Make sure you update or add safety policies to your handbook.** Start with the basics like a strict no-fault violence and threats of violence disciplinary policy. Your policy should make it clear that any violation will result in immediate termination. Then address each type of workplace violence as outlined by OSHA in their guidance and at the National Institute for Occupational Safety and Health (NIOSH). These are:
 - **Criminal intent.** The perpetrator has no legitimate business relationship to the workplace and usually enters the affected workplace to commit a robbery or other criminal act. Your handbook policy should assure employees that you have plans for possible criminal acts and are committed to regularly updating prevention measures.
 - **Customer or client.** The perpetrator is either the recipient or the object of a service provided by the affected workplace or the victim. The assailant may be a current or former client, patient, customer, passenger, criminal suspect, inmate, or prisoner. Your handbook policy should acknowledge potential violence and offer training for vulnerable employees. OSHA provides industry-specific guidance and training ideas.

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POMS WORKPLACE VIOLENCE PREVENTION

- **Co-worker or supervisor.** The perpetrator has some employment-related involvement with the affected workplace. Usually, this involves an assault by a current or former employee, supervisor, or manager. Your handbook policy should reassure workers that you take every complaint seriously, have processes in place for security during and after contentious discharges or disciplinary meetings, and encourage workers to speak with HR about alarming behavior.
- **Personal relationship.** The perpetrator is someone who does not work there but has or is known to have had a personal relationship with an employee. Your handbook policy should encourage workers to use your employee assistance program to address relationship and mental health challenges and provide information on how to access treatment.
- Finally, as part of your workplace violence policies, adopt the strictest no-weapons policy possible under your state's laws. You can tell employees no weapons are allowed at work. If you are in a state that allows workers to store unloaded weapons in their automobiles in company-owned parking lots, you may want to use a weapons checkpoint at entries.

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POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

- The past year saw increasing calls for paid leave laws to be enacted at both the state and local level. And new paid leave laws have come into effect in several states in 2022, like New Mexico's Healthy Workplaces Act.
- At least 11 states and municipalities have enacted paid leave laws and others are likely to follow. Consider these factors when assessing whether your leave paid policies may be in need of an update:
 1. **Pay attention to where employees are located and headcount.** Depending on the laws in those jurisdictions, consider a state or local supplement to the main handbook to account for the nuances under greatly differing paid leave laws, which may apply depending on how many employees you have in a particular state.

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POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

2. **Clearly explain employee eligibility.** Federal law requires employers provide FMLA leave after one year on the job and 1250 hours worked and state and local requirements may require leave after less time on the job (e.g.,
 - Wisconsin’s unpaid FMLA law only requires 1000 hours in the preceding 52 weeks). However, employers can also offer leave at any point before those requirements kick in.
 - Ensure that your policy clearly explains when an employee may be eligible for various paid leaves and ensure that if such leave is protected by law, the policy is compliant.
3. **Make sure your leave policies are not inadvertently discriminatory.** For example, parental leave policies should apply equally to all types of new parents, although there is an important distinction to be made between paid leave for recovering from childbirth and paid leave for bonding or other non-medical reasons.

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POMS EVOLVING LEAVE POLICIES (Paid and Unpaid)

The big-ticket items for employers to watch at the state level involve paid and unpaid leave laws.

- Many states expanded access to leave for COVID-19-related and other medical reasons.
- Effective Jan. 1, 2021, all private employers with five or more employees are covered under the California Family Rights Act (CFRA) - only applied to private employers with 50 or more employees.
- Effective Jan. 1, 2022, the California Family Rights Act was expanded to allow covered workers to take leave to care for a parent-in-law.
- Effective July 1, 2022, New Mexico private employers are required to provide paid sick leave
- In 2022, Connecticut and Oregon also expanded their family-leave laws, and Illinois has a new law requiring employers to provide victims of violent crimes (and family members of victims) with unpaid leave or allow them to take available paid time off.

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POMS DRUG-FREE WORKPLACE POLICIES

- A number of states have enacted medical and/or recreational use of marijuana, which affects your drug-free workplace policies and procedures.
- Post-Accident/Incident drug and alcohol testing - most policies we see do not comply with current law and regulations:
 - OSHA issued a rule on post-accident/incident/injury drug testing (29 CFR § 1904.35(b)(1)(i)), effective August 2016; which clarified in 2018 when post-accident drug testing is permitted
 - OSHA requires that employers replace a blanket testing policy or rule.
 - OSHA clarified that most workplace drug-testing programs are permissible, including:
 - Random drug testing.
 - Drug testing unrelated to the reporting of a work-related injury or illness.
 - Drug testing under a state workers’ compensation law.
 - Drug testing under other federal law, such as a U.S. Department of Transportation rule.
 - Employers need not specifically suspect drug use before testing, but there must be a reasonable possibility that drug or alcohol use by the reporting employee was a contributing factor to the reported injury or illness for an employer to require drug testing.
 - Additionally, drug testing that is conducted to evaluate the root cause of a workplace incident that “harmed or could have harmed employees” is allowed if the employer tests all workers who could have contributed to the incident, rather than just the employees who reported injuries.

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POMS EXPENSE REIMBURSEMENT

While federal law only requires that employers reimburse employees for expenses that bring an employee’s earnings below the federal minimum wage, state and local laws vary greatly in the treatment of worker expenses and reimbursement.

- California, Illinois, Iowa, Massachusetts, Montana, New York and the District of Columbia require that employers reimburse employees for various work-related expenses.
- Further, several of those states consider expense reimbursement wages subject to the same timing requirements as regular payroll.
- Lawsuits for failure to properly reimburse employees for expenses are rapidly increasing in these states and for all manner of expenses ranging from typical work-related expenses such as telephone and internet fees and the cost of office supplies, to the extra cost of energy to heat or cool a house.

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POMS EXPENSE REIMBURSEMENT

- Expense reimbursement also raises questions regarding the ultimate ownership of devices and equipment, especially when employment ends. To address these issues, a good expense reimbursement policy clearly provides:
 - what expenses are reimbursable and by when the employer will reimburse the employee (applicable state law will govern these and set floors for reimbursement);
 - who owns the devices or equipment; and
 - how the equipment is handled when the employment relationship terminates (will they be wiped of company information and the employee can keep them, must they be returned, etc.?)



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POMS PROTECTED CHARACTERISTICS

- Over the last several years, state and local authorities have expanded definitions of protected characteristics. At least 18 states and many municipalities have added protections for natural and protective hair styles, for example.
- Moreover, medical or recreational use of marijuana is now legal in 26 states. Several of those states such as Connecticut, Montana, Nevada, New Jersey, New York, and Rhode Island provide protections for employees that participate in off-duty recreational use of cannabis products and therefore limit an employer’s ability to refuse to hire or take adverse action against those workers.
- While catch-all language to include additional protected characteristics, such as “and any other characteristic protected by federal, state, or local law,” is a common solution, adding the particular protected characteristic to the policy - and better still to harassment and discrimination training - can serve as a defense against liability.

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POMS SEXUAL ORIENTATION AND GENDER IDENTITY

- Does the language used throughout the handbook reflect the recent Supreme Court ruling that Title VII’s sex discrimination provision applies equally to discrimination based on sexual orientation and gender identity?
- Does your equal opportunity statement include that the company does not discriminate on the basis of sex – including sexual orientation and gender identity/transgender status?
- Has your anti-harassment policy been updated to specifically state that the organization does not tolerate harassment based on sex, sexual orientation, or gender identity?
- Have outdated rules (such as requiring men to wear suits and women to wear dresses) been modified to reflect that the company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress?

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POMS SEXUAL ORIENTATION AND GENDER IDENTITY

- Have gendered hairstyle rules (such as no long hair or buns on men) been rectified?
- What legislation regarding hairstyles may affect your workplace? Several states already have passed the **CROWN Act** (Creating a Respectful and Open World for Natural Hair) to ban discrimination against natural hair (including afros, braids, twists, and locks), with federal action on the horizon.
- Does the code correctly place an emphasis on neatness, cleanliness, and safety in workplace dress over dictating specifics?
- Do the guidelines display an organizational commitment to supporting employees’ religious, ethnic, and cultural beliefs?
- Does the policy manual encourage workers with questions regarding appearance standards to consult with HR?

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POMS DRESS CODE - PROFESSIONAL APPEARANCE POLICY

- Have outdated rules (such as requiring men to wear suits and women to wear dresses) been modified to reflect that the company does not enforce the dress code in a way that reinforces stereotypes about how a particular gender should look and dress?
- Have gendered hairstyle rules (such as no long hair or buns on men) been rectified?
- Does the code correctly place an emphasis on neatness, cleanliness, and safety in workplace dress over dictating specifics?
- Do the guidelines display an organizational commitment to supporting employees' religious, ethnic, and cultural beliefs?
- Does the policy encourage workers with questions regarding appearance standards to consult with HR?

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POMS PROTECTED CHARACTERISTICS

- At a minimum, every policy manual should contain an Anti-harassment and Anti-Discrimination Policy that:
 - provides the state and local-specific characteristics that are protected from unlawful harassment and discrimination;
 - has a reporting procedure providing multiple reporting avenues for individuals to make complaints about harassment; and
 - emphasizes the employer's commitment to maintaining a workplace free from such unlawful conduct.
- Finally, Remember the Basics:
 - Use plain language.
 - Set clear expectations for attendance, conduct, and discipline.
 - Include that the handbook is not a contract of employment and does not modify the at-will nature of employment.
 - Include that the policies within the handbook may be revised, modified, or revoked at any time, with or without notice.
 - Make sure that the company retains discretion and flexibility when making decisions.
 - Ensure that you actually follow the policies!

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POMS DEIB AND THE CROWN ACT

Diversity, equity, inclusion, and belonging (DEIB) has been a hot-button topic for employers for a long time. However, in 2023, many organizations may need to create or update specific policies (including grooming and dress code policies) and language in their employee handbook for a few reasons.

- First, there are 18 states with their own version of The CROWN Act (Creating a Respectful and Open World for Natural Hair). This legislation protects employees (often black women) with natural hairstyles from discrimination.
- There may be a federal CROWN Act in the future, as well. Additionally, more states are adding natural hairstyles to the list of protected classes.
- Outside of a legal perspective, DEI is becoming more important to all workers. A report by the Pew Research Center finds that Generation Z is the most ethnically and racially diverse generation yet. This means the talent employers are trying to attract and retain are racially and ethnically diverse, or they have deep connections with people who are.
- Employers will pay the price in talent loss if they don't update their employee handbook to support DEI efforts, reduce opportunities for discrimination, and condemn racism, sexism, homophobia, and general bigotry.

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POMS DEIB AND THE CROWN ACT

- **DEIB Statements:**
 - Use diversity, equity, inclusion & belonging statements if you have them
 - Include this language where appropriate in the policy manual itself
 - Singular "they"
 - "Civil and Respectful Workplace" policy vs. "Harassment Prohibited"



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POMS PAY TRANSPARENCY LAWS

- Generally, Pay Transparency laws require employers to disclose prospective salary or salary range when advertising an open employment position. More specific obligations vary by state.
- Currently, pay transparency laws include those passed by New York City, New York state, California, Rhode Island, Connecticut, Nevada, Colorado, Maryland, and Washington state. Employers in these states should review their upcoming job postings to ensure compliance. There is an expectation that this will continue as a trend in other states.
- As pay transparency laws continue to take hold in new jurisdictions, employers should carefully consult state guidance keep job posting policies current. Non-compliance can result in mounting penalties, and compliance may be especially challenging in light of the increased number of remote work opportunities.
- Remote work may lead to confusion about which jurisdiction’s pay transparency law applies to a given job posting since several jurisdictions have opted to apply their laws broadly. For example, the California law applies to any job posting where the position could ever be performed by someone residing in California, even working remotely—as long as the employer has at least one employee residing in California.

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POMS PROMOTING EMPLOYEE WELLNESS AND MENTAL HEALTH

To retain staff in 2023-24, employers will need to keep up with the recent trend in supporting employee wellness and mental health. The pandemic accelerated this trend.

- Employers should deeply review employee benefits and a general prioritization of employee wellness.
 - Do they offer enough vacation time for employees to avoid burnout?
 - Do their health insurance plans make mental health care more accessible?
 - Many employers are offering mental health days and Employer Assistance Programs (EAPs) to improve access to mental health care services.
 - Employers may also want to adopt language urging employees to stay home or work from home when sick.
 - FMLA policies can be expanded to include language about mental health conditions, which often also qualify for leave.
 - It may be a good idea for employers to create a specific “Wellness Policy” in your 2023 employment policies, including the initiatives and benefits offered to support employees’ physical and mental health

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POMS PARENTAL LEAVE POLICIES/BENEFITS FOR WORKING PARENTS

- Employment policies should be updated to meet new and changing parental leave programs, as well as the expectations of working parents generally.
- Parental leave policies have been multiplying all over the US. Currently, ten states in the US have paid parental leave programs, with more states working on their own.
- Employers in these ten states and with employees who work remotely from these states must have paid family leave policies that are updated and in compliance.
- Beyond the legal requirements, employers should also seriously consider offering more flexibility for working parents as part of their employer brand.
 - Post-pandemic, employees can expect a substantial increase in flexibility at work.
 - Parents have benefitted from this flexibility and often consider it a necessity, not a perk.
 - Especially in the current, tight labor market, employers are more likely to lose talent (or have trouble attracting it) when they don’t offer the flexibility that working parents demand.

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POMS WEINGARTEN RIGHTS MAY SOON APPLY TO NON-UNION EEs

The National Labor Relations Board (NLRB) recently released an advice memo in which it signaled it is evaluating whether to extend Weingarten rights to nonunion employers.

- Nonunion employees can have representative in investigatory interviews that could lead to discipline
- Nothing states a policy change is required
- Should your organization’s policy change? Or just your practice?



The NLRB may be looking to expand this right to nonunion workforces once again may signal it will be more lenient when it comes to the type of conduct allowed by representatives in such meetings. Accordingly, this is an issue all employers should watch.

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POMS U.S. DEPT. OF LABOR (DOL) CHANGES IN OVERTIME AND INDEPENDENT CONTRACTOR RULES

The DOL issued two key Fair Labor Standards Act (FLSA) rules changes:

1. a proposed overtime rule published on Sept 8, 2023
2. a final independent contractor rule.

The DOL's new overtime rule proposes to raise the minimum salary ("salary level test") for exempt employees to \$1,059 per week (\$55,068 per year) from the current \$684 per week (\$35,568 per year).

- There were no proposed changes to the "Duties" tests.

Last October, the DOL proposed a new independent contractor rule that would establish a version of the "economic realities test" as the standard for determining whether a worker is an employee or an independent contractor under the FLSA.

- The proposed rule is more consistent with the IRS IC guidelines.

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POMS DISCRIMINATION AND ARTIFICIAL INTELLIGENCE (AI)

- In the workplace context, AI technology may be used to help with employee management functions, such as recruiting and hiring by analyzing resumes, predicting job performance or evaluating a job candidate's attention span.
- While the hope in using these tools in the recruitment process is to reduce or eliminate bias, the use of artificial intelligence is not without risk and may give rise to employment discrimination claims even on a class-wide basis.
- Last year, the USDOL Equal Employment Opportunity Commission (EEOC) issued a guidance on AI decision making tools and algorithmic disability bias.
- Also last year the U.S. Office of Science and Technology Policy issued its "[Blueprint for an Artificial Intelligence Bill of Rights](#)" concerning Algorithmic Discrimination Practices. The AI Bill of Rights provides recommendations to ensure that AI is safe and equitable in various sectors of society, including the workplace.
- Some states, such as New York, Illinois, and Maryland have enacted measures to regulate the use of algorithms in the workplace. Employers in these states should review these laws. It is anticipated that other states may propose legislation in this area.

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POMS THE FTC PROPOSED NONCOMPETE RULES

- The Federal Trade Commission (FTC) proposed a rule on January 5, 2023, prohibiting noncompete provisions in employment agreements.
 - Non-compete ban reportedly delayed until April 2024
 - The FTC rule proposed to ban agreements that are written so broadly as to effectively ban working in the same field post-employment and ban clauses that require paying unreasonable training costs if the employment terminates within a specified period.
- If the rule is implemented as proposed, it would bar employers from entering into or enforcing noncompete agreements with employees or independent contractors. The proposed rule would also nullify any existing agreements within six months from the date the rule takes effect.
- Employers should review their existing agreements and consider revising the agreements to include other contractual provisions that would protect their legitimate business interests even if the FTC rule takes effect.

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POMS NEW PROTECTIONS FOR PREGNANT & NURSING MOTHERS

- The 2023 omnibus government funding bill included two provisions that expanded protections for pregnant and nursing employees.
 - **The Pregnant Workers Fairness Act (PWFA)**, and
 - **The Providing Urgent Maternal Protections (or PUMP) for Nursing Mothers Act**
- These two laws are aligned with Title VII, the Pregnancy Discrimination Act, the Americans with Disabilities Act (ADA), and many existing state laws.
- The new legislation clarifies many of the rights and treatment of working mothers that have historically been pieced together under multiple statutes, regulations, and court decisions.
- **The PWFA** requires employers with 15 or more employees to engage in an interactive process to determine temporary reasonable workplace accommodations for pregnant applicants and employees with conditions related to pregnancy and/or childbirth, and to provide such accommodations if doing so would not impose an undue hardship.
 - The PWFA took effect on January 1, 2023.
 - Employers should be mindful of these expanded protections for pregnant employees and carefully consider accommodations that may be needed as a result of their pregnancy.

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POMS NEW PROTECTIONS FOR PREGNANT & NURSING MOTHERS

- **The PUMP Act** amended the FLSA by requiring employers to provide all employees—both exempt and non-exempt—with reasonable break time and a private location other than a restroom in which to express breast milk.
 - PWFA's requirements took effect in June 2023.
 - Employers with fewer than 50 employees may be granted an exemption from complying with the requirements if the employer is able to show that doing so would present an undue hardship in terms of expense or other difficulties in light of the employer's size, resources, nature, or business structure.
 - Employees must provide an employer with notice of an alleged failure to comply with the requirement to provide a private location to pump and give the employer 10 days to remedy the matter before initiating any legal action based on the failure.
 - Employers subject to the PUMP Act need to immediately ensure that they afford to all nursing mothers, regardless of their status as exempt or non-exempt, adequate break time and access to a private location for purposes of expressing breast milk.
 - Employers should also evaluate their current policies and procedures to ensure they are prepared to address accommodation requests from pregnant employees.

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

1. **Not regularly changing and updating policies** - i.e. reaching up onto a dusty shelf to hand out and refer to the same old Employment Manual someone wrote years ago.
 - Review and update AT LEAST annually, AND as needed.
2. **Including details that are likely to change frequently.**
 - e.g., Using peoples' names, details about benefits
3. **Using a Manual template** that does not fit the company. Manual templates are useful but must be used with care.
 - Be particularly careful about using public sector manuals as a model for a private sector employer.
4. **Not including disclaimers** and other statements to preserve management rights, e.g., right to bypass progressive discipline.

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

5. **Not communicating changes effectively to all employees** - including getting proper employee sign-offs on new or revised policies.
6. **Overly long and legalistic policies** that are not distinct from procedures and guidelines.
7. **Not adapting the policies for your local jurisdiction(s).** You may need more than one version of the policy manual if you have employees in several states.
8. **Having unlawful policy statements in your Employment Policy Manuals**
 - **Examples:** won't pay for unauthorized overtime, deductions from pay for lost/damaged property not allowed by law, compensatory time in private sector, prohibiting discussion of pay, non-payment of paid leave if required by state law, etc.

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 9. **Wage and hour issues** - Misclassification (exempt, non-exempt, independent contractor), failure to define workweek, meal and rest periods (state law especially). This is much more than just a Manual problem. Majority of employers have technical violations of wage/hour laws - DOL estimates 75%-80%.
- 10. **Not having essential or legally required provisions** (EEO statement, reasonable accommodation statements (disability, religion) anti-harassment (of any kind), anti-retaliation, FMLA notice if covered employer, authorized to work in United States, at-will employment).
- 11. **Leave policies that don't allow the flexibility needed to comply with ADA reasonable accommodation obligations.**

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 12. **Not having a statement prohibit making false charges**, fraudulent workers comp claims, etc.; subject to discipline
- 13. **Creating obligations that the company does not comply with** (e.g., performance reviews, disciplinary procedures, attendance policies, pay increases and promotions).
- 14. **Overly restrictive policies**, such as social media, non-solicitation, confidentiality, etc. These areas are frequently the source of charges to the NLRB alleging violations of the NLRA (section 7 - protected concerted activity rights of employees).
- 15. **Improper Harassment policy** - e.g., having a sexual Harassment policy instead of having a broad policy prohibiting harassment for other protected classes, and retaliation.
 - Current "best practice" is to have a policy on: "Civility and Respect in the Workplace: Preventing Discrimination, Harassment, and Retaliation"

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 16. **Limiting who employees can or must report to for harassment, retaliation or discrimination** of any kind and/or not following the process laid out .
- 17. **Not providing sufficient flexibility for similar conduct but different context or severity.** This is essentially over restrictive or overly detailed disciplinary processes or rules of employment.
- 18. **Having contradictory provisions** (e.g. multi-step discipline vs. immediate termination provisions)
- 19. **Putting a cap on medical leaves** and overly restrictive return-to-work policies.
- 20. **Not controlling Meal and Rest Periods ...** or not providing meal and rest periods that comply with legal requirements.
- 21. **Not clearly stating policy to control Overtime**

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 22. **"Use it or lose it" vacation/PTO policies** in some jurisdictions (e.g. CA - maximum accrual cap is okay).
- 23. **Public sector policies in private employer EPMs** (e.g. comp time)
- 24. **Negative, "prohibitive," or punitive language** - written in such a way that it demonstrates the company does not trust or respect employees - culture.
- 25. **Not including policies specific to your organization or industry** (e.g. Medicaid Fraud, Food handling, Child welfare)
- 26. **An overly detailed, step-driven corrective action/disciplinary policy or procedure.**
- 27. **Problematic terminology** (e.g. "permanent" vs. "regular" employee, "probationary period" vs. "Introductory" or "Training and Orientation" period)

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 28. **Having unlawful policy statements:**
 - “Do not discuss your wages with any other person ...” - Right to discuss terms and conditions of employment.
- 29. **“Guarantee” language** such as “will,” “shall,” etc. Becomes promissory and can be interpreted as contractual.
 - e.g., “Employees performance shall be reviewed on the anniversary date of hire.”
- 30. **Conflating policy with procedures and work rules** - except where required (e.g., unlawful harassment)
- 31. **Not “capping” certain paid leave benefits**, can result in unintended costs
 - Offering Paid Jury Duty leave - rare, but some jury trials (federal grand juries, for example) can last for months.
- 32. **Acknowledgement page certifying that the employee has “read” the policy manual.**
 - Signed acknowledgement receipt, and employee’s responsibility for becoming familiar with the policies, and knowing who to ask questions about the policies.
 - Provides a level of consistency and proof that an employer makes their employees aware of the Policy Manual.
 - File original signature acknowledgements (including revisions) in official file.

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 33. **Clearly define leave benefits:** how vacation time/PTO/sick leave is earned or accrued, and how it is paid out upon separation.
- 34. **Having an Overly Restrictive Disciplinary Policy.**
 - List the types of conduct that may result in employee discipline and potential penalties for infractions up to and including termination of employment
 - Should not include a rigid “step” disciplinary system from which the organization cannot deviate, leaving you ill-equipped to handle serious incidents if it is the employee’s first infraction.
- 35. **Not Applying Policies Consistently.**
 - *Managers’ & supervisors’ legal duty to uphold and enforce policy.*
- 36. **Not Expressly Reserving the Right to Change and Modify the Employment Policies With or Without Notice**
- 37. **Forget to include Safety and Security Policies**
 - Employers have the obligation to provide a safe and healthful workplace to their employees, who in turn are obligated to follow policy.

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POMS COMMON MISTAKES AND PROBLEMS WE SEE

- 38. **Consider union contract (CBA) conflicts.** Try to align policies and CBAs for consistent administrative processes.
 - If certain employees are covered by a union contract, there are limitations as to the degree that the employee manual can apply to those employees. Many times, an introductory section of the manual will make clear that the manual does not apply to these employees. If any aspects of the manual are intended to apply to such employees, application of the manual may require bargaining obligations.
- 39. **Not Including a Computer/Technology Use Policy**, and having a separate companion written agreement updated and signed annually.
- 40. **Copying Policies from the Internet** or Other Organizations without careful review and revision for your organization.

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REVISING AND UPDATING YOUR EMPLOYMENT POLICY MANUAL

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- 1 • Review current organization policies
- 2 • Create an outline - equal employment opportunity statement, statement about at-will employment, handbook's purpose, background information
- 3 • Summarize versions of each update policy and procedure
- 4 • Add each summary in the appropriate place after the outline, and assign team to review
- 5 • Submit the final version to legal council for review
- 6 • Select a means of publication
- 7 • Distribute handbook to all covered employees
- 8 • Establish a system for periodic review and updating

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POMS ALIGN POLICIES WITH OTHER DOCUMENTS


- An Employment Policy Manual is particularly interrelated with other employment documents because it is a summary of most of the information related to a company's employment practices and policies.
- Very few companies review their Employment Policy Manuals in the context of their other employment documents.
- A related problem is revising one document and not reviewing/revising other documents that are affected by the change in the first document.



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POMS MANAGEMENT / LEGAL REVIEW & FEEDBACK

- Have key management employees and supervisors review policies to ensure understanding
- Review by the employment attorney who will be defending you if an employment practices claim or charge is filed.
- Re-draft based on feedback, prior to publishing.



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POMS DISTRIBUTION OF MANUAL: EDUCATE EMPLOYEES

- **Communication of policies** to employees is key, both at hire, and whenever you issue changes
 - Review key policies
 - Opportunity for employee to ask questions
 - Get signed document acknowledging receipt, etc.
 - Collect and Storing Employee Acknowledgment Forms
- **Training**
 - Human Resources Personnel
 - Managers, Supervisors, Leads - affirmative legal duty to uphold and enforce policies
 - Employee Training - Review key provisions, questions
 - Explain the steps that were taken and why.
 - Re-educate employees when changes in policy occur
 - Take prompt action when policies are misused - Accountability, consistency

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POMS TRACKING CHANGES, UPDATES, ADDITIONS

- Develop a plan for active maintenance and review
- Solicit, and encourage users to provide feedback, and be prepared to make revisions as needed
- Archive changes and date new releases with an “Effective Date”
- Once adopted your policies must be followed & enforced by supervisors - check with them regularly
- Remember - you can change your mind and change your policy!
- Make it simple to update and keep it updated
- Track updates clearly and consistently
- Don’t just throw it on the shelf
- Remember it is a “living” document subject to legislative rulings, industry norms, technological advancements, and changes in your organization
- Measure outcomes by monitoring or testing - Why have a policy that nobody follows?

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POMS SUPERVISOR & MANAGER TRAINING

- It is vital to train managers, supervisors, and leads on the policy manual
 - The affirmative legal duty to enforce policy as written
- To Avoid legal problems, the company must enforce provisions as written, unless management provides different instructions
- Managers, supervisors, and leads should refer all benefits and leave issues to Human Resources - (e.g., ADA, FMLA)
- Supervisors fully put on notice of obligations
- Supervisors develop a better understanding of purpose of company’s policies
 - Also provides opportunity to provide input

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POMS QUESTIONS JacksonLewis

- This is the chance to address issues that may not have been covered to your satisfaction; or
 - To expand a point; or
 - To clarify a point.
- If there are any further questions which we were not able to get to today, please feel free to contact the instructors.



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About Jackson Lewis P.C.

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JacksonLewis

We get work.™

Employers need proactive strategies and business solutions that reduce workplace law risk. At Jackson Lewis, we don't just tell you what's legal – we tell you what's **effective**.

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Firm Overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, we understand the importance of having a workforce that reflects the various communities we serve.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

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Strategically located to serve employers' needs

61
Locations Nationwide

950+
Attorneys

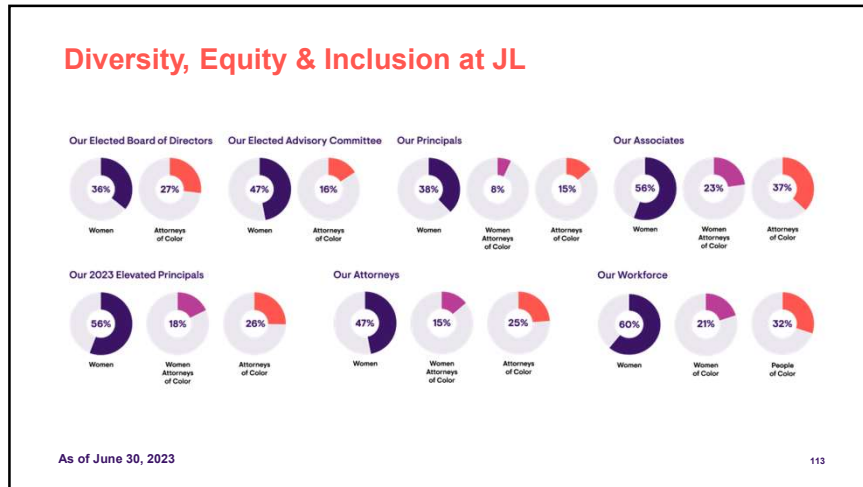
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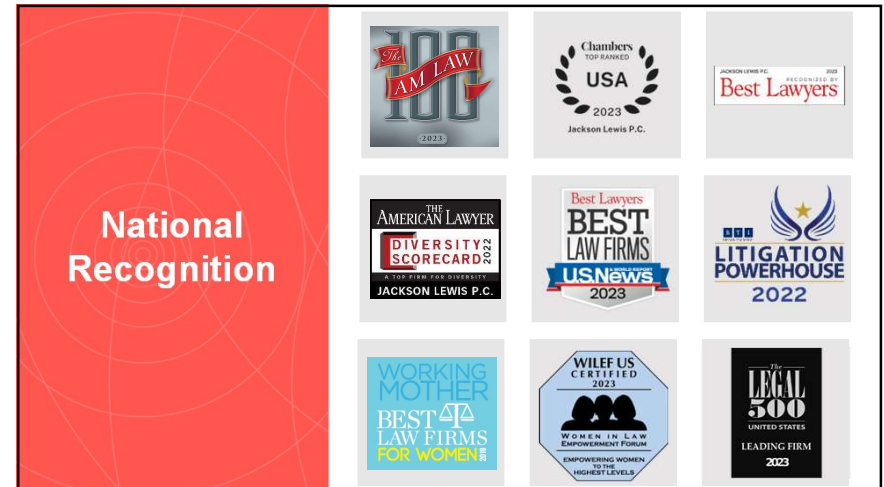
Practice & Industry Groups

| | | |
|---|--------------------------|---|
| Advice and Counsel | ERISA Complex Litigation | Privacy, Data and Cybersecurity |
| Affirmative Action, OFCCP and Government Compliance | Financial Services | Real Estate |
| California Advice and Counsel | Healthcare | Restrictive Covenants, Trade Secrets and Unfair Competition |
| Class Actions and Complex Litigation | Higher Education | Retail |
| Construction | Hospitality | Sports |
| Corporate Diversity Counseling | Immigration | Technology |
| Corporate Governance and Internal Investigations | International Employment | Transactional Services |
| Disability, Leave and Health Management | Labor Relations | Trials and Appeals |
| Employee Benefits | Life Sciences | Wage and Hour |
| Environmental, Social and Governance | Litigation | Workplace Safety |
| | Manufacturing | Workplace Training |
| | Pay Equity | |

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Client Service Standards

Jackson Lewis is committed to providing every client with the highest level of service. We promise our clients that Jackson Lewis will:

- Demonstrate an Unmatched Understanding of Your Needs and Expectations
- Commit to Fostering Diverse Teams and the Creative Ideas They Generate
- Embrace Proactive Communication and Collaboration as a Way of Life
- Provide Regular Opportunities for Formal and Informal Feedback and Act Upon the Results
- Build a True Partnership Where Goals are Shared and Success is Mutual

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As legal professionals **focused on the workplace**, we have a unique vantage point into the human condition.

It is our **privilege** to do work that affects **people**.

It is our **calling** to craft policies that achieve the delicate balance between **supporting diverse workers** and the **businesses that employ them**.

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