


**Human Resources for
Non-Human Resource Professionals**

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Session Objectives

- Selecting, Interviewing, Hiring, Evaluating, Disciplining & Terminating Staff
- Policy Manuals
- Hot Topics
- Resources



Preparing to Hire Staff

- Create a job description for each position and be sure to list the **Essential Job Functions**
- Be clear and specific in describing the duties associated with the position
 - "That's not in my job description."
- Develop a list of **qualities** you're looking for in each position
 - *Skills can be learned. You're looking for quality people that "fit"*
- Have standard employment application ready, along with state & federal tax documents (W-4) and INS Form I-9 (*I-9 completed after hire*)

Prepare Job Descriptions

- Job Title
- Responsibilities
 - For lifeguards, consider "**Help** prevent accidents...."
- Necessary Skills
 - Distinguish between primary and secondary skills.
- Experience
 - Be prepared to prove that the "experience" is essential
- Credentials
- Essential Job Functions
- Who the person would report to

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Interviewing Candidates


- Carefully select and train your *Interviewers!*
 - Not everyone knows how to conduct an interview
- An interviewer who doesn't know the right questions to ask isn't very effective
 - Trend toward behavior-based questions
- Avoid potential lawsuits by asking "appropriate" questions



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Inappropriate Interview Questions

- Age
- Race / Family background
- Marriage
- Family (Spouse, Kids, life partner)
 - Including capacity to give birth, birth control
- Child care
- Medical conditions
- Sexual orientation (some states)



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“Illegal Questions”

- **Asking** the question is not illegal.
- Denying employment based upon the answer is.
 - It’s the discriminatory intent behind the question that is illegal.
- So to avoid having to defend a claim, don’t ask the question!

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Title VII of the Civil Rights Act of 1964

- A federal law which establishes *protected classes*: race, color, religion, sex or national origin.
- Typical claims:
 - Failure to hire
 - Wrongful termination
 - Failure to promote
- Must show that the employment action was discriminatory

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Sexual Orientation Discrimination

- Not covered under Title VII
- However, 16 states *plus* the District of Columbia have added actual or perceived sexual orientation as a protected class to their state employer discrimination laws
 - CA, CT, HI, IL, ME, MD, MA, MN, NV, NH, NJ, NM, NY, RI, VT and WI

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Other Inappropriate Interview Questions


- Arrest record
 - You **can** ask about felony convictions
- Birth place
- Of what country are you a citizen?
- What is your native language



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What about asking during an interview


- Of what country are you a citizen?
- What is your native language?
- Maiden name? Changed name?
- List all clubs or societies to which you belong.
- Who is the nearest relative we should notify in an emergency?



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Interviewing Candidates

- Have an interview plan.
 - It is helpful to have a list of standard interview questions which are asked to all applicants
 - Have questions prepared regarding the applicant's resume/application
- Take notes during the interview or immediately following. Date and sign them.
- **Do not** take notes regarding protected classes (age, race, nationality, ability, etc.)



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Interviewing Candidates

- **The interview is a two-way street**
 - You try to get information about the candidate
 - The candidate tries to get information about the employer
- **Employers who do all the talking do not know how to interview!**
 - Ask situational questions. "How would you respond..." The answer might not even be important - it's the process that counts!

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Interviewing Candidates

- Explain the job: include the essential job functions
- Explain job expectations and key policies: uniform policy, tardiness, drug testing, background testing
 - People that can't conform to the policies or won't pass the tests might decide to

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Check References


- Avoid a claim for negligent hiring by checking at least 3 references
 - If conducting phone checks, document all answers provided using a checklist
- Check state laws/regulations for number of references and types of background checks required (criminal offender, sexual offender)
 - May be worthwhile even if not required under state law. Consider whether staff have unmonitored access to children



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Negligent Hiring


- You can be held liable if you know or should have known that the person you are hiring is a potential risk to others.
- Hiring someone that has been convicted of a serious crime, such as physical or sexual assault, could make your organization vulnerable to negligent hiring charges.
- Question gaps in employment history to determine whether the time was spent in prison for violent/sexual crimes.



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Reference Procedures for Employers

- Have departing employees sign a form permitting you to give references to prospective employers and waiving defamation liability. If employee refuses to sign, inform prospective employers and suggest they discuss it with the former employee.
- Never provide blank "to whom it may concern" form letters.
- Make sure all written references are sent in envelopes marked "confidential" and addressed to an individual at the prospective employer who has a demonstrated need to know.




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Can you give negative references?

Risky, but YES provided the following conditions are met:


1. Former employer (i.e. you) believes the information to be true.
2. The information was given to someone with a demonstrated need to know (i.e. prospective employer)
3. Information was not given out of malice.
4. No ambiguous language was used.



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Hiring

- Most employees will be "At Will"
 - They can be hired or fired for any *nondiscriminatory* reason or even *no reason* at all
- Employee manuals may create a "contract" situation
- If sending out letters notifying staff of their selection, be sure to state clearly that they are "at will" employees. List the **general, not specific**, dates of employment (Summer 2009), salary and benefits.
 - Have this reviewed by counsel as it may be construed as an employment contract.
 - It is wise to include the department's policies and procedures at this time as well.



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Discrimination in Hiring

- Avoid hiring based on gender roles
 - E.g. Court ordered an employer to pay \$300,000 after passing over a male applicant, because management felt that a "strong female role model." ← *Gender Discrimination*
- Avoid asking questions regarding ability/disability on employment applications and during an interview
 - If testing skills, you may ask whether a reasonable accommodation would be needed to complete the test



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Once hired ...

- Complete the USCIS I-9 form
 - Must be kept on files for three years (if employee still works for you) or
 - For one year after termination
- Paperless I-9 (electronic versions) now acceptable
- No mistakes: Fine \$110 - \$1100 up to \$16,000 for certain violations
- Available at <http://www.uscis.gov>

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Evaluating Staff


- All employees should know how and when they will be evaluated
- Include the evaluation criteria in orientation packets
- Discuss evaluation methods and standards of performance during training
- Ongoing evaluation is often more effective than specific evaluations based on length of service
- Evaluate knowledge, skills and abilities, but make note of problem areas such as attitude



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Evaluating Staff


- Most common error in staff evaluations:
 - **NOT BEING HONEST**
- If the employee is not meeting expectations **DO NOT** give an “acceptable” or “good” evaluation.
 - It’s hard to terminate staff who have been evaluated as meeting expectations.
- Do not recommend a “merit increase” unless the employee deserves it



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Evaluating Staff

- Always keep a well-documented file of any employee activity or action that you find contrary to the company’s benefit.
 - Days late for work
 - Petty theft
 - Not meeting work standards
 - Incidents with other workers
 - Customer complaints
 - Long lunches



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Evaluating Staff

- During the evaluation, review the file of inappropriate behavior
- Allow employee to sign the evaluation as well as make his/her own comments.
 - Remind employee that signing does not indicate agreement, but rather that the employee was made aware of the evaluation
- For seasonal employees, it may be advisable to list *Recommended for Rehire, Conditional Rehire, Do Not Rehire*



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Disciplining Staff

- Follow all applicable progressive discipline procedures outlined in the Employee Handbook
- Document *all* Verbal Warnings. Include
 - the employee's name
 - the date/time of the verbal warning
 - the specific offense or rule violation
 - a specific statement of the expected performance
 - any explanation given by the employee or other information that is significant



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Documentation of Verbal Discipline

I spoke with [*Employee*] today about his absenteeism record and gave him a verbal warning. Since [*Date*], [*Employee*] has been absent from work on [*Number*] occasions for a total of [*Number*] days. [*Employee*]'s response was, "You can't make people work when they are sick," and he argued about the verbal warning. I told him that he could request a medical leave of absence if he needed it, but that I expected him to be here every day unless a doctor says otherwise."




- Signature
- Date

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Document Written Warnings


- Keep to the facts... no opinions.
- Ask employee to sign and date written warning
- If employee refuses to sign, inform employee that this *could* be considered insubordination and make note of that refusal on the form “Employee refused to sign this document, date, time even after having been informed that refusing to sign the document *could* be construed as insubordination.”



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Legal Concern: Absenteeism


- Many employee illnesses and medical conditions fall under ADA.
- To crack down on a “disabled” employee’s attendance problems may be considered discriminatory.
- Be sure to provide consistent discipline for excessive absenteeism. Inconsistencies in discipline may result in discrimination charges under federal anti-discrimination laws.
 - E.g. You may be sued for religious discrimination if you refuse to allow employees to use personal days in order to observe religious holidays.



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Family Medical Leave Act


- FMLA grants certain employees up to **12 cumulative weeks of unpaid** leave in a 12-month period, overriding the leave policies of many companies
- Some state FML laws are more generous; may cover more employers and employees
- Employees don’t have to take their leave all at once
- FMLA applies to operations with 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year



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Family Medical Leave Act

- An **employee may elect** or an **employer may require** the employee to substitute any accrued paid vacation leave, PTO, family leave, or medical or sick leave for any part of the 26-week period.
- An employer is not required to provide paid sick leave or paid medical leave in any situation in which the employer would not normally provide leave.



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Family Medical Leave Act

Unpaid leave must be granted for *any* of the following reasons:

- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent who has a serious health condition; or
- for a **serious health condition** that makes the employee unable to perform the employee's job



And new in 2008:

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NEW

Family Medical Leave Act

Unpaid leave must also be granted for *any* of the following reasons:

- **Leave to care for injured service member** (applies to next-of-kin, parent, child, spouse)
 - Extended leave applies: up to 26 weeks
 - Only applies during a single 12 month period
- **Exigency Leave**
Standard 12 week unpaid leave for "exigent circumstances" such as short notice deployment, military events, childcare, rest and recuperation, counseling (legal, financial, mental health), etc



Effective January 16, 2009

DeRosaAquatics.com *Final Rule Relative to National Defense Authorization Act*

Family Medical Leave Act

- Applies to **immediate family members**: spouse, children under 18 unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities"
- Employees are eligible to take FMLA leave if they have worked for their employer for at least 12 months, and have worked for at least 1,250 hours over the previous 12 months, and work at a location where at least 50 employees are employed by the employer within 75 miles.



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Your Rights under the Family and Medical Leave Act of 1993

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave for "qualified" employees for certain family and medical reasons. Employees are eligible if they have worked for their employer for at least one year and for 1,250 hours over the previous 12 months, and if they are at least 50 employees within 75 miles.

Reasons for Taking Leave:
 Leave must be granted for any of the following reasons for the employee's spouse, son or daughter, or parent who has a serious health condition, or for a serious health condition that makes the employee unable to perform the employer's job. An employee's own serious medical condition of such kind may also be covered for FMLA purposes.

Advance Notice and Medical Certification:
 The employee may be required to provide advance notice and medical certification. Failure to do so may be cause for denial of FMLA leave. The employee normally must provide 30 days advance notice when the leave is foreseeable. An employee may receive medical certification to support a request for leave because of a serious health condition, and may require certification from a provider or the employee's physician and a doctor for other reasons related to work.

Job Benefits and Protection:
 For the duration of FMLA leave, the employee must maintain the employee's health coverage under any group health plan.

Unlawful Acts by Employers:
 FMLA is enacted to protect the employee's interference with, retaliation, or deny the exercise of any right provided under FMLA. Discharge or otherwise penalize any person for opposing any practice made unlawful by FMLA or for attempting to do so resulting under or during FMLA.

Enforcement:
 The U.S. Department of Labor is authorized to investigate and resolve complaints of violations. An employer may bring a civil action against FMLA. Does not affect any Federal or State law that provides a more favorable general benefit protection greater family or medical leave rights.

For Additional Information:
 If you have trouble in this Federal web site, FMLA website, please contact your nearest office. To locate your nearest Wage/Hour Office, telephone, or Wage/Hour office, call 1-866-487-2424 or visit the Wage/Hour Office website at www.dhs.gov. For more information, visit the Wage/Hour Office website at www.dhs.gov. For more information, visit the Wage/Hour Office website at www.dhs.gov.

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Pregnancy Discrimination Act

- PDA is an amendment to [Title VII of the Civil Rights Act of 1964](#).
- Discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII.
- Women affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

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Pregnancy Discrimination Act

- Employer may be required to provide woman modified tasks, alternative assignments, disability leave or leave without pay.
- Pregnancy related benefits cannot be limited to married employees.
- Pregnant employees must be permitted to work as long as they are able to perform their jobs.

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Intersection of ADA, FMLA and Pregnancy Discrimination Act


- PDA mandates that pregnant employees be treated like any other temporarily disabled employee.
- Under FMLA it may be against the law for a manager to count a sick day if it's due to morning sickness.
- Any medical complications which threaten the employee or pregnancy may be covered under ADA, requiring you to tolerate absences well beyond what is laid out in the sick leave policy.



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Terminating Staff

- Many terminations due to poor job performance, lateness and absenteeism are avoidable.
 - These are often due to unhappy workers. Show 'em some love!
- The most important word in terminating staff is DOCUMENTATION
- Follow any progressive discipline processes outlined in employee manuals



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Negligent Retention

- Failure to terminate an employee who poses a risk to others or who violates company policies (e.g. sexual harassment) is grounds for a **negligent retention** claim
 - “You *knew* this could happen, but did nothing about it.”

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Policy Manuals


- Policy manuals may be construed as implied contracts
- Have all manuals reviewed by legal counsel
- Employees should sign and date that they have read and understand the policies and have had an opportunity to ask questions
 - Consider a QUIZ on the policies!!!!



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Policy Manuals



- Clearly state that the manual DOES NOT confer any contractual rights
- Clearly state (and repeat) that “employment is at-will, terminable by the employer or employee at *any* time for *any* reason or for no reason at all”
- Make this disclaimer in **LARGE BOLD** text so that it is very conspicuous



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Sexual Harassment

Sexual harassment is unwelcome behavior of a sexual nature that makes someone feel uncomfortable or unwelcome in the workplace by focusing attention on their gender instead of on their professional qualifications.



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Sexual Harassment

- Sexual harassment is a form of sex discrimination that violates *Title VII* of the *Civil Rights Act of 1964*
 - *Title VII* affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult whether based on sex, race, religion or national origin.
- As with any anti-discrimination statute, the purpose of the law is to
 - discourage violations and
 - to remedy discrimination

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Sexual Harassment



- Same Sex Sexual Harassment is actionable

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Dealing with Sexual Harassment by Customers/Guests

- Customers (3rd Parties) who harass your employees must be dealt with as swiftly as you deal with harassing co-workers and supervisors.
 - Warn customer that his/her behavior is inappropriate. Make it clear that he/she is not to go near the employee.
 - Block interaction. Do not allow the customer to approach the employee. Have an employee (another gender perhaps) deal with the customer.
 - Don't automatically remove the employee from his/her regular position to protect him/her from the customer. The employee may consider the move retaliatory, especially if he/she suffers an adverse effect.
 - If behavior continues, consider other options such as banning customer from your facility and/or restraining orders



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Do companies have formal dating policies for staff?

- Most do not
 - 72% of companies surveyed do not have written policies
 - 14% have unwritten but "understood" policies
 - 13% do have a policy
 - 7% forbid
 - 6% discourage



* Source: 2006 Workplace Romance Survey, Society for Human Resource Management (SHRM). Margin of error +/- 1%

"No Dating" Policies Don't Work

- Romeo and Juliet will find a way for their true love to grow and flourish - whether you like it or not.
- Seasoned legal experts cast doubt on the legal viability of "no dating" restrictions, ranging from First Amendment rights of privacy arguments to various state privacy acts.

Policies Should Discourage Relationships

- Staff is encouraged to build friendships but dating relationships are discouraged.
- Staff are expected to refrain from becoming involved in any relationship that becomes a distraction from their regular duties.

When to Step In

- At the first sign of trouble, sit down with both parties and review workplace expectations.
 - Document the meeting
 - Have both sign an “agreement” reinforcing key issues: no flirting, eyes on the water, no stalking, etc.
- Remind employees that if the fallout reaches the workplace, both parties may need to find a new place to work.

Retaliation Claims

- An employee who asserts his/her rights to working in a discrimination-free workplace should not be treated any differently
 - Changed workshifts, locations, reduced hours, etc. all can be considered retaliatory conduct by the employer

HR Resources

- www.workforce.com
 - Free weekly e-newsletters "Workforce Week Management"
- Alexander Hamilton Institute (AHI)
Employment Law Resource Center
www.ahipubs.com
 - Free sample forms (Word, PDF)
 - Free newsletters
 - "Problem Solvers"
- www.human-resources.org

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Thank You



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