HR LEGAL PRIMER: BEST PRACTICES FOR ALLERGY PRACTICE

Penelope (Penny) J. Phillips, Attorney
Felhaber Larson
Minneapolis, Minnesota

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Strong Employee Handbooks – Required for Success

- Operating a medical practice carries the burden of complying with myriad laws and regulations
  - Ignorance of the law is **not** a valid defense
- It is imperative to draft, implement, and most importantly, follow, policies and procedures to ensure compliance with applicable federal, state, and local law
- Having compliant policies and training supervisors/managers on their implementation will decrease the potential risk for legal liability and exposure

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Strong Employee Handbooks – Required for Success

- Employee handbooks should be granted to provide the express "rules of the road" for employees, laying out the expectations placed upon employees for the employment relationship. Broadly, these policies should cover:
  - An employee's day to day experience (Scheduling, breaks, handling workplace complaints, etc.);
  - Job expectations (i.e. what can get you fired);
  - Wages and benefits; and
  - Ending the employment relationship (Termination/Resignation)

Essential Handbook Policy Topics

- At-Will Employment Acknowledgments;
- Anti-Discrimination/EEO Acknowledgments;
- Anti-Harassment;
- Attendance Policies;
- Benefits;
- Disability Discrimination/Accommodation Procedures; and
- Wage and Hour Provisions.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

At-Will Employment – An Overview

- The majority of employment relationships in the United States are **at-will**.
- Under the at-will employment doctrine, an employee can be terminated at any time, for any reason, as long as the reason is not otherwise prohibited by law.
- In other words, unless required by an employment contract or a collective bargaining agreement, an employer does not need "just cause" to fire an employee.

At-Will Employment – Handbook Best Practices

- Employment agreements and employee handbooks 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.
- Upon receipt of an employee handbook, employees should be required to sign an acknowledgment of receipt, which additionally indicates that the employment relationship is at-will.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

At-Will Employment – Handbook Best Practices

- 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.
- **However**, even though an employer **can** fire an employee for any reason, this does not mean that employers **should** do so. It is still a best practice to have a legitimate, well-documented reason to take employment action against an employee.

Attendance

- It is extremely important to draft, and follow, a neutrally applied attendance policy.
- Employers run into trouble when they do not treat employees similarly as one another, for example, through unequal enforcement of attendance.
- Having a policy in place to address this reduces the risk.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Attendance Policy Considerations

- What constitutes a violation of the policy?
  - Is showing up 5 minutes late a violation? 1 minute? 15?
- Under what circumstances will an employee's absence be excused?
  - What documentation is required for an employee's excused absence?
- What procedures are in place for the employee to inform their supervisor or manager of being tardy or an unplanned absence?
- How does an employee request time-off?
- What are the disciplinary consequences of an unexcused absence?
  - What are the consequences of an employee being "tardy" to work?

Why an Attendance Policy is Important

- Having an attendance policy in place is of paramount importance, because an employee's violation of the policy may serve as an employer's legitimate business justification to take adverse employment action.
- HOWEVER, make sure that your policy is not implemented on a discriminatory basis: for example, by holding female employees to strict compliance with the attendance policy but allowing male employees to violate it without consequence.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Anti-Discrimination Policy: Why Does it Matter?

- Having, and **following**, an anti-discrimination/ EEO Policy is crucial because the failure to do so and engaging in unequal treatment between employees may result in potential liability for discrimination.

Federal Anti-Discrimination Laws

- **Title VII**
  - Prohibits discrimination based upon race, color, religion, sex/gender or national origin.
- **Pregnancy Discrimination Act (PDA)**
  - Amended Title VII to prohibit discrimination based upon pregnancy, childbirth or medically related conditions.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Federal Anti-Discrimination Laws

- **Age Discrimination in Employment Act of 1967 (ADEA)**
  - Prohibits discrimination based on age against workers who are 40 years of age or older (Applies to employers with 20 or more employees).
- **Americans with Disabilities Act (ADA)**
  - Prohibits discrimination against qualified individuals with an actual, perceived, or record of a disability.

Federal Anti-Discrimination Laws

- **Equal Pay Act of 1963 (EPA)**
  - Prohibits sex based wage discrimination for performing substantially equal work.
- **Genetic Information Non-Discrimination Act (GINA)**
  - Prohibits discrimination against employees based upon genetic information.
- **Individual states may have their own additional anti-discrimination laws.**

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Handbook Best Practice – EEO Policy

- An employee handbook should contain a statement highlighting the company's commitment to Equal Employment Opportunities. For example:
  - "[Employer] is an equal opportunity employer. We celebrate diversity and are committed to creating an inclusive environment for all employees. [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 Statuses – Federal Law

- Race
- Color
- Creed
- Religion
- National origin or ancestry
- Sex
- Age
- Physical or mental disability
- Genetic information

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

What About Sexual Orientation?

- Sexual orientation is not expressly covered by Title VII, and the Federal Circuit Courts are split on whether sexual orientation is included under the umbrella of "sex."
  - *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248. (11th Cir. Mar. 10, 2017)—Held that "binding precedent" foreclosed action based on sexual orientation discrimination, but noted that discrimination based on "gender non-conformity" was actionable.
  - However, the Second Circuit, in *Zarda v. Altitude Express,* 883 F.3d 110 (2nd Cir. Feb. 26, 2018) held that "sexual orientation discrimination is properly understood as a subset of actions taken on the basis of sex," and therefore covered by Title VII.
    - The Seventh Circuit and the EEOC agree with the Second Circuit.

Protected Classes Under State and Local Law Also Apply

- Additional protected classes beyond those protected by federal law may be covered by state and/or local law.
  - Examples: Sexual orientation, gender identity, status with respect to public assistance, marital status, 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.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Protected Classes Under State and Local Law Also Apply

- This is especially relevant regarding compliance with anti-discrimination laws.
- For example, Title VII only applies to employers with 15 or more employees. However, State laws may cover employers 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.

Employment Actions That May Trigger Discrimination Claims

- Applications;
- Interviewing;
- Hiring;
- Promotions;
- Termination (including “constructive” discharge); and
- Other “material changes” in employment conditions.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Disparate Treatment Discrimination

- Employer's actions are motivated by discriminatory intent.
- Methods of Proof:
  - Direct Evidence—Evidence which establishes discriminatory intent without inference or presumption.
  - Circumstantial Evidence—Evidence does not directly establish discriminatory motive, but allows a jury to infer discriminatory motive.

Disparate Impact Discrimination

- No discriminatory intent required
- Employer has neutral policy or practice that adversely impacts one group more than another
- Defense:
  - Policy or practice is job-related and justified by business necessity

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Direct Evidence of Discrimination

- Direct evidence typically consists of clearly sexist, racist, or similarly discriminatory statements or actions by the employer:
  - "We're looking for a younger candidate for the position."
  - "We have to let you go because you are pregnant."
  - "We really want a male for this promotion."
- The "direct" in "direct evidence" refers to the causal strength of the proof.

Discrimination Prima Facie Case

- Without direct evidence of discrimination, the plaintiff must show a *prima facie* case:
  - Member of a protected class;
  - Was qualified for the position;
  - Experienced an adverse employment action; and
  - Received less favorable treatment than someone outside of the plaintiff's protected class.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Employer Defenses to Discrimination

- If a plaintiff establishes a *prima facie* case, that creates the presumption of discrimination.
- The burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for its actions.
- If successful, the burden shifts back to the plaintiff to offer evidence that the alleged reason of the employer is a pretext for unlawful discrimination.

Best Practices: Discrimination Defense

- The key to defending against a claim of discrimination is to have sufficient documentation of the legitimate, non-discriminatory reasons supporting the decision.
- The best way to prove you did not have a bad reason (*i.e.* an illegal reason) to take an employment action is to be in a position to prove you had a good reason for your actions. A good reason should be non-discriminatory, credible, and consistent with business practices.
- **Document, document, document!**

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Best Practices: Discrimination Defense (cont.)

- Internal policies should require that all decisions and events related to employee terminations/performance be documented as they occur.
  - Document performance appraisals – and be forthright in the appraisals.
  - Document all employment changes and employee complaints.
- You must be clear about why an employee has been disciplined/ terminated.
  - There is no law saying that an employee who has been fired has the immediate right to know why.
- But it is critical for the employer to have its story straight.

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?

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Anti-Harassment Policy – Why Does it Matter

- Employers must additionally implement a zero tolerance anti-harassment policy.
- The existence of such a policy is an employer's best line of defense against potential harassment claims.

Discrimination – Anti-Harassment Policy Requirements

- Employee handbooks must contain a provision addressing harassment in the workplace.
  - These policies should state:
    - 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
    - That retaliation is strictly prohibited, and that an employee will not be punished for making a claim or harassment.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Discrimination - Harassment

- Unlawful harassment is a form of discrimination which takes place at work (usually) and is based on unwelcome and offensive conduct.
  - Adverse treatment, or creation of a hostile work environment, **<u>because of</u>** the individual's protected classification.
- Two Types
  - Quid Pro Quo; and
  - Hostile Work Environment.

Sexual Harassment

- Male – Female
- Female – Female
- Female – Male
- Male – Male

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Sexual Harassment in the #MeToo Era

- As of January 2018, an ABC News Poll found that 72% of Americans think that sexual harassment is a "serious problem," and 83% think that it is a "problem."
- According to an October 2017 MIPO poll, 65% of U.S. residents believe that it is the employer's responsibility to prevent or solve sexual harassment problems in the workplace.
- Keep in mind, however, that harassment can occur as a result of any protected class status, not just sex.

Quid Pro Quo Harassment

- 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.
  - Explicit—Made an express condition of employment; or
  - Implicit—Employee who rejects advances is subsequently terminated, disciplined, transferred, etc.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Hostile Environment Harassment

- 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.
- **Repeated unwelcome attention/focus/discussion about someone's <u>protected class</u>** (race, color, religion, sex, age, national origin, disability, etc.) that a reasonable person would believe has created a hostile or intimidating working environment.

Hostile Environment Harassment (Cont.)

- The alleged harassment must be "sufficiently severe or pervasive."
  - According to the EEOC, petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality.
  - To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people (i.e. objectively offensive).
- May exist even if the harasser did not intend to offend.
- This can be based on words or conduct, whether directed at the victim or not.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

What Type of Behavior Could Create A Hostile Working Environment Based on Sex?

- Lewd jokes;
- Sharing sexual anecdotes;
- Sexual innuendos;
- Sexual gestures;
- Making sexual comments about someone's appearance, clothing, or body parts;
- Ogling, leering, or whistling (staring in a sexually suggestive or offensive manner); and
- In appropriate touching or "grooming," including kissing, hugging, pinching, patting, or rubbing.

What Type of Behavior Could Create A Hostile Working Environment Based on A Protected Class?

- Talking about negative stereotypes associated with a protected class;
- Mimicking an accent;
- Nicknames;
- Making negative comments about an employee's religious beliefs;
- Using racist slang, phrases, or nicknames;
- Making remarks about an individual's skin color or other ethnic traits; and
- Displaying racist drawings, or posters, bumper stickers or signs that might be offensive to a particular group.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Harassment Outside of the Workplace

- Harassment does not need to occur at the workplace or during normal working hours in order to create a hostile work environment.
- For example, online bullying or harassment on social media outside of work hours may create a hostile work environment for employees at work.

Anti-Harassment Policies – Social Media Considerations

- The anti-harassment policy should additionally indicate that harassment outside of work or on social media may also violate the employer's zero tolerance policy against harassment.
- If an employee is cyber-bullying a coworker on Facebook, such conduct may still be covered by an employer's anti-harassment policy.
- Companies should adopt social media policies indicating that any online activity that adversely affects the employee's job performance or the company's legitimate business interests may result in disciplinary action.
- Social media policies should prohibit an employee representing themselves as a spokesperson for the employer without prior employer approval.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Unlawful Harassment – Key Concepts

- What is "inappropriate behavior" is in the eye of the beholder (it is subjective) but must be objectively offensive to a reasonable person.
- The intent of the person engaging in the bad behavior is irrelevant.
- The behavior does not have to be "directed" at the person who is offended.
- The person does not need to complain to the person engaging in the behavior or tell them to knock it off.
- There is a difference between tolerating behavior (what is voluntary) versus participating in the behavior (when it is welcome).

Best Practices – Anti-Harassment Policies

- Having an easy-to-understand, comprehensive, and enforced anti-harassment policy is **non-negotiable.**
  - The policy must provide a mechanism for an employee to report the behavior so that the employer can conduct an investigation and stop the behavior if it is occurring.
  - The policy must further provide that 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.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Best Practices – Anti-Harassment Policies

- The anti-harassment policy must provide that an employee will not be retaliated against for making a complaint of harassment.
- The policy should additionally provide multiple individuals to whom the employee can lodge a compliant, and not be limited, for example, to the employee's supervisor, in the event that the supervisor is the one perpetrating the alleged harassment.
- **However, having a policy is only half of the equation, the policy must also be consistently implemented.**

Employer Liability For Harassment

- The standard to judge an employer's potential liability for harassment will depend upon who is perpetrating the harassment and what their relationship is to the victim.
  - Harassment by a co-worker;
  - Harassment by a supervisor; or
  - Harassment by a customer/patient.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Employer Liability: Co-Worker Harassment

- An employer is liable for co-worker's harassment if the employer is aware of the harassment and fails to take timely and appropriate action. *Vance v. Ball State Univ.*, 570 U.S. 421 (2013).
- 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.

Basic Harassment Investigation Procedure

- Select an appropriate investigator;
- Gather policies and procedures;
- Collect facts and relevant evidence;
- Determine witnesses and involved individuals;
- Determine who, what, when, where, why, and how;
- Evaluate credibility;
- Identify and eliminate extraneous information; and
- Make a recommendation for appropriate corrective action.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Practical Tips for Investigation Documentation

- Timely preparation;
- Accurate and comprehensive;
- Describe previous problems;
- Provide guideposts;
- Consistent;
- Nonjudgmental/Non-conclusory;
- Avoid Extraneous material; and
- Exhibit Quality.

Best Practices - Anti-Harassment Investigations

- When possible, employers must conduct investigations into the misconduct — and document these investigations — before terminating or disciplining an employee.
- Do not discuss the circumstances surrounding the discipline/ termination with anyone who does not have a legitimate need to know.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

What Is Timely and Appropriate Action?

- As soon as employer knows or should reasonably know that harassment may have occurred, the employer is required to take timely and appropriate action, including:
  - A prompt, thorough, and fair investigation;
  - Effective protective steps; and
  - Monitoring.
- **Managers and supervisors must be trained on when to recognize a report of harassment and what steps to take following said report, and policies should be drafted to cover these processes.**

Employer Liability: Supervisor Harassment

- An employer will be held **strictly liable** for harassment if it is done by a supervisor and culminates in a tangible employment action.
  - *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Employer Liability: Supervisor Harassment

- ***Faragher/Ellerth* Defense:** If the supervisor's harassment does not culminate in a tangible employment action, the employer can avoid liability under the *Faragher/Ellerth* defense 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.
- **This is why it is so important to have a policy and procedure for reporting harassment in place.**

Employer Liability: Harassment by Patients/Clients

- An employer cannot stand by when their employee is being harassed by a patient. The employer must **take action**.
- **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.
- **Take action** to stop the harassment. An employer's actions must be reasonable. Appropriate responses depend on the circumstances, and may include:
  - **Informing** the patient that they will be banned if they continue harassment;
  - **Banning** the patient; and
  - **Finding a way** that the employee will not need to deal with that patient.
- **Do not retaliate** against the employee.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Manager Training is Paramount

- Employers must train their managers/supervisors to spot and act to prevent harassment.
- Office Managers/Supervisors/HR usually have direct knowledge of employee's situation.
- Ignorance of the law surrounding these processes is not a defense to a claim.
- Existence of handbooks or policies is not sufficient to avoid liability—Managers and HR must actually enforce these policies.
- Providing harassment training is essential to establishing an affirmative defense.
- Managers must be trained to document any allegations, and investigations, into harassment.

Harassment Hypothetical #1

- 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. Johnson.
- What should you do?

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Harassment Hypothetical #2

- 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?

Other Potential Policies to Consider Regarding Employee/Workplace Conduct

- Drug-free workplace policies;
- Anti-violence policies;
- Policies regarding gifts received from patients;
- Anti-solicitation requirements;
- Policies governing outside employment; and
- Policies addressing otherwise offensive behavior.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

State Law Pitfalls – Drug Testing

- Some states place certain restrictions on when employees may be tested for drugs and alcohol.
  - Some states place no restrictions on workplace drug testing; and
  - Others place strict requirements on when an employee may be tested and require the testing be conducted through a compliant drug testing policy.
- Some states prohibit an employee from being terminated as a result of using medical marijuana.
- Employee handbooks should contain a statement that the employer will not tolerate the use of drugs/alcohol while on the job, laying out the consequences for employee non-compliance.

Disabilities and Reasonable Accommodations

- In addition to prohibiting discrimination on the basis of an employee's disability, employee handbooks should have policies in place that establish the processes an employee can follow in order to request a reasonable accommodation related to any disability.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Disability Discrimination

- The Americans with Disabilities Act ("ADA") applies to employers with 15 or more employees. State law may prohibit discrimination against disabled individuals who work for employers with fewer employees.
- The ADA prohibits discrimination against an individual who:
  - Has a disability; and
  - Is otherwise qualified for their position.
- The ADA also requires employers to grant reasonable accommodations to qualified individuals, unless doing so would impose an "undue hardship" on the employer.

What is a Disability Under the ADA?

- A person is disabled under the ADA if he or she:
  - Has a physical or mental impairment that substantially limits one or more major life activities;
  - Has a record of such an impairment; or
  - Is "regarded as" having such an impairment.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

"Major Life Activities"- Broadly Defined

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working
- Sitting
- Reaching Interacting with others
- Major bodily functions (immune system functions, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions)

Who is a "Qualified Individual"?

- A person who meets the legitimate skill, experience, education or other requirements of a position that he or she holds or seeks, and who can perform the <u>essential functions</u> of the position with or without an accommodation.
- A person is <u>not qualified</u> if he or she poses a significant risk to the health or safety to himself, herself, or others, and if the employer cannot eliminate that risk by reasonable accommodation.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

What is an Essential Function?

- Essential functions are the fundamental duties of a position.
- The EEOC has listed several, non-exhaustive factors to consider whether a function is essential:
  - The employer's judgment;
  - A written job description;
  - The amount of time spent performing the function; and
  - Consequence of not requiring the function to be performed.

What is a Reasonable Accommodation?

- A modification to a job application process or to the work environment that:
  - Enables a qualified applicant to be considered for employment;
  - Enables a qualified employee to perform essential job functions; or
  - Enables a qualified employee to enjoy equal benefits and privileges as other non-disabled employees.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Reasonable Accommodation Examples

- Making facilities readily accessible and usable;
- Job restructuring (altering when or how an essential job function is performed);
- Modified work schedules;
- Obtaining or modifying equipment or devices;
- Modifying examinations, training materials or policies;
- Providing qualified readers and interpreters;
- Allowing an employee to provide equipment or devices that an employer is not required to provide; or
- Providing a leave of absence.

Undue Hardship Factors

- An employer need <u>not</u> provide a reasonable accommodation if doing so would impose an undue hardship.
- Undue hardship is defined as a "significant difficulty of expense," considering:
  - The cost;
  - The employer's size and resources;
  - The employer's structure; and
  - The impact of the accommodation on the employer's operation.

How Do You Know When An Employee Might Need Reasonable Accommodation?

- Employee asks for a change in the way job is performed or the working conditions; or
- Informs a manager or human resources that workplace problems are due to a medical condition.
  - Employee handbooks should have a procedure in place outlining the interactive process for employees to make reasonable accommodation requests.

Typical Interactive Process

- Employee/applicant requests a reasonable accommodation based on his or her disability.
- HR and supervisor engage in the “interactive process” with the employee/ applicant to determine what (if any) accommodation is reasonable.
- Determine whether a proposed accommodation imposes an undue hardship.
- Notify the employee/applicant in writing that his or her requested accommodation is approved or denied.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Reasonable Accommodation Considerations

- The employee does not get to choose their reasonable accommodation – the employer just has to make **a** reasonable accommodation available.
- Employers do not need to accommodate a disability that creates a direct threat.
- It is extremely important to train managers to recognize accommodation requests and establish a process to follow for evaluating and granting reasonable accommodations.

Leave as a Reasonable Accommodation

- An employee may request <u>temporary</u> leave as a reasonable accommodation.
- An indefinite leave, however, is **not** a reasonable accommodation under the ADA.
- The Tenth Circuit recently articulated three factors to judge the reasonableness of a temporary leave request:
  - The essential duties in question;
  - The nature and length of the leave sought; and
  - The impact on fellow employees.

<u>Hwang v. Kan. State Univ.</u>, 753 F.3d 1159 (10th Cir. 2014)

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

ADA Example

- Dr. Hansen is a renowned ENT surgeon. She has performed hundreds of successful surgeries and is liked among colleagues. In recent months, Dr. Hansen began suffering from symptoms tied to Stargardt disease, a degenerative disorder affecting one's vision. Dr. Hansen's disorder only affects her sporadically and without any pattern. She recently requested special magnifying glasses for use during surgeries and has occasionally requested that nurses help her read monitors or documents with small print. She has not told you (the HR manager) about the disorder, and doesn't believe the disorder affects her work performance. You recently overheard nurses complaining and worrying about this problem.
- What should you do?

FMLA – Basic Overview

- The Family Medical Leave Act (FMLA) provides that qualified employees receive:
  - 12 weeks of unpaid leave during each FMLA year;
  - Reinstatement to the same or equivalent position;
  - Continued benefits; and
  - No discipline for time away from work.

FMLA Leave Eligibility

- The FMLA **only** applies to employees who meet the following criteria:
  - Employee has been employed for 12 months;
  - **AND**
  - Has worked the equivalent of 1,250 hours before beginning the leave;
  - **AND**
  - Is employed at a work site where **50** or more employees are employed.

FMLA Leave Policy – Best Practices

- In the event that your clinic is covered by the FMLA, your employee handbook should contain procedures outlining when an employee becomes eligible for FMLA leave, as well as the procedure/point of contact that employees should seek out in the event that they wish to take FMLA leave.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Non-FMLA Employee Leave

- Even if the FMLA does not apply, state and local law may provide an employee the right to take job-protected medical leave.
- An employee potentially could be entitled to take leave from work as a reasonable accommodation under the ADA, as discussed above.

Other Potential Leave/Break Considerations

- Smoking breaks;
- Time off for jury duty;
- Time off for election voting;
- Short term military leave;
- Bone marrow/organ donation leave;
- Bereavement leave; and
- Pregnancy and parenting leave.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

FLSA Wage and Hour Requirements

- The Fair Labor Standards Act ("FLSA") addresses overtime, minimum wage, recordkeeping, equal pay, and overtime. See 29 U.S.C. § 201, *et seq*.
- Applies only if employment relationship exists between the "employer" and "employee," does **not** apply to independent contractors.
- 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.

What is "Work" Under the FLSA?

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

FLSA Handbook Basics

- Employee handbooks should contain a process for which employees submit their timesheets.
- The employee handbook should contain a definition of the "work week" as well as a definition of the relevant reoccurring "pay period."
- Handbooks should contain 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.
- Handbooks should contain a provision stating that employees will not incur overtime without the express prior approval of management.
  - However, it's important to note that even with this provision in place employees must be compensated for all hours worked, even if those hours results in overtime.

FLSA Record-Keeping Requirements

- Department of Labor regulations state that employers should preserve all payroll records for a period of at least three years, and states that payroll records must include:
  - The total hours the employee worked each day;
  - The employee's regular hourly pay rate; and
  - The total wages paid each pay period.
- Without records, employers have little defense to claims of unpaid overtime wages.
  - Usually, employees bear the burden of showing, with **definite and certain evidence**, that they performed work for which they were not properly compensated.
  - However, if an employer fails to maintain accurate records, an employee only needs to produce "**sufficient evidence** to show the amount and extent of that work as a matter of **just and reasonable inference.**

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

FLSA Record-Keeping Requirements Best Practices

- Employers should have record-keeping policies in place which maintain employee pay records in order to defend against any potential FLSA violation.
- All employee timesheets should be reviewed by a supervisor or manager after their submission, and all employees should be required to verify that their submitted timesheet accurately reflects the amount of time worked.

Exempt v. Non-Exempt Employees

- Employers must make sure they properly classify employees as exempt or non-exempt under the FLSA.
  - Exempt employees receive no protection under the FLSA.
- Generally two requirements:
  - Duties Test; and
  - Salary Test (not less than $455.00 per week).

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Exempt v. Non-Exempt Employees – Best Practices

- Employers should regularly review job descriptions to ensure that employees are accurately classified as either exempt of non-exempt.
- Employee handbooks should expressly state that overtime pay is strictly limited to non-exempt employees.

Exemptions

- Executive exemption;
- Administrative exemption;
- Professional exemption (includes physicians);
- Outside sales exemption; and
- Computer-related occupations.
- Employers must make sure they **properly** classify employees as exempt or non-exempt under the FLSA.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Common FLSA Exemption Mistakes

- Do not make the mistake of assuming that a salaried employee or manager is exempt from overtime pay based on his or her title.
  - Simply because an employee's job title is "manager" does not necessarily mean that they qualify under the FLSA's executive exemption.
- Employers must pay non-exempt employees for <u>all</u> time spent working.
  - This includes "off-the-clock" time spent training, traveling, responding to e-mails from home, etc.
- Employers should thoroughly review employee job classifications to ensure they are categorized properly, as a mistake as to exemption status carries the risk of employer liability.

Other Handbook Provisions Related to Employee Pay

- Employers should consider if they offer the following benefits, and if so include provisions in their handbook governing how they are earned and distributed:
  - Employee bonuses;
  - Paycheck deduction;
  - Pay advances; and
  - Expense reimbursements.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

State Law Pitfalls – Employee Pay Requirements

- State law generally places requirements on when an employee must be paid.
- Terminated employees generally must be paid within a set period of time upon demand for their final payment.
- 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, an employee may be entitled to a payout of their PTO bank upon termination.

State Law Pitfalls – Employee Pay Requirements

- Handbooks should accordingly address:
  - The employees' regularly scheduled pay day;
  - Whether an employee is entitled to a payout of any PTO or accrued sick time upon termination; and
  - Whether an employee is entitled to a payout of any accrued PTO or sick time upon resignation.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Employee Breaks – State Law Pitfalls

- The FLSA does not require that employees receive lunch or rest breaks, however, state-specific law may place additional requirements upon employee breaks.
- For example, Minnesota law requires that employers provide employees with adequate time to use the restroom every four hours and sufficient time to eat a meal if the employee is working for eight or more consecutive hours. Minn. Stat. § 177.253 – 177.254.
- Minnesota administrative rules further require that rest periods of less than 20 minutes may not be deducted from total hours worked (i.e. are "paid"), and that "bona fide meal periods" of 30 minutes or more are not counted as hours worked. Minn. R. 5200.0120.

Employee Breaks – Handbook Considerations

- Accordingly, employee handbooks should lay out with particularity the non-exempt employees' entitlement to meal and break periods as required under applicable State law.
- For example, the policy should lay out:
  - How long employees get as a lunch break;
  - How long the employees' shift must be to receive a lunch break;
  - Whether the lunch break is paid or unpaid; and
  - Whether the employee is allowed to leave the clinic during their break.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Other Handbook Provisions Related to Other Employee Benefits

- Other than pay, policies should be drafted that cover any other benefits the employees receive.
  - Medical;
  - Dental;
  - Parking;
  - HSAs;
  - Life insurance;
  - Vision plan;
  - Retirement plans; and/or
  - An employee assistance program.

Vacation/PTO/Leave Considerations

- Handbook policies should additionally cover whether and how an employee receives vacation/PTO.
- Vacation Pay/PTO
  - Separate from sick leave?
  - When/how is it earned?
  - Rollover?
  - What happens upon termination? Is unused PTO paid out?
- Sick Leave Policy
  - State/Local laws may apply.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Employee Advancement/Development

- Some employers, based on practice size and other facts, may consider having handbook provisions covering employee advancement and development:
  - Professional development support/leave;
  - Promotion procedures;
  - Whether certifications, trainings, and licensing requirements are paid for by the employer;
  - Recognition programs; and
  - Performance incentives.

HIPAA Considerations for Clinical Workplaces

- Employment policies in clinical settings must have a mechanism in place to address the requirements imposed by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).
- HIPAA compliance is **not** optional.
- The HIPAA Privacy Rule applies to "protected health information" (PHI) which includes all "individually identifiable health information" which is transmitted or maintained in any format or medium.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Protected Health Information

- Includes information that identifies a person such as:
  - Names or initials;
  - Address;
  - Date of Birth;
  - Social Security Number; and
  - Date of Visit.
- Notably, photographs or videos of patients which contain any portion of the patient's face, or any tattoos are also considered to be PHI.

HIPAA Handbook Best Practices

- Employee handbooks should contain provisions prohibiting employees from disclosing information regarding a patient's protected health information, and that only the minimum amount of medical information required to accomplish a job is utilized.
- Handbooks should expressly prohibit taking **photographs** or **videos** of patients on the employees personal cellphones/cameras.
- Policies should additionally provide a requirement that employees report any potential HIPAA violations they may observe.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

HIPAA Hypothetical

- It comes to a nursing home employer's attention that an employee is posting photographs of nursing home residents to the employee's personal Instagram account. The patients' faces are covered, but the facilities' logo can be seen in the background of the photographs.
- What should the employer do?

HIPAA Example – Minimum Necessary Disclosure

- In a recent case, a nurse was terminated when she loudly stated that other technicians should use gloves when caring for a patient who had Hepatitis C. Another patient overheard this statement and filed a complaint because she felt that the nurse was too loud.
- The court upheld the nurses termination, noting that the nurse effectively disclosed the patients protected health information by not providing the "minimum necessary" amount of information to accomplish the task.

Hereford v. Norton Healthcare, Inc. et al., 2017 Ky. App. Unpub. LEXIS 525 (Ky. Ct. App. July 21, 2017).

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Provisions Related to Leaving Employment

- Employee handbooks should contain provisions governing what will happen when employment ends:
  - What constitutes a voluntary resignation?;
  - What happens to banked PTO upon termination? Is it different than following a 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).

State Law Pitfalls – Personnel File Access

- Current and former employees may have a right to request either an inspection or a copy of the documents in their personnel file, depending on relevant state law.
- What documents are required to be maintained in a personnel file vary based on state law.
- Employers should have internal policies, not included in the handbook, regarding personnel file access procedures, as well as what should be stored in an employee's personnel file.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

State Law Pitfalls – Background Checks/ Criminal Records

- Some states place certain restrictions on when employers may ask an employee regarding their criminal record or conduct a background check on employees.
- For example, some states have "ban the box" laws which prevent employers from inquiring if applicants have a criminal record.
  - These laws are designed to give convicted individuals a "second chance" and eliminate common employment barriers.

Final Thoughts: Employer Best Practices

- It is critical for all employers to have policies in place that address:
  - At-will status;
  - Categories of employment (exempt v. non-exempt);
  - Internal complaint and harassment procedures;
  - Reasonable accommodation policy and protocol;
  - Work hours, overtime, benefits, accrued time off, and medical leave;
  - Attendance, conduct, email and computer usage, personnel files, social media use; and
  - HIPAA.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Final Thoughts: Train Managers and Supervisors

- Existence of handbooks or policies is not sufficient to avoid liability—Managers and HR must actually enforce these policies.
- Providing harassment training is essential to establishing an affirmative defense.
- Managers and HR usually have direct knowledge of employee's situations and are the first point of contact when employees have questions.

Final Thoughts: Implement and Enforce Policies

- Once clear policies are created, employers must:
  - Distribute and explain written policies to all employees.
  - Receive an acknowledgment from all employees acknowledging receipt of the written policies.
  - Follow the policies – and apply the policies consistently with all employees.
  - If employees are unionized, consult CBA before disciplining.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

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.

Final Thoughts: Takeaway Tips

- Clear and consistently applied policies;
- Clear and enforced internal complaint procedures;
- Document, Document, Document;
- Bring in HR or legal counsel early in a situation to ensure that company procedures are properly followed and all complaints are treated consistently;
- Allow HR to make employment decisions.

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018

Questions?

HR LEGAL PRIMER: BEST PRACTICES FOR ALLERGY PRACTICE

Penelope (Penny) J. Phillips, Attorney
Felhaber Larson
Minneapolis, Minnesota

AIM TOWARDS THE FUTURE: Choose Your Path To Success
AAAAI Practice Management Workshop, July 20-22, 2018