HR LEGAL PRIMER:
Hiring, Firing, and
HIPAA Business Associate Agreements

AAAAI: Virtual Practice Management Workshop

July 23-24, 2021

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Operating a medical practice requires compliance with a myriad of laws and regulations, including those related to employment law, including, hiring, firing, and the Health Insurance Portability and Accountability Act (HIPAA).

Ignorance of the law is not a valid defense.

Where to Start: What Employment Laws Apply to Small Business Owners?

- Anti-discrimination laws
- FLSA and state law equivalent
- Benefit Laws
- I-9
- Posting requirements
- Miscellaneous state laws (voting leave, personnel files, workers’ compensation laws, etc.)
WHERE TO START: OTHER EMPLOYMENT LAWS WHICH MAY APPLY TO SMALL BUSINESS OWNERS

- Workers Compensation, Unemployment Compensation, Workers Right to Know Act, Drug & Alcohol Testing Laws, Wage Deductions, Notice of Termination, Non-work Activities, Nursing Mothers, Parenting Leave, School Conferences, Use of Sick Leave, Organ Donation, Whistleblowers, Retaliatory Discharge for Claiming Benefits, Parallel State laws (overtime, minimum wage, OSHA, etc.), Industry regulations (e.g. Health Care)

INTERVIEWING AND PERSONNEL RECORDS: BEST PRACTICES

- Use a prepared outline or script when conducting job interviews;
- Interviews should be thorough and consistent among all applicants;
- Ask uniform questions asked of all applicants
- Poorly prepared or ad lib interviews may result in unintentionally discriminatory questions or remarks.
- When coming up with interview questions, make sure you can identify the reason for the question/inquiry/qualification, and make sure the questions posed actually accomplish your goals.
INTERVIEWING AND PERSONNEL RECORDS: BEST PRACTICES

• Application forms: good practice to include requirement in application form that applicant:
  • Has answered all questions truthfully;
  • Understands they may be dismissed from consideration for failing to be truthful;
  • Understands no job is guaranteed;
  • Agrees to follow employer’s policies and procedures;
  • Understands that they can be dismissed for failing to do so.

<table>
<thead>
<tr>
<th>ITEM</th>
<th>PROBLEMATIC INQUIRIES</th>
<th>LEGAL INQUIRIES</th>
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</thead>
<tbody>
<tr>
<td>AGE</td>
<td>Age, date of birth, any inquiry for purpose of excluding persons of a particular age.</td>
<td>Whether candidate meets minimum legal age requirements.</td>
</tr>
<tr>
<td>ARREST RECORD</td>
<td>Any inquiry relating to arrest.</td>
<td>NONE</td>
</tr>
<tr>
<td>AVAILABILITY TO WORK</td>
<td>Inquiries directed only to persons of one sex, inquiries about religious observations</td>
<td>Inquiring of all candidates whether they can work the hours scheduled.</td>
</tr>
<tr>
<td>CITIZENSHIP</td>
<td>Inquiries relating to whether candidate is a citizen of the United States.</td>
<td>Inquiries relating to whether candidate is legally entitled to work in the United States.</td>
</tr>
<tr>
<td>CONVICTION RECORD</td>
<td>Inquiries regarding convictions that do not relate to performing the particular job.</td>
<td>Inquiries about felony convictions which relate to performing a particular job. Include disclaimer stating that conviction does not automatically bar candidate.</td>
</tr>
<tr>
<td>CREDIT RATING</td>
<td>Any inquiries concerning charge accounts, credit rating, etc. that do not relate to performing the particular job. In question.</td>
<td>Specific inquiries about credit rating that relate reasonably to performing the particular job in question.</td>
</tr>
<tr>
<td>DISABILITIES</td>
<td>Any inquiries that elicit information about disabilities or health.</td>
<td>NONE</td>
</tr>
<tr>
<td>FOREIGN LANGUAGE</td>
<td>Inquiries relating to how fluency in foreign language was obtained.</td>
<td>Inquiries as to whether the candidate is fluent in another language.</td>
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Virtual Practice Management Workshop
JULY 23-24, 2021
<table>
<thead>
<tr>
<th>Topic</th>
<th>Permissible Uses</th>
<th>Prohibited Uses</th>
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</thead>
<tbody>
<tr>
<td>Height or Weight</td>
<td>Any inquiries regarding height or weight of candidate unless BFOQ exists.</td>
<td>Inquiries regarding height or weight if BFOQ exists.</td>
</tr>
<tr>
<td>Home Ownership</td>
<td>Any inquiries regarding whether candidate owns or rents his/her home.</td>
<td>NONE</td>
</tr>
<tr>
<td>Marital and Family</td>
<td>Child care issues; unwed motherhood; spouse’s preferences regarding job conditions. Inquiries indicating marital status, number of children, pregnancy. Maiden names, or request to circle Miss, Mrs., Ms., or Mr.; Spouse’s protected characteristics.</td>
<td>Whether candidate can meet work schedule or job. Whether candidate has activities, responsibilities, or commitments that may hinder meeting attendance requirements. (Should be asked of candidates of both sexes)</td>
</tr>
<tr>
<td>Military Record</td>
<td>Fact of service; Type or condition of military discharge, unless it is the result of a military conviction.</td>
<td>Type of experience and education in service as it relates to a particular job.</td>
</tr>
<tr>
<td>Name</td>
<td>Inquiries about the origin of the person’s name (e.g. That’s an interesting name - is it Dutch?). Inquiries regarding prior marital status (Is Robinson your maiden name?).</td>
<td>Whether candidate has ever worked under a different name (for purposes of checking references).</td>
</tr>
<tr>
<td>National Origin</td>
<td>Lineage, ancestry, descent, mother tongue, birthplace, citizenship. National origin of spouse or parents.</td>
<td>Whether candidate is legally eligible to work in the United States. Investigating the applicant’s ability to read and write English when required for a specific job.</td>
</tr>
<tr>
<td>Organizations</td>
<td>Inquiries about membership to determine the race, color, religion, sex, national origin, or age of candidates.</td>
<td>Inquiries which do not elicit discriminatory information. Inquiring about membership in professional organization related to the job.</td>
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<tr>
<td>Race or Color</td>
<td>Specific race, complexion, color of skin. Height or weight where it is not related to the job.</td>
<td>NONE</td>
</tr>
<tr>
<td>Religion</td>
<td>Religious preference, affiliations, denominations.</td>
<td>Whether candidate can meet work schedules of job with reasonable accommodation by employer, if necessary.</td>
</tr>
<tr>
<td>Sexual Orientation</td>
<td>Sexual orientation of applicant</td>
<td>NONE</td>
</tr>
<tr>
<td>Smoking</td>
<td>Inquiries relating to whether or how much candidate smokes</td>
<td>May inform candidate of no-smoking rules, smoke-free environment, etc.</td>
</tr>
<tr>
<td>Welfare Experience</td>
<td>Inquiries relating to candidate’s history of receiving welfare.</td>
<td>NONE</td>
</tr>
</tbody>
</table>
PRACTICAL EMPLOYMENT LAW ISSUES FOR SMALL BUSINESSES

• At-Will Employment;
• Anti-Discrimination/EEO Acknowledgments; and
  • Anti-Harassment; and
  • Reasonable Accommodation.
• Benefits
  • Benefit eligibility (Full time and part time);
  • Time off (vacation, PTO, sick, holidays);
  • Health insurance, life insurance, STD/LTD;
  • Medical and other leaves of absences; and
  • Time away from work (jury leave, voting leave, military leave, bereavement).

PRACTICAL EMPLOYMENT LAW ISSUES FOR SMALL BUSINESSES

• Wage and Hour Provisions
  • Minimum wage;
  • Overtime; and
  • Hours of work
    • Schedules; and
    • Breaks.
• Miscellaneous
  • Email and computer usage;
  • Dress Code;
  • Separation (termination, resignation);
  • Discipline;
  • Attendance;
  • Personnel file; and
  • Reporting injuries.
**Basic Principle: At-Will Employment**

- The majority of employment relationships in the United States are at will.
- Generally, unless required by an employment contract or collective bargaining agreement, an employer does not need “just cause” to fire an at-will employee.

**At-Will Employment — Best Practices**

- Employment agreements and employee handbooks and employment applications should contain an express recognition that “nothing contained therein is intended to create an employment contract or otherwise alter the parties’ at-will employment relationship.”
- Employers should require employees to sign an “acknowledgement of receipt” upon receiving the handbook.
AT-WILL EMPLOYMENT — BEST PRACTICES (CONT.)

• Despite an employment relationship being “at-will,” employers cannot take adverse employment action against an employee on the basis of an employee’s protected class status (i.e., discrimination) as prohibited by Federal or State law or because the employee engaged in protected activity.

• However, even though an employer can fire an employee for any reason, this doesn’t mean an employer should do so.

• It is a best practice to have a legitimate, well-documented reason to take employment action against an employee.

ANTI-DISCRIMINATION POLICY: WHY DOES IT MATTER?

• Having, and following, an anti-discrimination/Equal Employment Opportunity (EEO) policy is crucial.

• An employee handbook or written policy statement should contain a statement highlighting the company’s commitment to Equal Employment Opportunities (EEO).

  • [Employer] is an equal opportunity employer. [Employer] does not discriminate on the basis of race, religion, color, sex, age, disability, national origin, veteran status, or any other basis covered by appropriate law.
PROTECTED CLASS STATUTES — FEDERAL LAW

- Race
- Color
- Creed
- Religion
- National origin or ancestry

- Sex
- Age
- Physical or mental disability
- Genetic information
- State laws include additional protected classes

IS SEXUAL ORIENTATION A PROTECTED CLASS?

- **Bostock v. Clayton County, GA, Altitude Express Inc. v. Zarda, and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC**

  - The cases involved gay men who alleged they were terminated because of their sexual orientation and a woman who alleged she was terminated after telling her employer she would embrace her gender identity at work.

  - **Holding:** Title VII’s prohibition on employment discrimination “because of sex” applies to gay and transgender workers.

  - “[I]t is impossible to discriminate against a person for being homosexual and transgender without discriminating against that individual based on sex.”
PROTECTED CLASSES UNDER STATE AND LOCAL LAW APPLY

• State and local law may protect additional classes beyond federal law.
  • Examples marital status, height and weight, status with respect to public assistance, etc.

• Employers are required to know and prohibit discrimination and harassment based on federally protected classes as well as any state and/or local protected classes.

PROTECTED CLASSES UNDER STATE AND LOCAL LAW APPLY (CONT.)

• Federal law only applies to employers with 15 or more employees.

• However, state laws may cover employees with fewer employees.
  • For example, the Minnesota Human Rights Act, which, like Title VII, prohibits discrimination on the basis of race, applies to employers with only a single employee.
**RETALIATION**

- Employees are protected if they engage in protected activity, which is defined as:
  - Opposition to a practice believed to be unlawful discrimination;
  - Participation in an employment discrimination proceeding; or
  - Requesting a reasonable accommodation based on religion or disability.

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**BEST PRACTICES**

- The best way to prove you did not have a bad reason (i.e., an illegal reason) for taking an adverse employment action is to prove you had a good reason for your actions.
- A good reason should be non-discriminatory, credible, and consistent with business practices. supporting
- Document, document, document!
**DISCRIMINATION HYPOTHETICAL**

- You are the HR manager of a mid-sized clinic. The town and patients are nearly all white. You recently hired Suzie, a provider from another country with a very thick accent. Several of Suzie’s patients have made general complaints about Suzie’s care, including that they cannot understand her accent. Recently, Suzie forgot to log records for a patient. This caused the patient to have to make several additional appointments. The patient is livid. This has happened twice before with other doctors, but the patients did not seem to mind. Suzie’s patient has called several times asking for Suzie’s termination or other discipline.
- What steps should you take to deal with the situation?

**UNLAWFUL HARASSMENT**

- Harassment is a form of employment discrimination and is based on unwelcome and inappropriate conduct.
- Harassment becomes illegal when enduring the offensive conduct becomes a condition of continued employment or the conduct is sufficiently severe or pervasive to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.
SEXUAL HARASSMENT
TWO LEGAL DEFINITIONS

• Quid pro quo: Unwelcome sexual advances or requests for sexual favors or other verbal or physical conduct of a sexual nature where acceptance is made a term or condition of employment.
• Quid pro quo harassment occurs when a person in a position of authority trades or tries to trade job benefits in exchange for sex.

SEXUAL HARASSMENT
TWO LEGAL DEFINITIONS (CONT.)

• Hostile Environment: The creation of an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct or communication of a sexual nature which has the purpose or effect of unreasonably interfering with an individual’s employment.
WHO CAN BE A TARGET OF SEXUAL HARASSMENT?

• Unlawful harassment can occur between any individuals, regardless of their sex or gender.
• The law protects employees, paid or unpaid interns, and non-employees, including independent contractors, and those employed by companies contracting to provide services in the workplace.
• Harassers can be a superior, a subordinate, a coworker or anyone in the workplace including an independent contractor, contract worker, vendor, client, customer or visitor.

WHERE CAN HARASSMENT OCCUR?

• Unlawful sexual harassment is not limited to the physical workplace itself.
• It can occur while employees are traveling for business or at employer sponsored events or parties.
• Calls, texts, emails, and social media usage by employees can constitute unlawful workplace harassment, even if they occur away from the workplace premises, on personal devices or during non-work hours.
OVERVIEW: EMPLOYEE RESPONSIBILITIES

• If an employee believes that he/she has been subject to inappropriate behavior, the employee must report the behavior so the employer can conduct an investigation and stop the behavior if it is occurring.

OVERVIEW: EMPLOYER RESPONSIBILITIES

• If an employer receives a report of inappropriate behavior or the employer is aware or becomes aware of potentially inappropriate behavior, the employer must conduct an investigation and if the behavior is substantiated, it must take timely and appropriate action to stop the behavior.
EMPLOYER LIABILITY WHEN A SUPERVISOR IS THE HARASSER

• There is a different liability standard for supervisor behavior.
• An employer is only liable for harassment between co-workers if the employer knew or should have known of the harassment and failed to take timely and appropriate action.
• An employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages.

EMPLOYER LIABILITY WHEN A SUPERVISOR IS THE HARASSER

• **Faragher/Ellerth Defense:** If the supervisor’s harassment does not result in a tangible employment action, the employer can avoid liability if it can show:
  • It exercised reasonable care to prevent and promptly correct harassing behavior; and
  • The complainant unreasonably failed to take advantage of preventative or corrective measures made available to her.


**HARASSMENT POLICY BASICS**

- Having a harassment policy is an absolute necessity. The elements should include:
  - That the employer will not tolerate harassment in any form in the workplace;
  - The procedures for reporting harassment;
  - The procedures for investigating reports of harassment;
  - The consequences for employees found to have engaged in harassment; and
  - Reporting employee will not be punished or retaliated for reporting.

- Reporting procedures should be clear, and should include multiple options so employee feels comfortable reporting. Example: avoid requirement that employee report to supervisor, as supervisor may be harasser.
- Policy should outline investigation procedure and assure consequences for substantiated harassment.
EMPLOYER LIABILITY FOR HARASSMENT BY THIRD PARTIES

- An employer cannot stand by when their employee is being harassed by a patient.
- **Recognize** a report of harassment, and when you are on notice of harassment (i.e., a supervisor observes a customer harassing an employee).
- **Investigate** the patient harassment the same way the employer would if an employee had committed harassment.

HARASSMENT

- **Hypothetical**
  - A nurse complains to HR that a new patient made sexually suggestive comments to her during a consultation. Specifically, the patient makes comments saying that he “liked the way she looked in scrubs.” The nurse complains to HR, and the clinic takes action to ensure that the patient is not seen by the nurse in the future. Is there any likely employer liability here?
  - What if the nurse complains but HR does not take action to ensure that the nurse has no future interactions with the patient. If the nurse continues to see the patient, who does not make any further inappropriate comments, is there any employer liability?
WHAT EMPLOYERS MUST DO

- **Train employees and supervisors** on what behaviors constitute harassment in the workplace and what to do about harassment;
- **Adopt a harassment policy** that is enforced and accessible to employees;
- **Know** what constitutes a report of harassment;
- **Investigate** reports of harassment promptly and appropriately, and take appropriate corrective action;
- **Save** investigation report and documents collected; and
- **Continue** to monitor the workplace to ensure that the harassment has stopped.

THERE ARE MORE TYPES OF HARASSMENT THAN SEXUAL HARASSMENT

- Race
- Color
- Creed
- Religion
- National origin or ancestry
- Sex
- Age
- Physical or mental disability
- Genetic information
- State laws include additional protected classes
HARASSMENT

• Hypothetical
  • Dr. Jameson has worked at Southtown Allergy for 25 years. Southtown recently hired several new doctors. The new doctors began to tease Dr. Jameson, calling him “grandpa” and other age-based names. The name calling became a daily occurrence, and you (the HR manager) overhear some of the comments. The comments appear mean and offensive, but you cannot determine whether or not the doctors are joking. No formal complaints are filed. When you arrive to work one morning, you receive a resignation email from Dr. Jameson.
  • What should you do?

FAIR LABOR STANDARDS ACT

• FLSA prescribes standards for the basic minimum wage and overtime pay.
  • Requires employers to pay covered, non-exempt employees:
    • A regular rate of at least the federal minimum wage; and
    • Overtime pay of 1.5x the regular rate of pay.
FLSA GENERALLY

- Topics Covered by the FLSA:
  - Minimum Wage;
  - Overtime;
  - Recordkeeping;
  - Equal Pay; and
  - Timely payment of wages and overtime.

WHAT EMPLOYERS ARE COVERED BY THE FLSA?

- Broad Coverage
  - No threshold number of employees required.
  - FLSA applies to any organization if it is:
    - Engaged in interstate commerce with gross income of at least $500,000; or
    - Public agency, operates a hospital, healthcare facility, or school.
**WHAT INDIVIDUALS ARE COVERED BY THE FLSA?**

- Notably, only a company’s employees, and not independent contractors, are covered by the FLSA.

**WAGE AND HOUR MATTERS**

- FLSA does not define “work”:
  - Defines “employ” as "suffer or permit to work";
  - Includes anytime an employer requires OR allows an employee to work; and
  - No such thing as a volunteering to work.
- Employer may not “sit back and enjoy the benefits” of an employee that works without entering time.
**FLSA**

- **FLSA Trap: Employee Misclassification**
  - Are your workers employees?
  - Employers must make sure they are properly classifying employees as exempt or non-exempt under the FLSA by thoroughly reviewing job classifications.

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**WHAT EMPLOYEES ARE COVERED BY THE FLSA?**

- Certain Employees are “exempt” from the FLSA’s coverage. For these employees:
  - No time records need to be kept;
  - Overtime does not need to be paid; and
  - No need to worry about what work is or is not covered.
**WHITE COLLAR EXEMPTIONS: THREE TESTS**

- In order to meet a white collar FLSA exemption, an employee must meet three tests:
  - Minimum Salary Level;
  - Salary Basis; and
  - Job Duties.

**FLSA**

- Exemptions include:
  - Executive exemption;
  - Administrative exemption;
  - Professional exemption (includes physicians);
  - Outside sales exemption; and
  - Computer-related occupations.
The salary rules do not apply to physicians and lawyers.

**Factor 1: Minimum Salary Level**

- For most employees, the minimum salary level required in order to meet an exemption is $684.00 per week or $35,568/year.
- Must be paid “free and clear”.
- The $684 per week may be paid in equivalent amounts for periods longer than one week.
- **NOTE**: This is **not** prorated for part-time employees.
MINIMUM SALARY (CONT.)

- Additionally, under the updated rule employers are able to use non-discretionary bonuses and incentive payments (including commissions) that are paid at least annually to satisfy up to 10 percent of the calculation of an employee’s standard salary level for minimum salary computation level purposes.
- Employers are also able to make a final “catch-up” payment within one pay period after the end of the relevant 52-week period to bring an employee’s total compensation up to the required threshold level.

FACTOR 2: SALARY BASIS TEST

- The employee must additionally be paid on a salary basis.
  - Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis);
  - The compensation cannot be reduced because of variations in the quality or quantity of the work performed;
  - Must be paid the full salary for any week in which the employee performs any work; and
  - Need not be paid for any workweek when no work is performed.
DEDUCTIONS FROM SALARY

• An employee is not paid on a salary basis if deductions from the predetermined salary are made for absences occasioned by the employer or by the operating requirements of the businesses.
• If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

PERMITTED SALARY DEDUCTIONS

• Seven exceptions from the “no pay-docking” rule:
  • Absence from work for one or more full days for personal reasons, other than sickness or disability;
  • Absence from work for one or more full days due to sickness or disability if deductions made under a bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences;
  • To offset any amounts received as payment for jury fees, witness fees, or military pay;
PERMITTED SALARY DEDUCTIONS (CONT.)

• Penalties imposed in good faith for violating safety rules of “major significance”;  
• Unpaid disciplinary suspension of one or more full days imposed in good faith for violations of written workplace conduct rules;  
• Proportionate part of an employee’s full salary may be paid for time actually worked in the first and last weeks of employment; and  
• Unpaid leave taken pursuant to the Family and Medical Leave Act.

IMPROPER DEDUCTIONS — EXAMPLES

• Deduction for partial day to attend parent-teacher conferences.  
• Deduction of day’s pay for weather-related closure (employer choice v. employee choice).  
• Deduction for three days’ absence for jury duty.
**PAYROLL PRACTICES THAT DO NOT VIOLATE SALARY TEST**

- Additional Compensation
  - Employer does not lose exemption by paying compensation above the $684.00 per week, such as:
    - Commissions;
    - Bonuses;
    - Additional pay based on hours worked beyond normal work week.
  - Computing pay on hourly, daily, or shift basis is not inconsistent with exemptions.

**PAYROLL PRACTICES THAT DO NOT VIOLATE SALARY TEST (CONT.)**

- Taking full or partial day deductions from exempt employees’ accrued leave accounts.
- Requiring exempt employees to keep track of and record hours.
- Requiring exempt employees to keep a particular schedule.
**Effect of Improper Deductions**

- An actual practice of making improper deductions from salary will result in the loss of the exemption:
  - During the time period in which improper deductions were made;
  - For employees in the same job classifications; and
  - Working for the same managers responsible for the actual improper deductions.
- Isolated or inadvertent improper deductions, however, will not result in the loss of exempt status if the employer reimburses the employee.

**Improper Deduction Safe Harbor Rule**

- The exemption will **not** be lost if the employer:
  - Has a clearly communicated policy prohibiting improper deductions and established a complaint mechanism;
  - Reimburses employees for any improper deductions; and
  - Makes a good faith commitment to comply in the future.
- Unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.
**Factor 3: Duties Test**

- An employee who meets the salary level tests and the salary basis tests is exempt only if s/he also performs exempt job duties.
- The **primary duty** of the employee’s work must fall under a category of exempt duties.

**What Counts as an “Hour Worked?”**

- Time spent for the benefit of the employer, with employer’s knowledge, and that is integral to the employee’s principal activity, is considered work.
- In addition to set work schedules, anytime this work is not requested but is “suffered or permitted,” is work time that must be paid.
Hours Worked: Issues

- Suffered or Permitted
- Waiting Time
- On-Call Time
- Meal and Rest Periods
- Training Time
- Travel Time
- Sleep Time

U.S. Department of Labor – Wage and Hour Division

MEAL BREAKS

Federal Meal Break Rule
- A “bona fide” meal period exists if: (1) the meal period is at least 30 minutes; (2) the employee is completely relieved from all duties during the period; and (3) the employee is free to leave the duty post.
HOURS WORKED - REST BREAKS

• Federal Rule
  • No obligation to provide 15-minute rest periods.
  • Breaks < 20 minutes must be paid.
  • Breaks > 20 minutes + employee is free to use it for their own purposes, are not hours worked.

FEDERAL RECORD KEEPING REQUIREMENTS

• The FLSA requires that for non-exempt employees, an employer must maintain certain records.
• The FLSA additionally requires employers to display a poster issued by the DOL.
**RECORD KEEPING REQUIREMENTS (CONT.)**

- Full name;
- Address, including zip code;
- Date of birth;
- Sex and occupation in which employed;
- Time and day of week when workweek begins;
- Hours worked each day;
- Total hours worked each week;
- Basis upon which wages are paid (such as hourly, weekly, piecework, etc.);
- Effective hourly pay rate for any week overtime is worked;

- Amount and nature of each payment excluded from the effective hourly pay rate;
- Total weekly straight-time earnings;
- Total overtime earnings for hours over 40 in any workweek;
- All additions to or deductions from wages for each pay period;
- Total wages paid each pay period; and
- Dates of payment and pay period covered by payment.
**Federal Record Keeping Requirements**

**Exempt Employees**

- For *exempt employees*, the following records must be maintained:
  - Full name;
  - Address, including zip code;
  - Date of birth;
  - Sex and occupation in which employed;
  - Time and day of week when workweek begins; and
  - Information regarding total remuneration for each pay period, including fringe benefits and prerequisites.

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**Federal Record Keeping Requirements (Cont.)**

- Employee records must be retained at least three (3) years.
- All records upon which wage and hour computations are based, for example, timesheets, must retained for at least two (2) years.
FLSA DOCUMENTATION BASICS

• Employee handbooks or written guidelines should contain:
  • A process for which employees submit their timesheets.
  • A definition of the work week and workday as well as a definition of the relevant reoccurring pay period.
  • A provision noting that all non-exempt employees will receive overtime at a rate of one and one half times their regular rate of pay for all hours worked in excess of 40 hours in a given work week.
  • A provision stating that employees will not incur overtime without the express prior approval of management.
    • Even with this provision in place employees must be compensated for all hours worked, even if those hours results in overtime.

STATE LAW PITFALLS — EMPLOYEE PAY REQUIREMENTS

• State laws generally have their own FLSA requirements and additional laws regarding when an employee must be paid.
• Terminated employees generally must be paid within a set period upon demand for final payments.
• Employers should not deduct additional funds from an employee’s final paycheck, other than usual withholdings, without first consulting with an attorney or HR.
• Depending on how a PTO policy is worded employees may be entitled to a payout of their PTO bank upon termination.
• Some state statutes require the payout of PTO/
POLICIES RELATED TO LEAVING EMPLOYMENT – BEST PRACTICES

• Employee handbooks should contain provisions governing what will happen when employment ends:
  • What constitutes a voluntary resignation?;
  • Procedures for the return of company property;
  • What will happen when future employers call asking for a reference, or to verify employment?;
  • Whether exit interviews will be conducted; and
  • Continuation of Insurance Coverage (COBRA).

OTHER EMPLOYMENT POLICIES TO CONSIDER

• Drug-free workplace policies;
• Anti-violence policies;
• Policies regarding gifts received from patients;
• Anti-solicitation requirements;
• Policies governing outside employment.
FINAL THOUGHTS: FOLLOW THE POLICIES

• Once in place, policies must be **consistently observed and followed**, otherwise the existence of the policies may backfire on the employer.
  • An employer’s failure to follow its own policies may **support an inference** of pretext of discrimination.
  • Applying the rules **inconsistently, infrequently, or unfairly** can result in employer liability as well.

HIPAA CONSIDERATIONS AND BUSINESS ASSOCIATE AGREEMENTS
COVERED ENTITIES

• “Covered entities” are covered by and subject to HIPAA
• The following entities are deemed “covered entities” under HIPAA:
  • Health care providers (doctors, clinics, psychologists, dentists, chiropractors, nursing homes, pharmacies) who process transactions electronically
  • Health plans (health insurance companies, health maintenance organizations (HMOs), employer sponsored health plans)
  • Health care clearinghouses (entities that process nonstandard health information they receive from another entity into an electronic format)

BUSINESS ASSOCIATES

• Business Associates (BA) of covered entities are also covered by HIPAA
  • A “Business Associate” is a person or entity that performs certain functions or activities if the BA uses, discloses, creates, receives, maintains, or transmits protected health information (PHI) on behalf of, or in the process of providing services to, a covered entity.
  • A member of a covered entity’s workforce is not a business associate
BUSINESS ASSOCIATES

• Examples of Business Associates include:
  • CPA firm whose accounting services to a covered entity involve access to protected health information.
  • An attorney whose legal services to a covered entity involve access to protected health information.
  • A consultant that performs utilization reviews for a covered entity.
  • An independent medical transcriptionist that provides transcription services to a physician.

RULES GOVERNING USE AND DISCLOSURE OF PHI
**Use and Disclosure Generally**

• Under HIPAA a covered entity can use and disclose PHI without an individual’s authorization for the following purpose or situations:
  • to the individual who is the subject of the information
  • for its own treatment, payment, and health care operations activities
  • Various other permitted uses discussed later

**May a Provider Disclose PHI to Its Business Associates?**

• **Answer.** Yes
  • HIPAA allows for disclosures to Business Associates without consent;
  • if there is a business associate agreement in place; and
  • the disclosure is consistent with the agreement (for treatment, payment or healthcare operations, or other disclosure not requiring consent).
HIPAA Security Rule

The HIPAA Security Rule requires covered entities and business associates to do the following:

• Implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity, and availability of electronic protected health information (ePHI) that is created, received, maintained or transmitted.
• Protect against any reasonably anticipated threats or hazards to the security or integrity of ePHI.
• Protect against any reasonably anticipated uses or disclosures of ePHI that are not permitted or required under the Privacy Rule.
• Ensure compliance with security by its workforce.

Business Associate Obligations

HIPAA Business Associate Agreements
BUSINESS ASSOCIATE AGREEMENT

Obligations and Activities of Business Associate. Business Associate agrees to:

• not use or further disclose PHI other than as permitted or required by the Business Associate Agreement or as Required By Law
• prevent use or disclosure of PHI other than as provided for by the Business Associate Agreement

SAFEGUARDS — ePHI & PHI

• A Business Associate must implement administrative, physical, and technical safeguards that reasonably and appropriately protect the confidentiality, integrity and availability of ePHI that it receives, maintains, or transmits on behalf of the Covered Entity
OBLIGATION TO MITIGATE

• The Business Associate must mitigate, to the extent practicable, any harmful effect that is known to Business Associate of a use or disclosure of PHI by Business Associate in violation of the requirements of this Agreement.

REPORT UNAUTHORIZED USE OR SECURITY INCIDENT

• The Business Associate must report to Covered Entity any use or disclosure of PHI not provided for by the Business Associate Agreement as well as any Security Incident of which it becomes aware.
NOTICE OF BREACH

- The Business Associate must notify Covered Entity of any Breach of Unsecured PHI as soon as possible, but in any event within at least sixty (60) calendar days from the date discovery of the breach
- Note that a shorter time frame may be provided in the BAA
- To the extent possible, the Business Associate should also provide the Covered Entity with the identification of each individual affected by the breach as well as any other available information required to be provided by the covered entity in its notification to affected individuals.

SUBCONTRACTORS/AGENT AGREEMENTS

- The Business Associate must ensure that any agent, including a subcontractor, to whom it provides PHI received from or created or received by Business Associate on behalf of Covered Entity agrees to the same restrictions and conditions that apply through the BAA to the Business Associate with respect to such information and agrees to implement reasonable and appropriate safeguards to protect ePHI.
COOPERATE WITH ACCOUNTING

Business Associate must:

• make internal practices, books, and records relating to the use and disclosure of PHI received from or created or received by Business Associate on behalf of Covered Entity available to the Secretary,
• in a time and manner designated by the Covered Entity or the Secretary,
• for purposes of the Secretary determining Covered Entity’s compliance with the Privacy Rule.

TRACK AND PROVIDE ACCOUNTING OF DISCLOSURES

Business Associate must:

• document such disclosures of PHI and information related to such disclosures as would be required for Covered Entity to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. 164.528.
• provide to Covered Entity or an Individual, information collected in accordance with the BAA to permit Covered Entity to respond to a request by an Individual for an accounting of disclosures of PHI in accordance with 45 C.F.R. 164.528.
SECURITY RULE

• Business Associate must comply with the Privacy Rules, the Security Rules, and other applicable provisions of HIPAA including, but not limited to:
  • implementing written policies and procedures,
  • conducting a security risk assessment, and
  • training employees who have access to PHI about the policies and procedures required by HIPAA.

MINIMUM NECESSARY RULE

• Business Associate agrees to limit its use, disclosure, and requests for use or disclosure to the minimum amount necessary to accomplish the intended purpose of the use, disclosure or request in accordance with the requirements of HIPAA.
PERMITTED USES AND DISCLOSURES BY BUSINESS ASSOCIATE

• Except as otherwise limited in the Business Association Agreement, Business Associate may use or disclose PHI to perform functions, activities, or services for, or on behalf of Covered Entity, provided that such use or disclosure would not violate HIPAA.

DISCLOSURE RULES

Business Associate may:
• disclose PHI for the proper management and administration of the Business Associate,
• provided that disclosures are Required by Law, or
• Business Associate obtains reasonable assurances from the person to whom the information is disclosed that it will remain confidential and used or further disclosed only as required by law or for the purpose for which it was disclosed to the person, and the person notifies the Business Associate of any instances of which it is aware in which the confidentiality of the information has been breached.
SANCTIONS

Business Associate must:
• Develop and apply appropriate sanctions for the non-compliance with covered entities’ Policies and Procedures.
• Document sanctions that are applied.
  • NOTE: “Sanctions” can be referred to as discipline or corrective action.

OBLIGATIONS OF COVERED ENTITY

• Covered Entity shall not request Business Associate to use or disclose PHI in any manner that would not be permissible under the Privacy Rule if done by Covered Entity.
• Covered Entity shall limit its disclosure of PHI to Business Associate to the minimum necessary.
QUESTIONS?

THANK YOU.