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Essential Provisions for Employee Handbooks – The Good, The Bad & The Ugly

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Why Do Handbooks & Handbook Policies Matter?

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For Lots of Reasons!

- Legal compliance/protection
- Communicates operational policies and organizational culture
- Advises employees of company expectations
- Reference tool for employees (and managers)
- Promotes consistency
- Credibility - helpful to show EEOC, other agencies overseeing employment laws, and judge/jury if ever investigate your company or have a lawsuit

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Handbook and Policies = Potential Exhibit in Litigation

- While policies and a handbook are useful to communicate an employer's policies to employees and answer commonly asked questions, they also often becomes an **exhibit** in any employment-related litigation or administrative proceeding.

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Perception of Bias or Favoritism

- Biggest reason for internal complaints and lawsuit
- One of the most common methods of "proving" discrimination is by pointing to other similarly-situated employees who were not treated the same way – or examples of company policy and how not followed – creates potential inference…
- **Having and following** handbook and policies/procedures are key to maintaining consistency
- Also, potentially helpful **employee relations tool** – if well drafted and actually followed

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Policies and Your Handbook Should

- Comply with applicable law
- Demonstrate an employer's commitment to complying with the law
- Should be written in clear and simple language that make sense to employees (and a jury)
- Accurately reflect the employer's actual practices
- Not be 100 pages (single spaced)

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General Considerations

- Customize for industry and workforce
- The multi-state employer
- Use easy to understand language
- Employee expectations and benefits
- How to distribute? (Hard copy, electronic or both?)
- Track receipts/acknowledgment
- Maintain previous versions by date
- Avoid excessive rigidity, limiting discretion

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Tell Us About Your Employee Handbook…

- When did you last use it or look at it?
- When was it last updated?
- Does it actually reflect your policies and what do in practice?
- How looooonnnnngggggg is it?
- Can employees actually locate/access/find it?
- What records do you have of providing/acknowledging?
- When was the last time you trained supervisors or employees on the contents of the handbook?
- What are you most proud/embarrassed about relating to your handbook?

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Breakout Time!

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Breakout Table Topics

- When did you last use it or look at it?
- When was it last updated?
- Does it actually reflect your policies and what do in practice?
- How looooonnnnnggggg is it?
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Faragher Defense

Under Title VII, employer is subject to vicarious liability to victimized employee for an actionable hostile environment created by a supervisor even when no tangible employment action is taken. An employer may raise an affirmative defense to liability or damages when there is no tangible action, however, subject to proof by preponderance of evidence and comprising two necessary elements:

- (a) that employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (b) that employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer or to avoid harm otherwise.

Demonstration that an employee failed to use a complaint procedure provided by the employer in response to sexual harassment by a supervisor will normally suffice to satisfy the employer's burden of demonstrating lack of reasonable care by employee to avoid harm.

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TRAINING IMPORTANT TO DISSEMINATE: New Guidance on Harassment in Workplace

- Released September 29, 2023 – on hold since 2016.
- Express recognition that sex-based harassment includes harassment on the basis of sexual orientation and gender identity, including the expression of one's gender identity.
- An individual may establish harassment based on conduct that is not specifically directed at them.
- Conduct that occurs outside of the workplace (e.g., on social media) can still affect the terms and conditions of employment.

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Permissible Salary Deductions for Exempt Employees

- **Full** day absences for:
  - Personal reasons
  - Sickness/disability where in accordance with a policy providing wage replacement benefits
  - Unpaid disciplinary suspensions imposed in good faith for infractions of workplace conduct rules and imposed pursuant to a written policy

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Permissible Salary Deductions for Exempt Employees

- Initial and final weeks of employment
- Unpaid FMLA leave
- Offsets for jury or witness fees or military pay
- Good faith penalties imposed for safety infractions

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Impermissible Salary Deductions for Exempt Employees

- If not a "permissible" deduction, then an impermissible deduction:
  - **Partial day** absences for personal leave, disability, or illness (except intermittent FMLA leave) BUT **not** license to work half-days (address as disciplinary matter)
  - Reimbursement for shortages or damages
  - Absence due to inclement weather where the employer is closed

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Effect of Impermissible Deductions

- Actual practice of making deduction will result in loss of exemption for that period
- Isolated or inadvertent deductions will not result in the loss of the exemption if employee is reimbursed
- Implement a safe harbor policy

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FLSA Safe Harbor Clause?

Under the **safe harbor** protection, an employer does not lose an exemption based on improper deductions if it:

- Has a clearly communicated policy prohibiting improper salary deductions.
- Provides a complaint mechanism in the policy.
- Reimburses employees when it makes improper deductions.
- Makes a good faith commitment to comply in the future.
- Does not willfully violate the policy by continuing to make improper deductions after receiving employee complaints.

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FLSA Safe Harbor Clause?

Under the **safe harbor** protection, an employer does not lose an exemption based on improper deductions if it:

- Has a clearly communicated policy prohibiting improper salary deductions.
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- Reimburses employees when it makes improper deductions.
- Makes a good faith commitment to comply in the future.
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Sample Safe Harbor Language

"You should review each pay check each pay period for errors. If you have questions about any deductions from your pay, believe improper deductions have been made from your pay, or believe that your pay is otherwise incorrect, you must report your concern to your manager or the Company's [Payroll/HR Department] immediately at [Name/contact information].

The Company will promptly investigate all complaints of paycheck errors and, if any improper deductions have been taken or any other errors have been made, the Company will promptly take corrective action—including reimbursing you for any improper deductions or other pay issues.

In addition, the Company will take reasonable steps to ensure that the error does not recur in the future. The Company expressly prohibits and will not tolerate any retaliation against any employee because that employee filed a good faith complaint under this policy."

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National Labor Relations Board

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Any Issues With These Rules?

"Personal video recording, photographing or audio recording of customers or other employees in the restaurant without their consent is not allowed – and illegal under Florida law."

"Do not make fun of, denigrate, or defame your supervisors, co-workers, customers, the Company, or our competitors."

""Disrespectful conduct or insubordination, including, but not limited to, refusing to follow orders from a supervisor or a designated representative is grounds for immediate dismissal."

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Heightened Scrutiny of Handbooks/Rules

Stericycle, Inc. (August 2023)

- Stricter (and more nebulous) standard for evaluating employee handbooks/rules:
  - Does rule/provision have **a reasonable tendency to "chill" employees' exercise of their Section 7 rights**
- 2 Step Analysis:
  - Could employee "reasonably interpret" the provision to have a meaning that could lead to chilling effect"?
  - If so, employer must:
    - Establish and be able to show what value or interest the rule serves; and
    - That the rule can't be replaced with narrower, lawful rule and still serve the same purpose.

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Examples of NLRA Issues

- Prohibit conduct that "**impedes harmonious interactions and relationships**"
- Prohibit "**behavior that is counter to promoting teamwork**"
- Require employees to "**maintain a positive work environment by communicating in a manner that is conducive to effective working relationships**"
- Prohibit "**arguing**"
- Prohibit conduct that is "**offensive** to fellow employees"

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Heightened Scrutiny of Handbooks/Rules

Some key targets/areas of scrutiny:

- Workplace civility rules
- Disciplinary rules
- Loitering/must leave premises
- Use of cell phones at work or taking photographs/recording
- Confidentiality rules
- Social Media policies

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Key Policies/Areas to Include in Handbook

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Top 10 Key Policy Areas/Provisions

1. Disclaimer/At-Will Statement
2. EEO/Non-Discrimination/Harassment & Reporting of Same
3. Probationary Periods
4. Standards of Conduct
5. Reasonable Accommodations: Disability, Pregnancy, Religious
6. FMLA/Leaves (50 or more – 75 mile radius)
7. Wage and Hour Policies – Accurate records, safe harbor, payout of unused PTO, etc.
8. Protection of confidential information/return property
9. Anti-Retaliation
10. Safety and Work-Related Injuries

PLUS SIGNED ACKNOWLEDGMENT!!

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Top 10 Key Policy Areas/Provisions

1. Disclaimer/At-Will Statement
2. EEO/Non-Discrimination/Harassment & Reporting of Same
3. Probationary Periods

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Introductory Period

Fla. Stat. 443.131(3)(a) – An employer will not be charged for unemployment compensation if:

- Employee is discharged for "unsatisfactory performance"
- During an "initial 90-day probationary period"
- Applicable to all employees or a specific group of employees
- Employee informed of probationary period within first 7 days of work

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Introductory Period – Key Language

- Can call it "probationary" "new hire" "orientation" etc.
- Note right to extend and that does NOT change at-will status

Example:

- The company reserves the right to extend this probationary period as it deems appropriate.
- This Probationary Period in no way alters the "at-will" nature of your employment, nor does it limit the ability of the Company to terminate your employment sooner (within the Probationary Period) if deemed warranted or appropriate by the Company in its sole discretion.

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Top 10 Key Policy Areas/Provisions

4. Standards of Conduct
5. Reasonable Accommodations: Disability, Pregnancy, Religious
6. FMLA/Leaves (50 or more – 75-mile radius)

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Top 10 Key Provisions - Continued

7. Wage and Hour Policies – Accurate records, safe harbor, payout of unused PTO, tip credit/tip pool (if using)
8. Protection of confidential information/return property
9. Anti-Retaliation
10. Safety and Work-Related Injuries

CRITICAL: Signed Acknowledgment – received, read, understand, at-will, confidentiality protection/obligations, EEO/ant-harassment, anti-retaliation.

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Other Key Provisions (if Not Capture in Above):

- Progressive discipline
- Open door policy
- Drug-free workplace policy (required provisions in 440.102)
- Workplace violence prevention and reporting
- Code of ethics/conflicts of interest
- Electronic monitoring/computer usage
- Attendance/tardiness policy
- Remote work policy
- Artificial intelligence – use and responsibilities
- Nepotism/fraternization
- Non-Solicitation

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Core Mistakes We See on Regular Basis

1. Boilerplate language or template - not followed or does not apply
2. Too long and/or complicated for average employee
3. No one reads or has a copy
4. No one is trained on or knows policy
5. Policies not applied consistently
6. Overly restrictive requirements or limitations – for employee and/or company
7. No one had a qualified employment attorney look at it

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Legal Mistakes We See on Regular Basis

1. Reflects unlaw practices/legal violations
2. Fails to take into account state law variations
3. Making changes – without thinking through potential issues
4. Drug testing – that not actually followed or done, or missing required elements from 440.102
5. Out of date – does not reflect new laws and legal obligations (e.g., pregnancy and new moms, protected categories, etc.)
6. Omits policies that can help limit legal liability – safe harbor, *Faragher* defenses, disclaimers, at-will employment, etc.)

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Thinking it Through….

Sarah has accrued 80 hours of PTO over the past year. She decides that she is going to submit her resignation and asks to take a two-week vacation utilizing her PTO before the effective date. The company declines the request and accepts her resignation to be effective the date it was given.

When Sarah asks HR if she will be paid out her PTO per the handbook policy she references in her email, they inform her that the company policy has changed, and they no longer pay out accrued PTO upon termination or resignation.

Sarah feels this is unfair as she was precluded from using her accrued PTO before her identified last date and the company is now not going to pay her out that PTO based on a policy she has never seen.

Any issues?

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Thinking it Through….

- Contractual agreement?
- State laws implicated?
- Retroactive Policy Changes OK?
- Breach of Implied Contract?

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440.102 – Required “Bells & Whistles”

- An employer is required to maintain a written policy containing 12 enumerated details in the policy, including things like the types of drug testing that may be done, a statement regarding confidentiality, what medications may interfere with drug test, the drugs that may be tested for, representative sampling of names, addresses, and telephone numbers of employee assistance programs and local drug rehabilitation programs, details on contacting a medical review officer (MRO), etc.
- The full list points are detailed in the statute at 440.102(3).

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Examples of Potentially Unlawful Practices or Policies in Handbooks

1. Capped leave policies – max 3 months, etc.
2. No fault points attendance/punctuality policies (3 or more days = termination)
3. Overly restrictive conduct, social media, media communication, use of cell phones, or confidentiality requirements (NLRA violations per NLRB)
4. Automatic deductions or withholding pay (e.g., broken items, returning property)
5. Not paying for overtime or time worked if not authorized (e.g., early punch-ins)
6. Tip credit and tip sharing/pools policies that are not compliant with FLSA

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Tip Credit Notice (Ideally in Writing – Signed)

DOL regulations require employers who take tip credit against minimum wage obligation provide tipped employees with notice including:

(1) the amount of cash wages the employer is paying the tipped employee (in FL = $8.98);
(2) the amount being claimed by the employer as a tip credit ($3.02);
(3) the tip credit cannot exceed the amount of tips actually received;
(4) the employee retains all tips except where a valid tip pool exists; and
(5) the tip credit will not apply to any tipped employee unless the employee has been informed of the foregoing provisions.

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Follow Tip Credit "Rules"

- Regardless of whether an employer takes a tip credit, the FLSA prohibits employers from keeping any portion of employees' tips for any purpose, whether directly or through a tip pool.
- A manager or supervisor may keep only those tips that they receive directly from a customer for the service they directly and solely provide.
- Observe the 80/20 rule – employers lose the tip credit for the time spent performing non-tipped side work - if an employee spent more than 20% of their time performing tasks like rolling silverware into napkins, cleaning and setting tables, and making coffee (non-tipped work).

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Follow Tip Credit "Rules"

- Employee must spend a minimum of 80% of their time doing "tip-producing work" and no more than 20% of their time doing side work or "directly supporting work."
- Under DOL rules, an employer loses the tip credit for a tipped employee who performs "directly-supporting work" (like side work) for a ***continuous*** period that exceeds 30 minutes.

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Follow Tip Credit "Rules"

- True even if the continuous time spent on this work amounts to less than 20% of the employee's total work for the week
- Avoid having tipped employees spending lengthy periods of time without any customers – e.g., review opening and closing procedures (e.g., schedule tipped employees so they do not arrive more than 30 minutes before the doors open to customers, if possible).
- Consider paying full minimum wage for "directly supporting work."

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Tip Pool Rules

- FLSA allows employers to require employees to share or "pool" tips with other eligible employees.
- Pool is limited to employees in occupations in which they customarily and regularly receive tips, such as waiters, bellhops, counter personnel (who serve customers), bussers, and service bartenders – NOT back of the house or managers.
- Different rules for sharing with back of house -- if employees paid full minimum wage (NOT taking tip credit) – but still no managers/supervisors.

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Examples of Potentially Unlawful Practices or Policies in Handbooks (continued)

7. Blanket policies regarding not hiring if criminal background/arrests or convictions
8. Requiring doctors note for every absence or sick day
9. Safety bonuses (discourage reporting)
10. Rigid uninform or scheduling policies (no religious exceptions)
11. English only policies

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Conduct Regular Handbook Audits!

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Evaluating Current Policies and Handbooks

- Policy Manuals and Employee Handbooks should be carefully reviewed on a regular basis:
  - Revisions and updates
  - Additions and deletions
  - Changes in law/new laws

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What Else Should Review/Ask in Reviewing Handbook

- Is the current policy up-to-date?
- Does the organization operate in the same way it did when the policy was adopted?
- Has a policy interfered in any way with operations?

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What Else to Ask?

- Has a policy adversely affected employee morale or productivity?
- Have complaints resulted from the policy?
- Are there charges or lawsuits associated with a policy?

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What Else to Ask?

- Have the policies been uniformly and consistently enforced?
- Is there an important standard operating procedure that has not been recorded as a policy?
- Can any policy be improved upon?

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New Law/Changes in Past Year

- Pregnant Worker Fairness Act
- PUMP Act
- Religious Accommodations (new standard?)
- NLRB scrutiny back (*Stericycle* – August 2023)
- E-Verify (if 25 employees or more)
- Break and work rules for 16- and 17-year-olds (FL SB)

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Pregnancy Accommodation

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Pregnant Workers Fairness Act (PWFA)

- Pregnant Workers Fairness Act passed in December 2022 - Effective June 27, 2023
  - Applies to employers with at least 15 employees.
  - Requires employers to provide **reasonable accommodations** to pregnant workers
  - Requires interactive process.
  - An employer may not require an employee to take paid leave if another reasonable accommodation is available (i.e., unpaid leave).
  - Protects employees from retaliation, coercion, intimidation, threats, or interference.

- EEOC began accepting charges under PWFA on June 27, 2023
- EEOC issued *proposed* regulations on August 7, 2023 (275+ page)
- EEOC issued **final version** of its regulations on April 15, 2024 (400+ pages)
  - The rule will take effect after its **April 19, 2024** publication.

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Proposed Regulations On PWFA

- Regulations include protections for current, past, and potential pregnancy; lactation; use of birth control; menstruation; miscarriages; and abortion.
- **Broader than ADA**:
  - Expands definition of who is "qualified" for accommodations
  - Not have to be challenging pregnancy or health issue per se
  - Not have to be able to do essential functions at times
  - Cannot ask for documentation at times?

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Who is Entitled to an Accommodation?

Employee/applicant can meet definition of "qualified" in two ways:

- First, if they can perform the essential functions of their jobs with or without reasonable accommodation, which is the same language used in the ADA.
- Second, they can be qualified – **even if they cannot perform one or more essential functions of the job** – if: (a) the inability to perform an essential function is temporary; (b) the essential function could be performed in the near future; and (c) the inability to perform the essential function can be reasonably accommodated.

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What is "temporary" to EEOC?

- Proposed rule defines the terms "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future," and "in the near future" as **generally within forty weeks** from the start of the temporary suspension of an essential function.
- As long as the employee is "qualified," the employer must grant the requested accommodation or an equally effective accommodation, unless doing so imposes an undue hardship.

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What are "related medical conditions"?

- "**Related medical conditions**" are conditions that "related to, are affected by, or arise out of pregnancy or childbirth."
- Examples include: termination of pregnancy, including by miscarriage, stillbirth, or abortion; infertility; **fertility treatment**; lactation and conditions related to lactation; **use of birth control**; **menstrual cycles**; **postpartum depression**, anxiety or psychosis; vaginal bleeding; preeclampsia; pelvic prolapse; preterm labor; ectopic pregnancy; gestational diabetes; cesarean or perineal wound infection; maternal cardiometabolic disease; endometriosis; changes in hormone levels; and many other conditions.

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What are "related medical conditions"?

- Conditions do not have to be unique to pregnancy or childbirth:
  - chronic migraine headaches;
  - nausea or vomiting;
  - high blood pressure;
  - incontinence;
  - carpal tunnel syndrome; and
  - many other medical conditions.

These conditions are only covered under the PWFA if the condition relates to pregnancy or childbirth (although the ADA or other civil rights statutes may apply) or are exacerbated by pregnancy or childbirth.

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What is a Reasonable Accommodation?

Some EEOC believes "in virtually all cases," will be reasonable accommodations that do not impose undue hardship:

(1) allowing an employee to carry water and drink, as needed, in the employee's work area;

(2) allowing an employee additional restroom breaks;

(3) allowing an employee whose work requires standing to sit and whose work requires sitting to stand; and

(4) allowing an employee breaks, as needed, to eat and drink.

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How Much Leave Must an Employer Provide?

» There is no bright line rule

» The proposed regulations state that the employer must consider providing leave as a reasonable accommodation, even if the employee is not eligible or has exhausted leave under the employer's policies (including leave exhausted under the Family and Medical Leave Act or similar state or local laws)

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Can Employers Ask for Medical Documentation to Support an Accommodation Request?

- **Not always.**
- Examples of when it would not be reasonable to request:
  - (1) when both the limitation and the need for reasonable accommodation are obvious;
  - (2) when the employee or applicant has already provided sufficient information, i.e., the employee has already provided a medical note imposing lifting restrictions for a specific time period;
  - (3) when an employee states or confirms they are pregnant and requests one of the four common accommodations; and
  - (4) when the limitation is lactation or pumping.

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Possible Violations of PWFA

- Unnecessarily delay when responding to a request for an accommodation
- Failing to provide a reasonable accommodation when one is available
- Requiring employee to accept accommodation not arrived at through interactive process
- Require employee to take a paid or unpaid leave of absence if another reasonable accommodation can be provided
- Determine an employee is unqualified because they declined a reasonable accommodation (e.g., whether an essential function can be suspended must be considered)
- Take any adverse employment action because an employee requests or uses a reasonable accommodation provided under the PWFA

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What Should You Do to Prepare?

- The proposed regulations have now been finalized and will take effect after April 19, 2024. While there may be legal challenges to these regulations, the **PWFA is currently in legal effect**.
- It is critically important that your managers and human resource professionals are aware of this new law and its implications for pregnant workers.
- If you have an employee requesting accommodations to the workplace as a result of pregnancy, childbirth, or a related condition, it's important that you engage in an appropriate interactive conversation to determine the needed accommodation and document your conversations accordingly.

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Breastfeeding Accommodation

- Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act – passed December 2022
- PUMP Act amends FLSA to give most nursing employees break time **and** space to express breast milk at work for up to one year after childbirth
- Prior to PUMP Act, only hourly employees had these rights previously – now exempt too

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Breastfeeding Accommodation

- Employers < 50 employees may be exempt if they can establish an **undue hardship**.
- If an employee chooses to file a private action, an employee may be required to **notify** their employer first and the employer would have **10 days** to comply (notification period may be waived under certain circumstances – e.g., termination).
- Field Assistance Bulletin No. 2023-2 provides additional information regarding break times, lactation spaces, and posting requirements.

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PWFA and PUMP Act - Sample Language

The Company recognizes that employees may need accommodations in connection with a newborn child or a newly adopted or newly placed foster child, or due to a pregnancy-related or childbirth-related condition. The Company provides accommodations in accordance with applicable law, including the Pregnancy Discrimination Act (PDA), the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act), Pregnant Workers Fairness Act (PWFA), ADA, and any applicable federal, state or local law.

Requests for accommodations related to pregnancy, expressing, childbirth, or related medical conditions will generally be handled in the same manner as ADA accommodation requests, subject to the specific provisions of the PUMP Act, PWFA and applicable laws.

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Accommodations For a Nursing Mother - Sample

- The Company will make reasonable efforts to provide nursing mothers reasonable unpaid break time to express milk for their infant child(ren) for up to one year following the child's birth.
- If you are nursing, the Company will make reasonable efforts to provide a room or other location where the employee can express her milk in private.
- Expressed milk can be stored in refrigerators, or in a personal cooler. Sufficiently mark or label your milk to avoid confusion for other team members who may share the refrigerator.
- The break time must, if possible, run concurrently with any break time already provided. You are encouraged to discuss the length and frequency of these breaks with your Manager/Supervisor.

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National Labor Relations Board

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Do You Have Rules Against Any of the Following?

- Discussing work-related information?
- Making negative remarks about the company or its employees?
- Disrespect for others?
- Identifying yourself as employee of the company?
- Using company logo?
- Conflicts of interest?
- Using company e-mail during non-working time?
- Taking photographs or making recordings?
- Walking off the job?

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Protected Concerted Activity (PCA)

Action by 2+ employees, re wages, hours, working conditions

» Examples: a strike
a walkout

Action or speech by one employee on behalf of a group

» Example: one employee complains about working conditions, and the complaint may or does lead to group action

NOT Protected: personal gripes, threats of violence, destructive acts

NLRB v. Washington Aluminum, 1962

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Critical Elements of PCA

» Motive for taking the action is not relevant to whether it was concerted, nor is motive relevant to whether it was for "mutual aid or protection"

» The Board's analysis focuses on "...whether there is a link between the **activity** and matters **concerning the workplace** or **employees' interests as employees**"

» Single employee's efforts to enlist the support of co-workers for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity

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Concerted Activity - EXAMPLES

- Assisting a co-worker who claims her supervisor was engaging in sexual harassment
- Assisting a co-worker who has filed charges with the EEOC or NLRB
- Complaining about malfunctioning air conditioning in building
- Petition seeking better wages
- Refusal to work on piece of equipment claimed to be unsafe to the team
- Employees wearing buttons advocating a particular cause tied to work
- Employees complaining about employer wages, work policies, or terms and conditions of employment

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Heightened Scrutiny of Handbooks/Rules

Stericycle, Inc. (August 2023) - ACTION ITEMS:

- Review all handbooks/rules/policies to look for "chilling effect"
- Consider the purpose and value of any questionable rule/policy, and whether it could be narrowed or eliminated

See rescinded GC Memo 15-04 (Mar. 18, 2015): https://apps.nlrb.gov/link/document.aspx/09031d4581b37135

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Examples of Facially Illegal Rules

- Rules prohibiting employees from discussing their pay and benefits with other employees
- Rules prohibiting employees from solicitation and distribution on non-working time (distinction between “working time” and “paid time”)
- Rules prohibiting communication with the media
- Non-disparagement rules that apply to discussions between/among employees
- Confidentiality rules prohibiting the disclosure of employee handbooks
- Rules requiring employees to arbitrate NLRA claims
- Non-competes?

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Heightened Scrutiny of Handbooks/Rules

Some key targets/areas of scrutiny:

- Workplace civility rules
- Disciplinary rules
- Loitering
- Use of cell phones at work or taking photographs/recording
- Confidentiality rules
- Social Media policies

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NLRB - Disclaimers Will NOT Cure Bad Policy . . . .

- "This code does not restrict any activity that is protected . . . by the National Labor Relations Act . . . "
- ". . . This policy will not be construed or applied in a manner that interferes with employees' right under federal law."

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How to Fix?

- Draft/update policies with eye toward clarity of purpose **and** intent
- Contextualize your rules - describe the "why"
- Provide specific examples (that don't implicate PCA)
- Define, limit and make clear
- Consider disclaiming infringement on employee rights

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Latest from Tallahassee/Florida Workplace Laws

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New Florida E-Verify Law

- Private employers with 25+ employees required to use E-Verify for new hires beginning July 1, 2023
- Cannot "knowingly employ an unauthorized alien"
- No exceptions for employees in the process of obtaining a work visa or permanent status
- **Penalties for non-compliance, including potential revocation of licenses – beginning in July 2024 ($1,000/day if multiple violations over period of months)**
- Follow rules when status unclear… until confirmed/resolved

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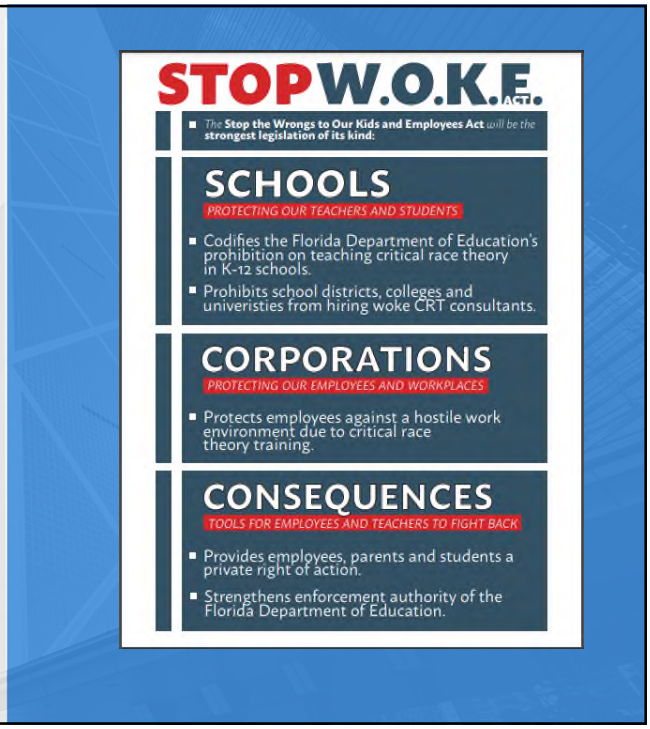
Latest on HB7/Individual Freedom Act: How Florida's "Stop WOKE Act" May Affect Your Handbook and Training?



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Overview of HB-7: "Individual Freedom Act" (a/k/a "Stop WOKE Act")

- Was supposed to go into effect July 1, 2022
- Applies to all employers with 15 or more employees in Florida
- Amends the Florida Civil Rights Act to make certain types of employee diversity trainings unlawful – if the trainings endorse or compel employees to believe certain prohibited concepts
- Modeled on "divisive concepts" of President Trump's 2020 EO 13950 (Combating Race and Sex Stereotyping), which targeted trainings by federal contractors and governmental agencies (revoked by President Biden January 20, 2021)
- Appeal of injunction was pending at Eleventh Circuit . . . .

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Is the Stop WOKE Act Lawful?

- On August 18, 2022, U.S. District Court for the Northern District of Florida entered a preliminary injunction ordering state officials in Florida to take no steps to enforce the Act while the court considers merits of case (*Honeyfund.com, Inc. v. DeSantis*)
- Two private employers and a diversity, equity, and inclusion (DEI) consultant and training company argued that HB7 is unconstitutional because it **restricts free speech** and is **impermissibly vague**
- Eleventh Circuit: Injunction kept in place pending appeal; oral argument held August 24, 2023

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Injunction Left in Place

- **March 4, 2024**, the U.S. Court of Appeals for the Eleventh Circuit upheld the August 2022 preliminary injunction.
- Court rejected what it claimed was "the latest attempt to control speech by recharacterizing it as conduct," and in so doing, indicated that the Stop Woke Act commits "**the greatest First Amendment sin**" by targeting speech based on its content and penalizing certain viewpoints that the state deems offensive.

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HR FL Day on the Hill – February 1, 2024!

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Day on the Hill – Employment Bills

- Marijuana employment protections-public sector (SB 166)
- Paid Parental Leave (public sector) (HB 127/SB 128)
- Gender Identity Employment Practices (HB 599/SB 1382)
- Hairstyles – in educational setting (students and employees) (HB 643/SB 686)
- Employment and Curfew of Minors (HB 49/SB 1596)
- Biological Sex (HB 1233)
- Leave for Crime Victims/Witnesses (HB 839)
- Review of Employment Contracts (SB 40)

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Work Hour Restrictions for Minors (HB 49)

- Signed March 22, 2024 - eases restrictions on minors aged 16 and 17 and allows parents and school superintendents to waive 30-hours-per-week work limitation during school year.
  - Minors aged 16 and 17 can work more than 8 hours on Sundays and holidays, even when there is school the next day, and when scheduled to work 8 hours in one day, entitled to a meal break of at least 30 minutes for every 4 hours of continuous work.
  - Otherwise keeps in place restrictions that provide that 16/17 employees may only work eight hours in any one day (between 6:30 a.m. and 11:00 p.m.) when there is school the next day.

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Workplace Heat Exposure (HB 433)

- Approved final day of session – awaiting signature.
- Would prevent cities and counties from enacting local laws directed to heat exposure safety requirements – e.g., requiring employers to provide shade and water to outdoor workers.
- Also ends local "living wage" ordinances passed in some communities, beginning in the fall of 2026, and prevents local governments from enacting predictive scheduling laws, which essentially require employers to notify hourly workers of their work schedules in advance.

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Is Legal Weed Coming to Florida?

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State of Legal Marijuana in 2024

- Recreational marijuana is now legal in **24 states plus the District of Columbia**.
- 2024 Amendment in Florida?
  - More than 1 million signatures (891,000 required)
  - Needs 60% to pass (medical marijuana passed with 71% of vote in 2016)
- April 1, 2024: Florida Supreme Court rejected AG Moody argument that ballot language is vague and may confuse voters.

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Ballot Language for 2024

Allows adults 21 years or older to possess, purchase, or use marijuana products and marijuana accessories for non-medical personal consumption by smoking, ingestion, or otherwise; allows Medical Marijuana Treatment Centers, and other state licensed entities, to acquire, cultivate, process, manufacture, sell, and distribute such products and accessories. Applies to Florida law; does not change, or immunize violations of, federal law. Establishes possession limits for personal use. Allows consistent legislation. Defines terms. Provides effective date

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Oh Yeah – the Other Legal Stuff…

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