

Personnel Law The Basics and Trends

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Employees are an investment. Let us help manage the risks.

Employment-at-will

- What it is
- What it is not
- When an employee is not at-will



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What It Is

- Employment-at-will is the general rule governing employment relationships in Missouri
- It allows the employer or the employee to terminated the employment relationship at anytime for any reason
- It allows employers to make bad decisions but not illegal decisions



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What It Is Not

- It does not allow an employer to terminate an employee for an illegal reason
 - Such as discrimination, retaliation, or in violation of an employee's constitutional rights
- It is not a defense to a claim by an employee that the employer made a decision for an illegal reason



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When an Employee Is Not At-will

- When the employee has an individual employment contract for a definite period of time
- When the employment relationship is governed by a collective bargaining agreement
- When the employment relationship is governed by a merit system
- When the employee is an elected official



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Discrimination, Harassment and Retaliation

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act
- Age Discrimination in Employment Act
- Missouri Human Rights Act



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Title VII

- Applies to employers with 15 or more employees
- Prohibits discrimination and harassment based on an employee's race, color, religion, sex, and national origin
- Prohibits retaliation for making a complaint or participating in an investigation



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Harassment

- Employers are responsible for harassment of an employee whether the harasser is a co-worker, supervisor, elected official, or a member of the public
- Harassment is not just sexual harassment but any protected class
 - Race or religion is often a basis for harassment



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Americans with Disabilities Act

- Employers must provide reasonable accommodation to a qualified individual with a disability
- Employers must engage in the interactive process with an employee with a disability
 - Employer and employee work together to determine a reasonable accommodation
 - Ultimate decision rests with the employer
- Reasonable accommodation ideas - www.askjan.org



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Marijuana

- Legalization by states for medical and in some cases recreational use
- Remains illegal under federal law
- Remains illegal under Missouri law
 - There is an effort to get the issue on the ballot
- ADA does not protect individuals currently using illegal drugs
 - Your drug policies are safe for now



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Drug Use Policies

- Keep an eye on changes to the laws in this area
- Prepare now for how you will handle potential changes in the law
 - Are some positions more dangerous and require greater regulation
 - Police, fire, public works, any position that operates a governmental vehicle
 - Update policies regarding any medications that affect the ability to perform the duties of the position



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Age Discrimination in Employment Act

- Prohibits age discrimination against an applicant or employee who is at least 40-years-old
- Allows mandatory retirement in some cases
 - When the employer can show that age is a bona fide occupational qualification
 - Police officers
 - Firefighters



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Missouri Human Rights Act

- Prohibits discrimination based on race, color, religion, national origin, ancestry, sex, disability, and age
- Imposes individual liability on decision makers as well as liability on the employer
- Punitive damages may be imposed on local government
- “Contributing Factor Analysis” – did a protected characteristic play any role in the decision



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Pregnancy Discrimination Act

- The Pregnancy Discrimination Act amended Title VII to prohibit sex discrimination based pregnancy, child birth, or related conditions
- Renewed enforcement emphasis by the EEOC and the Department of Justice
- Areas of focus include: leave policy; return to work policy; and light duty policy
- Avoid paternalistic approaches with a woman who is pregnant



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Pregnancy EEOC Enforcement

- May be entitled to a reasonable accommodation under the ADA
- Must treat an employee who is pregnant the same as any other employee with a temporary disability
- EEOC requires an interactive process between the employer and the employee
- EEOC will take action when policies require an employee who is pregnant to take leave when she reaches a specific point in the pregnancy



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Sexual Orientation and Gender Identity

- EEOC interprets Title VII's prohibition of sex discrimination as applying to discrimination based on gender identity or sexual orientation
- Missouri court found sexual orientation discrimination is not covered by the MHRA prohibition of sex discrimination Pittman v. Cook Paper Recycling Corp. WD77973 (W.D. Mo. 2015)



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Restrooms and Locker Rooms

- Potential violation of Title VII
- Not an issue in your workplace now
 - Determine how you will handle it
 - Allow to use the facilities relate to the gender with which the person identifies
 - Single occupant employee restrooms
 - Cannot single out an individual for different treatment



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Same Sex Marriage and Employee Benefits

- If an employer provides benefits for a spouse
 - The same benefits must be provided to a same sex spouse



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Workers' Compensation Retaliation

- The Missouri Supreme Court changed the standard from “sole cause” to contributing factor for claims of retaliation under the Missouri Workers’ Compensation law
- *Templemire v. W&M Welding, Inc.*, 433 S.W.3d 371 (Mo. banc 2014)



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You Are the Government

- Employees entitled to protection of constitutional rights
 - First Amendment
 - Due Process
 - Search and Seizure



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First Amendment

- Freedom of speech
 - Employees are free to speak on matters of public concern as private citizens
 - Job related restrictions are permitted
 - It's a balance
- Political affiliation



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Due Process

- A property or liberty interest must be implicated
- A liberty interest is implicated when an employee's good name, reputation, honor, or integrity is at issue
 - Why you should not speak about employment issues
 - If you do, an employee may be entitled to a name clearing hearing



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Search and Seizure

- Citizens are to be free from unreasonable searches and seizures
 - Employer's property
 - Policies to make clear that the employer's property may be searched at any time, including desks, vehicles, computers, phones, etc.
 - Can be searched if the employee does not have a reasonable expectation of privacy in the item
 - Employee's property
 - Employees have a more of a reasonable expectation of privacy in personal items



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What Does It All Mean

- Do not count employment-at-will as a defense when an employee alleges that the employment decision was made for an illegal reason
 - Such as discrimination, retaliation, harassment, etc.



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What You Should Do When Making Employment Decisions

- Document
 - Keep hiring documents, including ads for positions
 - Not just the final decision but all discipline and counseling
- Follow your written policies and unwritten practices
 - Keep your policies up to date for changes in the law and changes in your practices
- Be consistent
 - Decisions should **not** be based on personal feelings about an employee



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Wage and Overtime

- Fair Labor Standards Act sets minimum wage and overtime standards
 - Missouri minimum wage is set by RSMo §290.502 with annual adjustments
- The FLSA excludes from coverage, so long as not subject to civil service rules:
 - Elected officials
 - Their personal staff
 - Certain policy making officials



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FLSA Provisions for Governmental Employers

- Compensatory time off
- Overtime rules for firefighters and police officers



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Compensatory Time Off

- Public employers may provide compensatory time off in lieu of overtime pay if:
 - Provided in a collective bargaining agreement
 - Agreed to by the employer and the employee before the work is performed
- Caps on accumulated compensatory time
 - 480 hours for all public safety, emergency and seasonal employees
 - 240 hours for all other employees
 - Must pay overtime for all hours worked after reaching cap



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Use of a Work Period for Firefighters and Law Enforcement Officers

- Local governments may employ firefighters and law enforcement officers on a work period of 7 to 28 days for determining overtime rather than a workweek
- Overtime must be paid if the hours worked during the work period exceed the hours set out in the Department of Labor's regulations



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FLSA Rule Change

- Updates the exemption for executive, administrative and professional employees ("white collar" exemption)
- Goes into effect December 1, 2016
- Increases the salary requirement from \$455 per week to \$913 per week to be eligible for the exemption
- The change does not affect the duties requirement
 - Executive must manage the business
 - Administrative must perform office work and regularly exercise discretion or independent judgment



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Effect of the FLSA Rule Change

- Only impacts employees the government claims are exempt from overtime based on the white collar exemption
 - Employee must still meet the duties test
 - If not, then not exempt
 - Employee must meet the higher salary threshold
 - If not, then
 - Can pay overtime or agree on comp time
 - Increase salary
 - Realign work loads



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Reevaluate Exempt Status

- The rule change provides an opportunity to re-evaluate the exempt status of your employees



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Family and Medical Leave Act

- Provides up to 12 weeks of unpaid leave during a 12 month period to qualified employees for the birth of a child, placement of an adopted or foster child, care for a spouse or child with a serious health condition, or for the employee's own serious health condition
- The time off can be intermittent



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FMLA Military Caregiver Leave

- An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered veteran with a serious injury or illness may take up to 26 weeks of unpaid leave in a 12 month period to provide care for the veteran
 - The veteran was a member of the armed forces including the guard or reserves
 - Was discharged under conditions other than dishonorable
 - Was discharged within 5 years before the employee first takes caregiver leave



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FMLA Military Family Leave

- Exigency leave when a family member is deployed to a foreign country or notified of a pending deployment
- An employee who is the spouse, parent, son, or daughter of the military member is entitled to take up to 12 weeks of leave for qualifying exigencies such child care and school activities, attending military ceremonies, financial and legal arrangements, counselling, etc.



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FMLA Adult Child Care

- An eligible employee may take up to 12 weeks of leave to care for an adult child who
 - Has a disability
 - Is incapable of self care due to the disability
 - Has a serious health condition
 - Needs care due to the serious health condition



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FMLA Same Sex Marriage

- Effective March 27, 2015, the Department of Labor modified the definition of "spouse" to include legal same-sex marriages
 - The change recognizes all legal marriages and common law marriages
 - If the marriage was legal in the place of the celebration
 - And the marriage could have been entered into in at least one U.S. state



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FMLA Covered Employer and Eligible Employee

- All public agencies are covered employers
- To be an eligible employee the employer must have at least 50 employees within 75 miles of the employee's worksite



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USERRA

- Generally requires reemployment of returning service members with the same seniority, status, pay, and all other benefits had their employment not been interrupted
- There are time limitations for seeking reemployment based on the length of the deployment
- Defenses include changed circumstances, like a reduction in force



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I-9 Forms

- I-9 forms must be completed for all new hires
- I-9 audits have been on the rise
 - May increase further depending on election outcome
- Maintain I-9 forms in a separate file



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Record Keeping

- Local retention board sets time requirements for local governments to maintain records often longer than the minimum set by employment laws
- Maintain medical records and I-9s separate from personnel files
- Do you know what files are maintained
 - Do departments or supervisors maintain separate files



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Preservation of Evidence

- Duty to preserve evidence arises when you reasonably become aware that you may face a lawsuit
- You must preserve all potentially relevant evidence
 - This includes electronic evidence not just paper evidence
- Do you have control over the evidence
 - If so, you must preserve it
- Stop any automatic actions regarding destruction of backup files



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Example

- Sexual harassment
 - Text messages, email, offending poster, cards, notes, voicemail messages, etc.
 - Anti-harassment policy
 - Changes to the policy - maintain older versions
 - Discipline records
 - Official records
 - Supervisor's notes
- Investigation into the harassment


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Posting requirements

- State and federal statutory requirements for posting information regarding employment law
- Federal and Missouri Required Posters can be found at
 - <http://labor.mo.gov/posters>
- Keep them up to date


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Questions?


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