



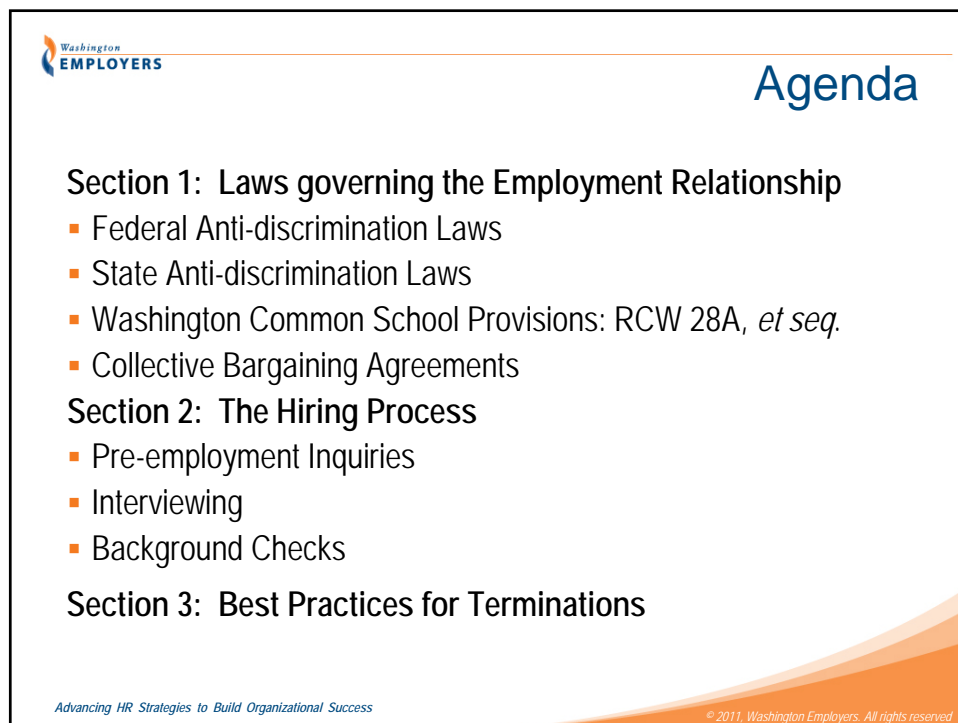
Washington
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Legal Compliance in Hiring and Terminations

Washington School Personnel Association : The HR Journey
Kara M. Craig, Employment Attorney
February 25, 2014

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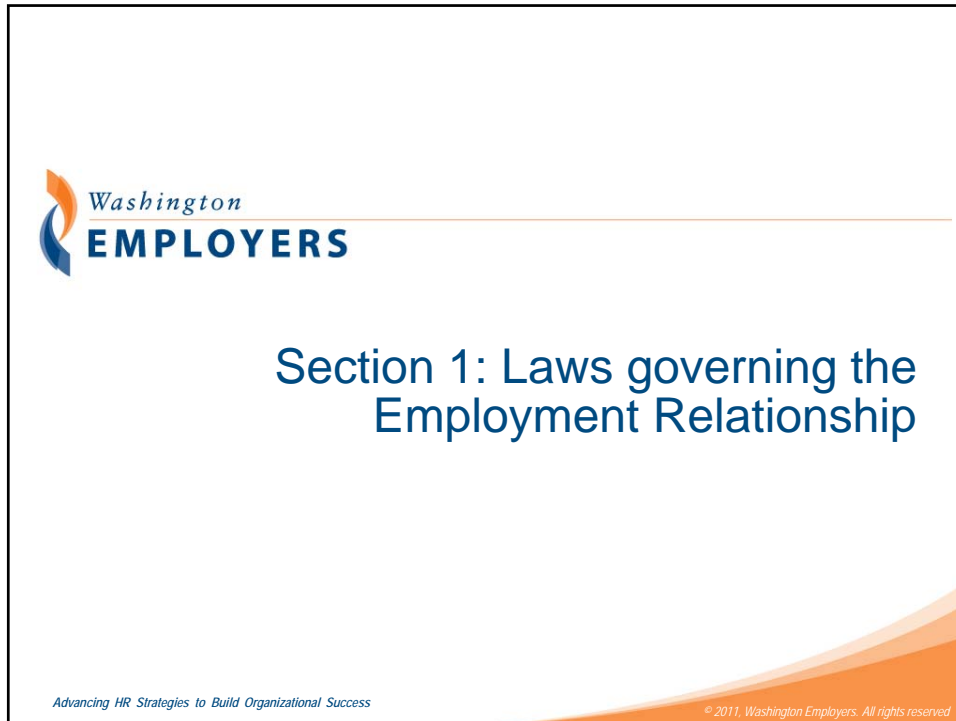
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Agenda

- Section 1: Laws governing the Employment Relationship**
 - Federal Anti-discrimination Laws
 - State Anti-discrimination Laws
 - Washington Common School Provisions: RCW 28A, *et seq.*
 - Collective Bargaining Agreements
- Section 2: The Hiring Process**
 - Pre-employment Inquiries
 - Interviewing
 - Background Checks
- Section 3: Best Practices for Terminations**

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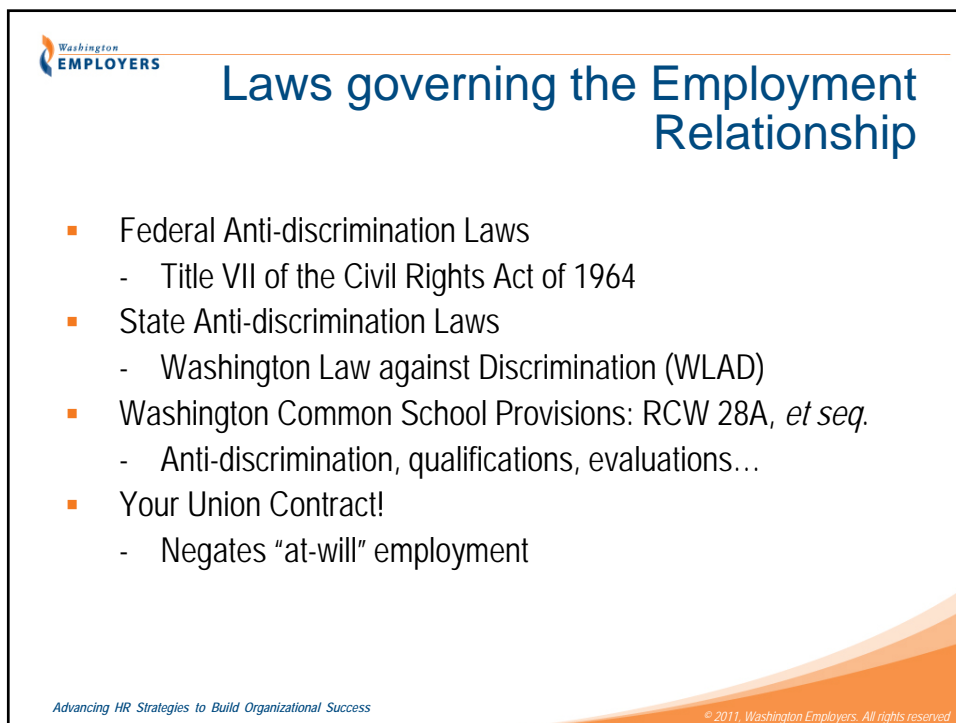


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Section 1: Laws governing the Employment Relationship

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Laws governing the Employment Relationship

- Federal Anti-discrimination Laws
 - Title VII of the Civil Rights Act of 1964
- State Anti-discrimination Laws
 - Washington Law against Discrimination (WLAD)
- Washington Common School Provisions: RCW 28A, *et seq.*
 - Anti-discrimination, qualifications, evaluations...
- Your Union Contract!
 - Negates "at-will" employment

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What is Discrimination?

What is discrimination?

- Improper employment decisions made based upon a protected classification.
- Harassment or conduct that creates an intimidating, hostile or offensive working environment.
 - Unreasonably interferes with work performance.
 - Adversely affects employment opportunities.
 - Where employee is targeted because of his/her protected classification.

Protected Classifications

- Race
- Color
- Religion
- National Origin
- Sex
- Age
- Disability
- Pregnancy
- Marital Status
- Sexual Orientation
- Gender Identity
- Political Ideology
- Military Status



Anti-Discrimination Laws

- Title VII of the Civil Rights Act of 1964: Race, color, religion, national origin and sex (Title VII)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Washington Law against Discrimination (WLAD)
- Federal and state pregnancy/maternity laws and regulations
- Various state and local laws: Sexual orientation, and marital status, military or veteran status
- Federal and state laws regarding equal pay

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Federal Laws

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Title VII of the Civil Rights Act of 1964

Employers covered:

- State and local government entities;
- Private sector employers with 15 or more employees engaged in an "industry affecting commerce."

What it does:

Makes it unlawful for employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin."

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Terms and Conditions of Employment

Title VII, the ADEA and ADA make it illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements, recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits, pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

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Title VII of the Civil Rights Act of 1964

Types of claims:

- Discrimination
- Harassment
 - quid pro quo
 - hostile work environment
- Failure to Accommodate – religion only.
- Retaliation
- Enforced by the Equal Employment Opportunity Commission (EEOC) – prerequisite to filing suit.

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Pregnancy Discrimination Act of 1978

- Amended Title VII to prohibit sex discrimination on the basis of pregnancy.
- The terms “because of sex” or “on the basis of sex” include... because of or on the basis of pregnancy, childbirth, or related medical conditions.
- Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same as any other temporarily disabled employee for all employment-related purposes.
- Discrimination prohibited in **every aspect of employment**, including hiring, firing, pay, promotion...layoff, training, fringe benefits...and any other term or condition of employment.

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Age Discrimination in Employment Act (ADEA)

Employer coverage:

- State and local government entities;
- Private sector employers with 20 or more employees.

What it does:

- Prohibits age discrimination against individuals 40 years of age or older in terms and conditions of employment.
- Covers candidates *and* employees - failure to hire claim.
- Makes "involuntary retirement" at any age illegal.

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Americans with Disabilities Act (ADA)

Who is covered?

- Employers with 15 or more employees (same as Title VII).

What it does:

- Prohibits discrimination against a **qualified individual with a disability** because of the disability of such individual in regard to job application procedures, the hiring, advancement, discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.
- Covers candidates *and* employees – failure to hire claim.
- Discrimination and failure to provide reasonable accommodation = 2 separate claims.

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“Qualified” means:

- Satisfies prerequisites or minimum requirements of the position, such as skills, experience, education, etc...
- Can perform the essential functions of the job with or without reasonable accommodation.

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ADA

“Disabled” means:

- Physical or mental impairment that substantially limits one or more major life activities of the individual.
 - “Major life activity” defined as just about anything.
 - Substantially limits = “more than a moderate impairment.”
 - Broadly construed.
- “Regarded as” having a disability.
- There is a record of the individual being impaired.

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ADA

Types of Claims:


- Discrimination (including failure to hire)
- Failure to accommodate
- Retaliation

Defenses:

- Bona fide occupational qualification
- Undue hardship

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Washington State Laws

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WLAD

Employer coverage:
Employers with 8 or more employees

What does it do?
Declares it a civil right to be free from discrimination because of:

- race
- creed
- color
- national origin
- sex
- honorably discharged veteran or military status
- sexual orientation
- gender identity
- presence of any sensory, mental, or physical disability

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WLAD

- Prohibits discrimination in wages or the terms and conditions of employment;
- Requires reasonable accommodation;
- Places *affirmative obligation* upon employers to initiate the interactive process to consider reasonable accommodations where a known disability exists.
- Definition of disability broader than ADA; must be applied to the benefit of employee:
 - Presence of a sensory, mental or physical impairment .
 - Medically cognizable or diagnosable.
 - Exists as a record or history.
 - Is perceived to exist whether or not it exists in fact.

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WLAD Reasonable Accommodations

- In Washington, employers are required to assist qualified applicants and employees in their efforts to perform essential job functions.
- Always engage in (and document!) the following step-by-step analysis:
 1. Is the individual qualified?
 2. Does the individual have a disability?
 3. Are there reasonable accommodations available?
 4. Affirmative defense - can you make a showing that the available accommodations pose an undue hardship?
 5. Affirmative defense - direct threat to safety.

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Reasonable Accommodations Interactive Process

- An informal process, required by state law, between employer and employee that establishes the need for a reasonable accommodation.
- Employer should document process.
- Employer may require medical information from employee's doctor; obtain release to obtain the information.
- Utilize deadlines for the exchange of information.
- Ongoing dialogue.
- Employer may be required to modify accommodations over the course of the condition.

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Reasonable Accommodations Examples

- Does not have to be accommodation that employee wants, suggests or requests.
- Does not have to be most expensive.
- Does not include changing supervisors.
- May include telecommuting, or working from home.
- May include extending otherwise approved leave of absence.
- You have to *try*.

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Equal Pay

Federal Law: Equal Pay Act of 1963

- Coverage: All employers covered by the Fair Labor Standards Act ("FLSA").
- Prohibits "discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."
- Enforcement: EEOC.

Washington State Law: Equal Pay Act, RCW 49.12.175

- Coverage: All employers with one or more employees.
- Enforcement: Department of Labor and Industries, Wage and Hour Division.

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RCW Title 28A Common School Provisions

- Employees
- Certificated Employees
- Qualifications
- Certifications
- Evaluations
- Salary and Compensation
- Benefits
- Insurance

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RCW 28A.642.010 Discrimination Prohibited

- "Discrimination in Washington public schools on the basis of race, creed, religion, color, national origin, honorably discharged veteran or military status, sexual orientation including gender expression or identity, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability is prohibited."
- RCW 28A.640.020 – sexual equality; sexual harassment policies
- RCW 28A.642.020 – applies to school employment
- RCW 28A.640.040 and 642.040 – "Any person aggrieved by a violation...has a right of action in superior court for civil damages and such equitable relief as the court determines."

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RCW 28A.400s Hiring and Discharge

- [28A.400.200s](#) – Salary and compensation for employees.
- [28A.400.300](#) - Written leave policies and benefits.
- [28A.400.301](#) - Disclosure and investigation of sexual misconduct.
- [28A.400.303-306](#) – Process for fingerprinting/background checks.
- [28A.400.310](#) - Law against discrimination applicable to districts' employment practices.
- [28A.400.315](#) – Duration of administrator contracts.

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RCW 28A.400s Hiring and Discharge cont'd

- [28A.400.317](#) – Mandatory reporting and training.
- [28A.400.320-322](#) - Crimes against children - mandatory termination.
- [28A.400.330](#) – Districts cannot hire contractors who have committed crimes against children .
- [28A.400.340](#) – “Any notice of discharge given to a classified or certificated employee, if that employee has a right to appeal the discharge, shall contain notice of that right, notice that a description of the appeal process is available, and how the description of the appeal process may be obtained.”

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Collective Bargaining Agreements

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At-will Employment General Rule

What does “at-will” mean?

- Ended by either the employer or employee.
- At any time.
- For any or no reason.
- With or without notice.

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At-will Employment Exception - CBA

- Collective Bargaining Agreements negate the at-will relationship by specifying the terms and conditions of employment.
- Generally, union employees may only be dismissed based on "Just Cause":
 - Discharge only when sufficient reasons are shown.
 - The employer follows a specific procedure – affords the employee "due process."

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"Just Cause"

How may an employer show just cause?

- Notice to the employee of work rules/acceptable performance.
- Work rules are reasonable
- A full and fair investigation is conducted.
- Verification of the employee's misconduct.
- Discipline (up to termination) is consistent.
- Discipline (up to termination) is reasonably related to the severity of the conduct.

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Washington Law governing Public and School Employees

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At-will Employment Exception – WA Law

- In Washington by statute certain school employees, such as certificated teachers, can only be dismissed in accordance with the process set forth in RCW 28A.405 *et seq.*
- The CBA and Washington law circumscribe the employment relationship - negating the at-will relationship by specifying the terms and conditions of employment and dismissal.

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At-will Employment Exception – WA Law

- RCW 28A.405.300 requires:
 - **Notification**; and
 - **Probable Cause**.
 - “In the event it is determined that there is probable cause or causes for a teacher, principal, supervisor, superintendent, or other certificated employee, holding a position...with the school district,...to be discharged or otherwise adversely affected in his or her contract status, such employee shall be notified in writing of that decision, which notification shall specify the probable cause or causes for such action...”
 - Employee has 10 days to request a hearing to “determine whether or not there is sufficient cause or causes for his or her discharge or other adverse action...”

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At-will Employment Exception – WA Law

- Washington law sets forth different discharge procedures for employees for:
 - Disciplinary terminations; and
 - Performance terminations.

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Loudermill Right - Public Employees

- 1985 U.S. Supreme Court case, stating that prior to termination a “tenured public employee is entitled to oral or written notice of the charges against him/her, an explanation of the employer’s evidence, and a opportunity to present his/her side of the story.”
 - Employer provides: **oral or written notice of charges** or allegations and explanation
 - Public employee must be given **opportunity to respond to charges/allegations in person** or by submitting a written statement, before a final decision is issued.

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Loudermill Right - Public Employees

- Includes 5 components:
 1. **Property Right:** Non-probationary public servants are considered to have a property right to their employment and can only be terminated for cause.
 2. **Due Process:** If employment is a property right, then employee must have proper notice and opportunity for a hearing before being deprived of such property right.
 3. **Employee’s Case:** Limited; employee does not have a right to cross-examine.
 4. **Before Final Decision**
 5. **Hearing:** Goal of the meeting is to verify truth of the allegations, and whether or not the anticipated level of discipline can be substantiated and then justified.

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Weingarten Rights - Union Employees

- In *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the U.S. Supreme Court held that the National Labor Relations Act “guarantees an employee’s right to the presence of a union representative at an investigatory interview **in which the risk of discipline reasonably inheres.**”
- An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend his or her conduct.
- Employee has right to request representation if she has a **reasonable belief that discipline or other adverse consequences may result from what he or she says.**

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Section 2: The Hiring Process

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Hiring Process Pitfalls

- Improper questions and conduct during the interview and hiring process can lead to claims of discrimination .
- Applicants are protected even though there is no employment relationship established.
- Information prohibited from the applicant cannot be solicited from third parties, e.g., former employers.

Prepare

- Create a file for each job opening (copies of postings, resumes received, etc.)
- The job description and job requirements should be meaningful and understandable to both internal and external candidate.
- Essential and secondary job functions should be listed.
- Identify 3-5 major objectives when interviewing candidates.
- Process should be the same or very similar for all candidates to avoid claims of discrimination.
- Similar interviews and questions for each candidate - each interviewer should have a prepared list or core questions.
- Interview notes should be retained.



Pre-employment Inquiries

What can you ask a job applicant during the interview?

- Skills, ability.
- Background experience.
- Education.
- Objective information or opinions relating to the job.

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Pre-employment Inquiries

You may **NOT** ask a job applicant about:

- **Age:** May imply a preference for persons under 40 years of age.
- **Convictions:** Only after initial screening for minimum qualifications.
- **Arrests**
- **Citizenship:** But you may ask, "Do you have the legal ability to work in the United States?"
- **Family:** No inquiries about spouse or partner, or their employment or salary, children, child care arrangements or dependents, BUT, you may ask if applicant can meet a specific work schedule or has commitments that may prevent meeting work attendance requirements.

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Prohibited Inquiries – cont'd

- **Disability:** You may ask whether an interviewee is able to perform the essential functions of the job with or without reasonable accommodation.
- **Marital Status:** Stay away from any question that may elicit an answer revealing an applicant's marital status.
- **National Origin:** No inquiries into applicant's or applicant's family's lineage, ancestry, national origin, descent, birthplace, or first language. You MAY ask about the applicant's ability to read, write and speak foreign languages only if those are qualifications for the position.

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Prohibited Inquiries – cont'd

- **Organizations:** Do not require applicants to disclose all of the organizations, clubs, societies, etc. to which they belong – if you want to ask, ask for only job related or professional organizations.
- **Pregnancy:** Only make inquiries related to the duration of stay on the job or anticipated absences that are made to ALL interviewees.
- **Race/Color**
- **Relatives**
- **Religion**

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Prohibited Inquiries – cont'd

- **SEX:** Unless in the rare instance of a bona fide occupational qualification
- **SEXUAL ORIENTATION**
- **POLITICS:** While not prohibited this is a topic to be avoided in interviews.

NOTE:

- If an applicant volunteers any of the above information or if the information is received from a reference, it must not be considered in the hiring process.
- Your notes about an applicant during the screening process should not contain words or comments related to any of the prohibited subjects; only job related information.

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WAC 162-12-140 – “Unfair Practices”

- Provides examples of “fair and unfair inquiries” made in job applications, interviews or any other type of applicant inquiry.
- Applies to inquiries made to persons other than an applicant (about the applicant) and inquiries made by third parties such as credit reporting service.
- The rules do not apply after a person is employed.
- Rules apply *unless*: (a) there is a “**bona fide occupational qualification**,” (b) voluntary affirmative action plan; or (c) requirement of federal law or regulation.
- If exception applies, then inquiries of employers must be accompanied by a written explanation of their purpose.

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Section 3: Best Practices for Terminations

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"Tom, we're letting you go, but we'd like you to stay on and train your replacement so they know what not to do."

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Wrongful Termination Claims

- Civil tort claim or a statutory claim
- Generally, employee alleges that he/she was discharged for:
 - (1) unlawful reasons; or
 - (2) prematurely when the employer failed to follow established procedures.
- May allege breach of contract
- May allege breach of "implied contract"
- May allege violation of public policy - retaliation

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Wrongful Termination Claims

Ways to minimize the risks of wrongful termination claims:

- Know the law.
- Know your contract.
- Include disclaimers in Employee Handbooks.
- Document performance issues, counseling sessions, warnings...
- Consistently apply policies and rules.
- Train of supervisors and managers.
- Communicate frequently with employees you supervise.
- Do not make oral promises of job security or specific treatment.

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“If it isn’t written down, it didn’t happen.”

- Record only accurate facts and contemporaneously.
- Keep it all about business - who, what, WHEN, where...
- Avoid personal opinions.
- Record all pertinent facts; omit extraneous and irrelevant information.
- Written reports should stand on their own; and before an unknown audience. It may be read by higher administrators, third parties, courts... The document must convey to reader exactly what you intend to record without the further interpretation or additional explanation.
- Consistent format across departments and in similar situations.

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Document, document, document

Appropriate situations for documentation:

- Attendance
- Orientation
- Trainings
- Performance evaluations
- Counseling sessions
- Discipline
- Investigations
- ALL separations of employment (layoffs, firings, voluntary resignations...)

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Absenteeism

- Implement a formal written attendance policy
 - Different attendance standards can be set for different departments, as long as those standards are applied consistently
 - Set expectations
 - Make clear that attendance policies apply to all employees
- Consistently enforce attendance policy
- Document all absences
 - Excessive absences
 - Patterns

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Before Terminating...

- Build a Smart Case. Effective discipline and defensible terminations start with a solid foundation – avoid undocumented reasons, inconsistent records, or having no basis at all.
- Keep thorough and accurate records. Refreshes your memory and lends to credibility.
 - Document poor performance.
 - Document absenteeism.
 - Document questionable conduct and attitude by tying it to behavior and performance.
 - *Specific fact-based examples.*

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Document these Crucial Steps for Public/Unionized Employees

To establish "Probable Cause":

1. Notice must be given to the employee of work rules/acceptable performance.
2. Work rules must be reasonable.
3. A full and fair investigation must be conducted to verify conduct.
4. Discipline must be consistent with those similarly situated.
5. Discipline (or termination) must be reasonably related to the severity of the conduct.

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Have you built your case?

- Are there grounds for action at this time? Not all documented observations of the employee's behavior may justify immediate corrective action or termination.
1. Is there a reasonable work rule?
 2. Is employee aware of that rule, and the consequences of violating it?
 3. Was an "investigation" conducted?
 4. Has the employee had a chance to explain?
 5. What disciplinary actions were issued recently or in the past?
 6. *How have you treated other employees in similar circumstances in the past?*

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Communicating the Decision

- Have a script. Working from a written outline helps to focus your thoughts ahead of time, cut away extraneous or irrelevant “filler” talk, keep you on track during the meeting, and provides an excellent record.
- Respect *Weingarten* rights. Ensure the employee has the opportunity to be represented by his/her union rep if requested.
- Protect your credibility. Use documented examples in discussion with the employee to establish that your position is well-reasoned and appropriate.
- Level with ‘em. Be direct and clear with the employee. Describe the performance, behavior or situation with non-judgmental words, being brief and to the point.

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Obtain a Release and Waiver Agreement

- **OPTIONAL**
- Not required by law
- Sets forth the terms of separation
- Legally binding and enforceable agreement
 - Must include “consideration” - something to which the employee is not already entitled to, ie., severance pay
- Generally waives: “all claims, demands, damages, causes of action, attorney fees and expenses of any kind whatsoever,” related to employment, including those under Title VII, the ADEA, the ADA, ERISA and WLAD...

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Release and Waiver Agreements

Certain rights CANNOT be waived in a severance agreement:

- Workers' compensation claims
- Unemployment claims
- Future rights (unlawful acts done after the signing of the release and waiver)
- Fair Labor Standards Act wage and hour claims (unless blessed by the DOL)
- EEOC *charge-filing* rights
 - Waiver of discrimination claims does prohibit filing a charge
 - Courts have held that employees who sign waivers can forfeit their right to recover from the employer in lawsuit
 - Employee may have to return severance pay if they want to sue

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Release and Waiver Agreements Employees 40+

Releases of ADEA claims must meet certain requirements:

- Applies to persons 40 years and older
- Must refer specifically to the ADEA, as amended
- Advise the individual of the right to consult with legal counsel
- 21-day consideration period (45 days for groups)
- 7-day revocation period
- Plainly written
- Additional disclosure requirements where 2 or more employees are terminated within the same time period

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Summary

- When engaging in the hiring process or considering termination, be aware of:
 - Numerous federal, state and local anti-discrimination laws.
 - The terms of your union contract and relevant WA statute outlining process required for discipline or termination.
- Prepare for, and document the hiring/interview process – keep a job file.
- Before terminating, make sure you've "built your case" and you've got consistent, thorough documentation to support the adverse employment action.
- The goal is to present a legitimate business reason that refutes a claim of wrongful termination, retaliation or discrimination.

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Any Questions?

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Thank You

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