

HR 101: Roundtable on Basic & Best Practices

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Outline

- Hiring
- Wage and Hour
- Leave Laws/Issues
- Employment Agreements
- Performance/Discipline Issues
- Harassment/Discrimination
- Termination

BUT BEFORE WE DO THAT

What is an employee?

- Is anyone who provides services an employee?
- Are owners employees?
- Are independent contractors employees?
- Are temps employees?
- Are interns employees?
- How do I know, how do I choose?
- Why does it matter?

Hiring: Assessing Your Employment Needs

- Job duties and responsibilities
 - Reporting structure
- Hours and schedule
 - Exempt or non-exempt position
- Required education or training
 - Difference as to preferred education or training
- Physical requirements
- Compensation
 - Wages
 - Benefits
- Other desired traits (that are legally permissible)



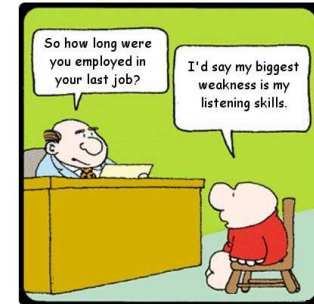
Hiring: Advertising the Position

- Where to advertise
- Accurately describing the position
- Beware language that implies membership in a particular protected class, for example:

Avoid:	Say instead:
Recent college graduates	Entry-level
Young and energetic	Enthusiastic
1-3 years of experience	At least 1 year of experience

Hiring: Applicant Interviews

- Selecting the interviewer(s)
 - Relevant to the position
 - Trained on interviewing
 - Presents company in a positive light
- Ask good questions designed to assess the applicant's potential as an employee
 - Consider using a script
- Avoid asking personal questions, even if interested
- Avoid risky questions (next slide)



Hiring: Background Checks

- Reference verification
 - Listed references v. industry connections
- Criminal background checks
- Credit checks
- Social media and Google searches
- Drug testing



Hiring: Offer Letters

- No requirement that employee have a contract
- In absence of contract, recommend use of an offer letter which sets forth
 - Title/position
 - Start date
 - Supervisor
 - Rate and frequency of pay
 - Hours of work (including full-time, part-time, seasonal, etc.)
 - Eligibility for benefits
 - Conditions of offer
 - Confirm relationship is at-will

Hiring: New Hire Paperwork

- W-4 forms
 - State and federal
 - Retain for at least four years
- I-9 form and verification
 - Within 3 days of hire
 - Retain for 3 years from hire or 1 year after employment ends
 - How do you handle remote employees?

Wage and Hour Issues To Be Mindful Of:

- Payment for all time employees “suffer” or are “permitted” to work.
 - “Donning” and “Duffing”
 - Clocking out and returning to work
 - Mobile Devices
- Restaurants/Hospitality & Tip Pooling
- Independent Contractor versus Employee
- Equal Pay (Wage and Hour & Discrimination)
 - Audits of Pay practices
 - Handling salary information
- Wage Payment at Termination
 - Vacation
 - Commissions

Wage and Hour: Exempt vs. Non-exempt

- Relevant to whether the employee must be paid overtime
- Common exemptions
 - Administrative employees
 - Executive employees
 - Learned and creative professionals
 - Computer professionals
 - Outside sales employees
 - Highly compensated employees

Wage and Hour: Non-Exempt

- Minimum wage
- Overtime
 - Must be paid when an employee works more than 40 hours in a workweek
 - For all hours worked over 40, the employee must be paid 1.5 times his or her regular rate of pay
 - Subject to exemptions for certain types of employees

Wage and Hour: Exempt Employees

- Requirements
 - Paid on a salary basis
 - Salary is at least \$33,000/year (State = 3000 times state min. wage \$11)
 - “Duties test” is satisfied
- Paying an employee a salary does not automatically mean the employee is exempt from the overtime requirement
- Tracking hours recommended

Wage and Hour: Exempt Employees

- Exempt v. Non-exempt employees

- Professional Exempt
- Administratively Exempt

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs.

Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

- Executive Exempt

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a [salary basis](#) (as defined in the regulations) at a rate not less than \$455* per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

WAGE AND HOUR LAWS:

Rest Breaks (State Law)

- 26 M.R.S.A. § 601
- Non-exempt hourly employees must be given at least a 30 minute rest break (which can be used to eat a meal) after working 6 hours.
- Exemptions for locations where work involves frequent breaks and there are fewer than three employees
- Break waivers
 - Must be in writing and signed
 - Kept in employee file and provide them with an opportunity to revoke at any time
 - Does it matter if I pay them for the breaks anyways?
 - Yes.

WAGE AND HOUR LAWS:

Minimum Wage/Overtime (State and Federal Law)

- Applies to all employers regardless of size
- Minimum wage – look at state, federal and now local
 - Pay at the highest rate
- Overtime for non-exempt employees
 - Pay at 1.5 times the regular rate of pay for hours in excess of 40 per week
 - No such thing as “comp. time” in different weeks
 - “Regular Rate of Pay” may include bonus calculations

WAGE AND HOUR LAWS: Employee Classifications (State and Federal Laws)

- Employee
- Independent Contractor
- Exempt/Nonexempt
 - Different from hourly versus salary
- Full-time; Part-time; Temporary
- Joint Employment Situations

Independent Contractors –

Maine's Independent Contractor Standards

Step 1: Does the individual have the essential right to control the means and progress of the work except as to final results?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 2.

Step 2: Is the individual customarily engaged in an independently established trade, occupation, profession or business?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 3.

Step 3: Does the individual have the opportunity for profit and loss as a result of the services being performed for the other individual/entity?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 4.

Step 4: Does the individual hire and pay his or her assistants (if any) and to the extent that these assistants are employees, supervise the details of their work?

No: Stop. The individual is an *employee*, not an independent contractor.
Yes: Move to step 5.

Step 5: Does the individual make their services available to some client or customer community even if their right to do so is voluntarily not exercised or is temporarily restricted?

No: The individual is an *employee*, not an independent contractor.
Yes: Move to step 6.

Step 6: Determine if the individual meets any of the 3 of the following elements:

- The individual has a substantive investment in the facilities, tools, instruments, materials, & knowledge used by the individual to complete the work.
- The individual is not required to work exclusively for the other individual/entity.
- The individual is responsible for satisfactory completion of the work and may be held contractually responsible for failure to complete the work.
- The parties have a contract that defines the relationship and gives contractual rights in the event the contract is terminated by the other individual/entity prior to completion of the work.
- Payment to the individual is based on factors directly related to the work performed and not solely on the amount of time expended by the individual.
- Such work is outside the usual course of the business for which the services is performed.
- The individual has an IRS Determination (SS-8) of independent contractor status.

No: If the individual meets less than 3 elements, **STOP**. The individual is an *employee*, not an independent contractor.
Yes: If the individual meets 3 or more elements; the individual is an independent contractor.

WAGE AND HOUR LAWS: Vacation/PTO (State Law)

- No requirement that vacation or PTO be provided
- If it is, have a policy that sets forth appropriate use
- May be considered wages to be paid out at the time of termination

Leave Laws

- Family and Medical Leave (State/Federal)
 - Initial Response
 - Document/Document/Document
 - Can you ask for more information?
 - Return to Work
 - Intermittent Leave Issues
- ADA
 - The Interactive Dialogue
 - What is NOT a Reasonable Accommodation
 - Issues of Proof
- Workers' Compensation
 - “Work is really stressing me out”

LEAVE LAWS:

Maine Family Medical Leave

- Applies to employers with 15 or more employees
- Permits 10 weeks of protected leave in any 2 year period
- Can run consecutively with any federal leave entitlements
- Employee must have been employed for at least one year
- No 1,250 hour requirement
- No state-created forms to document the leave-use federal forms as a guide

LEAVE LAWS:

Federal Family and Medical Leave Act

- Employers who have 50 or more employees within 75 miles
 - Part time or full time
- Employees who have been employed for over 1 year and worked over 1,250 hours in the last year
- Entitled to 12 weeks of protected unpaid year every year
- Recommended rolling calendar period, but can use a date of hire or calendar year to measure the 1 year period.
- Permissible leave:
 - Leave related to pregnancy, birth, adoption and childcare
 - Care for a family member with a serious health condition
 - Employee's own serious health condition
 - Military qualifying exigency leave
 - Care for a military family member with an injury or illness

ADA/MHRA

- When FMLA or MeFMLA runs out, ADA/MHRA is still applicable
- Interactive Dialogue
- Duty to Accommodate Unless “Undue Hardship”

Employment Contracts

- At Will versus Set Time Frame
- Non-Competes
- Confidentiality Agreements
- Non-Solicitations
- Bonus/Commission Agreements
- Is a Performance Improvement Plan a Contract?

Managing Discipline Issues

- Policies versus practices
- Manager Training
- Oral Warnings
- Written Warnings
- Performance Improvement Plans
- The Termination Discussion/Decision

HARASSMENT/DISCRIMINATION:

Posting and Training Requirements

- All Maine employers must provide employees with annual written notices regarding sexual harassment, which must include:
 - A statement that sexual harassment is illegal
 - The definition of sexual harassment
 - Examples of sexual harassment
 - A description of the employer's internal complaint procedure
 - A description of the Maine Human Rights Commission complaint process
 - Directions on how to contact the Maine Human Rights Commission
 - A statement that any complainant will be protected from retaliation
- Employers with 15 or more employees
 - Training on sexual harassment must occur within one year of employment beginning
 - Additional manager/supervisor training must occur to discuss responsibilities and methods for preventing and correcting harassment

HARASSMENT/DISCRIMINATION: Employee Fair Practices Statutes

- Title VII (42 U.S.C. § 2000e, et. seq.)
 - Prohibits discrimination on the basis of: race, color, national origin, religion, sex, gender, and pregnancy.
 - Prohibit retaliation for complaining about protected conduct
 - Prohibits harassment regarding a protected class
 - Employer = must have 15 or more employees
- Age Discrimination in Employment Act
 - Protects employees over the age of 40 from discrimination
- Americans with Disabilities Act
- Maine Whistleblowers' Protection Act
- Maine Human Rights Act
 - Prohibits discrimination on the basis of: race, color, sex, pregnancy, sexual orientation, gender expression, physical or mental disability, religion, age, ancestry/national origin, previous claims under the workers' compensation statute, and previous actions under the Maine Whistleblowers' Protection Act.

TERMINATION:

Employer's Final Payment Obligation

- 26 M.R.S.A. § 626
- All Maine Employers (regardless of size) must pay any earned and unpaid wages within a “reasonable time” after demand is made by the employee
- The “demand” by a departing employee triggers the statute
- Employer duties once demand for unpaid wages (whether written or oral has occurred)
 - Pay amount demanded (least risk)
 - Pay what the employer believes is owed and explain why (more risk)
 - Pay nothing at all (high risk)
- Damages
 - Failure to pay results requirement to pay the original amount owed, treble damages (doubling), attorneys’ fees, interests and costs, and a potential claim of untimely wage payment.

TERMINATION:

Employer's Final Payment Obligation

- **Best Practices**
 - Don't wait to be asked, pay on the next regular pay date. Failure to pay on the next regular pay date opens you up for liability for untimely wage payment
 - What are wages?
 - Hourly/salary paid
 - Earned Commissions
 - What may be wages?
 - Vacation/PTO – Depends on the way in which the policy is worded (unclear under ME case law)
 - Commissions – Policy/Agreement will identify when a commission is “earned”
 - Bonus – Policy/Agreement will identify when a commission is “earned”

TERMINATION:

Written Reason for Termination

- 26 M.R.S.A. § 630
- Employer must give a former employee a written statement setting forth the reasons for the termination.
- Statement must be provided within 15 days of a written request for the reason
- There are no legal parameters for what can/can not be included in the letter
- Recognize that this could be an exhibit in any future litigation
 - DO NOT SUGAR COAT
 - If there were multiple reasons for the termination, lay them all out

TERMINATION:

Personnel File Request

- 26 M.R.S.A. § 631
- *In each calendar year, the employer shall provide, at no cost to the employee, one copy of the entire personnel file when requested by the employee or former employee and, when requested by the employee or former employee, one copy of all the material added to the personnel file after the copy of the entire file was provided.*
- Employers may maintain the employee's file in any form (electronic, paper, on the cloud)
- Employers need to take steps to ensure the contents remain confidential
 - Get a signed authorization before releasing the file to anyone
- Must provide a copy within 10 days of the request
- What is a personnel file?
 - *Harding v. Wal-Mart, Inc.*, 2001 ME 13 “any records the employer has in the employer's possession” related to the employee's character, credit, work habits and compensation
 - This includes formal/informal evaluations and emails/documents related to performance

Questions?

