

The logo for the Oregon State Bar (OSB), consisting of the letters "OSB" in white on a black square background.

Professional Liability Fund

Employment Practices for Attorneys: Hire with Confidence and Avoid Trouble at Termination

Thursday, May 28, 2015

3.5 MCLE General or Practical Skills Credits

Paula A. Barran, Barran Liebman LLP
Shari L. Lane, Of Counsel, Harrang Long Gary Rudnick P.C.

www.osbplf.org

503-639-6911

1-800-452-1639

OSB Center
Tigard, Oregon

© 2015 Oregon State Bar Professional Liability Fund, all rights reserved. The information may not be republished, sold, or used in any other form without the written consent of the Oregon State Bar Professional Liability Fund. This information does not establish, report, or create the standard of care for attorneys in Oregon. Readers should conduct their own appropriate legal research.

MCLE FORM 1: Recordkeeping Form (Do Not Return This Form to the Bar)

Instructions:

Pursuant to MCLE Rule 7.2, every active member shall maintain records of participation in **accredited** CLE activities. You may wish to use this form to record your CLE activities, attaching it to a copy of the program brochure or other information regarding the CLE activity.

Do not return this form to the Oregon State Bar. This is to be retained in your own MCLE file.

Name:		Bar Number:	
Sponsor of CLE Activity:			
Title of CLE Activity:			
Date:		Location:	
<input type="checkbox"/> <i>Activity has been accredited by the Oregon State Bar for the following credit:</i>	<input type="checkbox"/> Full Credit. <i>I attended the entire program and the total of authorized credits are:</i>	<input type="checkbox"/> Partial Credit. <i>I attended _____ hours of the program and am entitled to the following credits*:</i>	
<input type="checkbox"/> General	<input type="checkbox"/> General	<input type="checkbox"/> General	
<input type="checkbox"/> Prof Resp-Ethics	<input type="checkbox"/> Prof Resp-Ethics	<input type="checkbox"/> Prof Resp-Ethics	
<input type="checkbox"/> Access to Justice	<input type="checkbox"/> Access to Justice	<input type="checkbox"/> Access to Justice	
<input type="checkbox"/> Child Abuse Rep.	<input type="checkbox"/> Child Abuse Rep.	<input type="checkbox"/> Child Abuse Rep.	
<input type="checkbox"/> Elder Abuse Rep.	<input type="checkbox"/> Elder Abuse Rep.	<input type="checkbox"/> Elder Abuse Rep.	
<input type="checkbox"/> Practical Skills	<input type="checkbox"/> Practical Skills	<input type="checkbox"/> Practical Skills	
<input type="checkbox"/> Pers. Management Assistance	<input type="checkbox"/> Pers. Management Assistance	<input type="checkbox"/> Pers. Management Assistance	

*Credit Calculation:

One (1) MCLE credit may be claimed for each sixty (60) minutes of actual participation. Do not include registration, introductions, business meetings and programs less than 30 minutes. MCLE credits may not be claimed for any activity that has not been accredited by the MCLE Administrator. If the program has not been accredited by the MCLE Administrator, you must submit a Group CLE Activity Accreditation application (See MCLE Form 2.)

Caveat:

If the actual program length is less than the credit hours approved, Bar members are responsible for making the appropriate adjustments in their compliance reports. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

About our Speakers

Paula Barran

Paula Barran, a founding partner at Barran Liebman, has been practicing labor and employment law since 1980. She has written extensively on management law and is a national speaker and trainer. In addition to providing employer advice, Paula handles employment litigation in state and federal courts, and labor disputes and employment arbitrations. Additionally, she develops and presents "train the trainer" programs to introduce comprehensive, and cost effective, training programs into workplaces. Since the first publication of the Oregon *Super Lawyers* magazine in 2006, Paula has repeatedly been named as a "Top Ten Lawyer" in Oregon. In 2008, and 2010, she was honored as the "Top Point Getter" for the year. Since 2003, Paula has been ranked #1 (with partners Ed Harnden and Rick Liebman) for Labor and Employment Law defense in the State of Oregon by *Chambers & Partners USA*, America's Leading Business Lawyers. She is also a fellow of The College of Labor and Employment Lawyers, a fellow of the American Bar Foundation, and has been named in US News' *Best Lawyers'* directory since 1995. Best Lawyers recently named Paula as their 2014 Portland, Oregon Employment Law - Management "Lawyer of the Year." She is admitted to practice in Oregon, Washington and before the U.S. Supreme Court, U.S. Court of Appeals, Ninth Circuit; U.S. District Court, District of Oregon and U.S. District Court, Eastern and Western Districts of Washington. Paula received her B.A. from the College of William and Mary, M.A. from Cornell University, Ph.D. from the University of British Columbia, J.D., with honors, from Osgoode Hall Law School at York University, and M.B.A. degree from the University of Oregon, Oregon Executive MBA program. Paula has also earned an ATIXA Title IX Coordinator Certificate. In addition to her labor and employment practice, she represents colleges and universities on wide ranging compliance issues including institutional obligations under Title VI, Title IX, and VAWA.

Shari Lane

Shari Lane has over a decade of experience as a labor and employment attorney and serves as vice chair of Harrang Long Gary Rudnick P.C.'s labor and employment group. Shari's practice focuses on advising employers in personnel issues and labor negotiations and on representing employers facing administrative agency claims and audits. Shari's advice and representation of employers is practical and down-to-earth, guided by her experiences as a business owner, employer, and manager.

Shari serves as an arbitrator on both the Arbitration Service of Portland and the Multnomah County Mandatory Arbitration Panel, in a variety of civil litigation cases. She is also available to provide mediation and arbitration services in employment law matters, calling on her knowledge and experience with both employers and employees to assist the parties in finding common ground and achieving resolution.

Prior to becoming Of Counsel at HLGR, Shari was the owner of Northwest Employment Law LLC in Portland and prior to that, an attorney with Cosgrave Vergeer Kester LLP, and Operations Manager for the Oregon Bureau of Labor & Industries.

NOW HIRING?

HOW TO AVOID TRAPS & PITFALLS DURING THE HIRING PROCESS

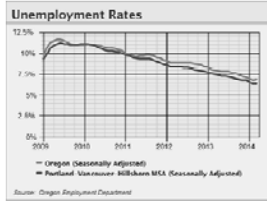
Professional Liability Fund: CLE
May 28, 2015

WITH PAULA BARRAN



THE UNEMPLOYMENT RATE IS LOOKING PRETTY GOOD

- Unemployment has declined every year since 2009
- Peak unemployment rate:
 - Oregon 11.6%
 - Portland metro 11.2%
- Current unemployment rate:
 - Oregon 6.9%
 - Portland metro 6.4%
- Times have changed since 2009...



STEPS IN THE HIRING PROCESS


- Recruitment and Job Announcements
- Application Forms and Resumes
- Initial Screening
- The Interview
- Offer Letters and Related Issues
- Background Checks
- Pre-employment Drug Testing
- Employment Eligibility



**RECRUITMENT &
JOB ANNOUNCEMENTS**


**DRAFTING THE JOB
ANNOUNCEMENT**

- Include minimum qualifications of the position
 - Should be job related, based on business necessity
 - Use job description, or conduct a job analysis
 - Talk with the supervisor about the duties of the vacant position



**DRAFTING THE JOB
ANNOUNCEMENT**

- Do not include phrases like:
 - “able-bodied person”
 - “citizens or green card holders only”
 - “great opportunity for students”
 - “perfect opportunity for stay at home mom looking to re-enter the workforce”
 - must be currently employed



UNEMPLOYED APPLICANT DISCRIMINATION



- Oregon law prohibits posting a job vacancy that:
 - Requires current employment as a job qualification
 - States unemployed job applicants will not be considered
- Employers may still check job applicants' qualifications
- No private cause of action

BARRAN LIEBMAN
ATTORNEYS

POSTING THE JOB ANNOUNCEMENT

- Internal posting
 - Required by CBA/policy?
- External posting
 - Be strategic about disparate impact
- Federal contractors and subcontractors
 - Comply with OFCCP outreach regulations
 - Self-assessments on recruiting efforts
 - If ineffective, implement alternative efforts



BARRAN LIEBMAN
ATTORNEYS

RECRUITING & SOCIAL MEDIA

- Social media is a vital tool for staffing professionals
- A recent survey by Bullhorn found 98.2% of recruiters use social media
- Practice includes adding individuals to contact list to develop a pool of candidates



BARRAN LIEBMAN
ATTORNEYS

RECRUITING & SOCIAL MEDIA

- ORS 659A.300 make it unlawful for an employer to:
 - Compel an applicant to add the employer to the applicant's list of contacts
 - Refuse to hire an applicant because the applicant refused to add the employer as a contact
- Practice tip: limit activity to accepting requests, do not send invitations



BARRAN LIEBMAN
ATTORNEYS

APPLICATION FORMS & RESUMES

USING EMPLOYMENT APPLICATIONS

- Why use a standard application form?
 - Consistent information from each applicant
 - Certification language
 - Authorization and release
- Application and resumes are not mutually exclusive



BARRAN LIEBMAN
ATTORNEYS

COMPONENTS OF AN APPLICATION

- Personal data
- EEO Statement
- Expected salary/wage
- Position sought
- Experience/work history
 - Previous employers
 - Dates of employment
 - Reasons for leaving
 - Rate of pay at conclusion of employment
 - Contact information for supervisors



BARRAN LIEBMAN
ATTORNEYS

COMPONENTS OF AN APPLICATION

- Education and Training
 - Questions should be job related
 - Avoid age-related inquiries (high school graduation date, etc.)
- Drivers license/driving record - if position requires driving
- Availability - shifts/days of the week
- Note potential accommodation issues
- Criminal record?
 - Cannot consider expunged and juvenile records
 - Pending "Ban the Box" law in Oregon (more on that later)

BARRAN LIEBMAN
ATTORNEYS

ACKNOWLEDGEMENT BY THE APPLICANT

- Acknowledge/Signature
 - Authorization to investigate (watch for FCRA issues!)
 - "Truthfulness" and consequences of lying
 - At-will employment
 - Arbitration agreement? (separate agreement and magic language required)



BARRAN LIEBMAN
ATTORNEYS

INITIAL SCREENING
CREATING A POOL OF QUALIFIED CANDIDATES


MAKING THE CUT

- Minimum qualifications
- Look for gaps on the application form
- Types of tests and process
 - Cognitive testing
 - Physical ability test
 - Watch our for disguised medical tests
 - Sample job tests
 - Avoid the asking applicants to perform "work" as a test

BARRAN LIEBMAN
ATTORNEYS

DEVELOP & APPLY SELECTION CRITERIA

- List characteristics of the ideal applicant
- Beyond just minimum qualifications
- Preferred or special qualifications (i.e. bilingual)
- Based on job descriptions



BARRAN LIEBMAN
ATTORNEYS

CONSIDER ADVERSE IMPACT

- Review applicant data
- Determine if there is an adverse impact
- Adverse impact means selection rate of a protected class is less than 80% of the rate for the group with the highest selection rate
- Consider Uniform Guidelines on Employee Selection Procedures

BARRAN LIEBMAN
ATTORNEYS

OREGON'S PUBLIC SECTOR VETERANS' PREFERENCE

- | | |
|---|---|
| <u>Current law</u> | <u>SB 87 (2015) changes</u> |
| <ul style="list-style-type: none">• Covers all competitive positions and promotions• Preference means<ul style="list-style-type: none">• Add points to applicant score (5 for veteran; 10 for disabled veteran), or• "Special consideration"• Applied at every stage• Must interview all veteran-applicants with "transferable skills"• Safe harbor against adverse impact | <ul style="list-style-type: none">• Preference means<ul style="list-style-type: none">• Add points to applicant score (5 for veteran; 10 for disabled veteran), or• Rank applicants, and advance veteran-applicants• Applied at initial interview• Must interview 5 veterans |

BARRAN LIEBMAN
ATTORNEYS

THE INTERVIEW

BASIC RULES

- Don't ask for information you can't use!
- Be strategic about your questions
 - You can get the information you want, just think about how you ask for it



BARRAN LIEBMAN
ATTORNEYS

IN PERSON OR TELEPHONIC?

- In person
 - Employers need to be aware of religious and cultural variations in appearances
 - New EEOC guidance on Religious Garb and Grooming in the Workplace
- Telephonic
 - Consider accommodations for hearing disabilities
 - Do not ask for photos or physical description unless BFOQ

BARRAN LIEBMAN
ATTORNEYS

EEOC GUIDANCE ON RELIGIOUS GARB



- Employers must provide a reasonable accommodation for sincerely held religious beliefs and practices
- Employees' religious beliefs may change over time
- Accommodation may require relaxing dress and grooming standards
- Most common issues that arise in court challenges seem to be hair—long or short, covered or not, bearded or clean shaven

BARRAN LIEBMAN
ATTORNEYS

EEOC V. ABERCROMBIE

- Employer maintains a “look policy” governing employee dress
- Before interview, Employer informed female applicant of the policy
- Applicant wore a hijab during her interview, but never requested an accommodation
- Employer determined wearing a hijab violated its “look policy”
- Applicant was denied position
- Applicant filed claim with EEOC, and EEOC sued Abercrombie for religious discrimination



BARRAN LIEBMAN
ATTORNEYS

COURT DECISIONS

- District court
 - Employer discriminated
- Appeals court
 - Employer was not on notice that it would have to accommodate applicant
- Supreme Court to decide:
 - Whether an employer can be liable for refusing to hire an applicant based on a “religious observance and practice” only if the employer has actual knowledge that accommodation was required



BARRAN LIEBMAN
ATTORNEYS

IS NOTE TAKING A GOOD IDEA?

- You need to take notes to keep track of the applicants
- Be careful of what notes you take
 - Notes will be requested in litigation
 - Short hand notes will be taken out of context
- “Wore a colorful headscarf”
- Document retention requirements and best practices



BARRAN LIEBMAN
ATTORNEYS

INTERVIEW QUESTIONS: DISABILITY

- Instead of:
 - Do you have a disability?
 - Have you ever filed a workers' compensation claim?
 - Do you have a history of drug or alcohol abuse?
 - Did you have to take a lot of time off at your last job?
- Ask:
 - "After reviewing the job description, can you perform the duties listed in the job description, with or without accommodation?"
 - If a worker has an obvious disability or reveals a hidden disability, ask the person to describe or demonstrate how he/she would perform job duties.

BARRAN LIEBMAN
ATTORNEYS

INTERVIEW QUESTIONS: AGE

- Instead of:
 - Date of birth?
 - When did you graduate?
 - When do you intend to retire?
- Ask:
 - The job requires someone to be 21 (or 18) or older. Can you meet that requirement?
 - Are you able to do this type of work?
 - Can you supply transcripts of your education?
- Interview Questions: Religion
 - Instead of:
 - What outside activities do you participate in?
 - Can you work Sundays?
 - Ask:
 - Are you a member of any professional associations?
 - Are you able to work the schedule of the position, including overtime?

BARRAN LIEBMAN
ATTORNEYS

INTERVIEW QUESTIONS: MARITAL STATUS

- Instead of:
 - Are you married?
 - When do you plan to start a family?
 - Do you have children? Child care arrangements?
- Ask:
 - Are you available to travel frequently?
 - Can you work overtime with little or no notice?
 - Can you work evenings and weekends?
 - When we check references/do a background check, are there other names we should look under?

BARRAN LIEBMAN
ATTORNEYS

**INTERVIEW QUESTIONS:
CITIZENSHIP**

- Instead of:
 - What type of accent is that?
 - Are you a citizen of the US?
 - Place of birth?
 - What country are you from?
 - Where is your accent from?
 - What nationality is your last name?
 - When does your visa expire?
- Ask:
 - If you are hired, are you able to provide documentation to prove that you are eligible to work in the US?
 - Are you comfortable with a lot of writing in English?

BARRAN LIEBMAN
ATTORNEYS

**INTERVIEW QUESTIONS:
MILITARY**

- Instead of:
 - How much time do you spend with the military?
 - Will you miss work to perform military service?
- Ask:
 - What experience did you gain in the uniformed service that is relevant to the job you would be doing?
 - Transferable skills under ORS 408.237

BARRAN LIEBMAN
ATTORNEYS

**OFFER LETTERS &
RESTRICTIONS**

OFFER LETTERS

- Include
 - Starting date
 - Salary & benefits
 - Normal work hours (subject to business needs)
 - Job title & exempt or non-exempt status
 - Acknowledgment of at-will employment
- List contingent conditions
 - Pre-hire drug test,
 - Physical or cognitive tests, based on business necessity
 - Background check
 - Employment eligibility/right to work in U.S.

BARRAN LIEBMAN
ATTORNEYS

SPECIAL OFFER REQUIREMENTS

- Non-compete
 - 2 weeks' written notice required before first day (ORS 653.295)
 - First day excluded, last day included
- Non-solicitation
 - No advance notice required
- Employer should have applicant certify he/she is not subject to these limitations

BARRAN LIEBMAN
ATTORNEYS

SPECIAL OFFER REQUIREMENTS

- Arbitration agreements
 - 72 hours' written notice
 - In employment offer
 - Required as a condition of employment
 - Must be signed by employee
 - Provide copy of agreement
 - Mandatory acknowledgment language in **boldface**

- ORS 36.620

BARRAN LIEBMAN
ATTORNEYS

BACKGROUND CHECKS
THE PANDORA'S BOX OF ON-BOARDING

DIY OR CONTRACT IT OUT?

- DIY
 - Verify information on application
 - Contact references
 - To Google or not to Google
 - No FCRA obligation
- Third party contractor
 - Criminal history
 - Credit history
 - Obligations under FCRA



BARRAN LIEBMAN
ATTORNEYS

CURRENT RULES REFRESHER

- Fair Credit Reporting Act (FCRA) applies when a third party agency conducts background checks for an employer—not employers who conduct their own background checks
- Procedural requirements:
 - Notice to applicant
 - Signed authorization
 - Notice before taking adverse action in whole or in part based on report
 - Copy of report
 - Summary of rights (CFPB document)
 - Notice after taking adverse action
 - Contact information for third party agency

BARRAN LIEBMAN
ATTORNEYS

FCRA PROCEDURAL REQUIREMENTS

1. Disclose that you are conducting a background investigation
 - Provide applicant or employee FCRA Disclosure Form
2. Obtain a signed authorization
 - Authorization MUST be a stand alone form
 - Authorization that is incorporated into application form is invalid
 - Authorization may not contain a release of claims
 - Authorization may be valid throughout term of employment, if it is written that way

BARRAN LIEBMAN
ATTORNEYS

FCRA PROCEDURAL REQUIREMENTS

3. If you decide not to hire based IN WHOLE OR IN PART on the background investigation
 - Notify the applicant BEFORE taking adverse action
 - Provide a copy of the investigative report
 - Provide "a summary of rights" form
4. After taking adverse action, provide notice including how to contact reporting agency

February 2014, FTC and EEOC issued joint guidance on background checks

BARRAN LIEBMAN
ATTORNEYS

CRIMINAL CONVICTION, NOW WHAT?

- EEOC's position
 - Criminal records lead to adverse impact discrimination based on national origin
- Employer's burden
 - Demonstrate practices do not cause a disparate impact
- Required process to establish no discrimination requires an "individualized assessment"



BARRAN LIEBMAN
ATTORNEYS

“INDIVIDUALIZED ASSESSMENT”

- Inform applicant he may be excluded because of past criminal conduct
- Provide applicant an opportunity to explain why he should still be considered
- Evaluate the business need for the exclusion and the applicant’s information
- Factors to consider:
 - Incorrect/inaccurate criminal records
 - Facts surrounding the crime
 - Passage of time since the conviction
 - Age at the time of conviction
 - Whether he has performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct



ARREST RECORDS

- Oregon law
 - Permits inquiries into arrest records
 - Prohibits considering expunged juvenile records
 - ORS 659A.030(d)
- Washington law
 - If you ask about arrests, you must follow up to determine if charges are pending or if it resulted in a conviction
 - Prohibits considering offense not reasonably rated to job or older than 10 years
 - WAC 162-12-140



“BAN THE BOX” LAWS

- “Ban the Box” refers to a requirement to remove the “box” from employment applications asking an applicant whether he or she has ever been convicted of a crime
- Ban the Box has gone viral
 - 14 states have passed laws
 - 100+ cities/counties have passed laws
 - Multnomah County
 - Bipartisan support



BAN THE BOX AS PROPOSED IN OREGON

APPLICATION FOR EMPLOYMENT

Q1) Have you ever been convicted of or pled guilty to a criminal offense?

YES

NO

NONE OF YOUR BUSINESS



- Would make it an unlawful employment practice to:
 - Inquire about an applicant's conviction history
 - Fail to use application forms that inform a background check is required
 - Conduct a background check without making a finding the check is related to the position
 - Disqualify an applicant because of a conviction, unless the conviction is job related

BARRAN LIEBMAN
ATTORNEYS

CRIMINAL CONVICTION, NOW WHAT?

- If it is the basis for an adverse action, employers must provide:
 1. Written notice of why the conviction disqualifies the applicant
 2. The applicant with a copy of the criminal report
 3. The applicant examples of evidence to submit for reconsideration
 4. Provide the applicant time to respond (employer cannot fill the position in the meantime)
- Employer's decision on disqualification must be based on the following factors:
 - Related to job duties
 - Opportunity for similar offense to occur
 - Length of time since conviction

BARRAN LIEBMAN
ATTORNEYS

TAKING AN ADVERSE ACTION

- Employer taking an adverse action must:
 - Inform the applicant of the final decision and other positions the applicant may be eligible for
 - Still comply with FCRA
- Applicant may challenge final decision by:
 - Filing a lawsuit for an unlawful employment practice
 - "Appeal the adverse decision to the Commissioner of the Bureau of Labor and Industry."



BARRAN LIEBMAN
ATTORNEYS

USING CREDIT HISTORY

- Oregon and Washington law

- Prohibits employers from obtaining or using an applicant/employee's credit history for employment purposes

- Exception
 - Statutory exceptions
 - Substantially job-related and disclosed to applicant



BARRAN LIEBMAN
ATTORNEYS

PRE-EMPLOYMENT DRUG TESTING

ADA CONSIDERATIONS

- Testing for illegal drugs is NOT a medical examination under the ADA
- Risk is in learning of presence of prescription drug in sample or other medical information
 - Keep medical records confidential
 - Need to know basis
 - Separate from personnel file



BARRAN LIEBMAN
ATTORNEYS

TIMING MATTERS

- At the pre-offer stage, ADA prohibits employers from requiring a medical examination
- Extend offer conditioned upon pre-employment drug test



BARRAN LIEBMAN
ATTORNEYS

MECHANICS OF DRUG TEST

- Establish a written policy and provide it to applicants
 - List illegal drugs to be tested
 - Testing method and procedure
 - Consequences of attempting to alter, refusing test or testing positive
 - Confidentiality of records



BARRAN LIEBMAN
ATTORNEYS

A WORD ABOUT MEASURE 91

- Federal Controlled Substance Act did not change
- Cannabis is still a Schedule I Drug
 - Possession and use of marijuana is illegal under federal law
- Measure 91
 - Vests OLCC with authority to regulate recreational marijuana
 - OLCC's FAQs
 - Q: Can I lose my job for using marijuana?
 - A: Passage of Measure 91 does not impact employment law in Oregon

www.oregon.gov/olcc/marijuana

BARRAN LIEBMAN
ATTORNEYS

NEW I-9FORMS
BIGGER AND BETTER THAN EVER?

BACK TO THE BASICS

- Immigration Reform & Control Act of 1986 (IRCA)
 - Prohibits employers from knowingly hiring, or continuing to employ, any person not authorized to work in the United States
 - Requires employers to verify each new employee's
 - Identity
 - Authorization to work in the U.S.

BARRAN LIEBMAN
ATTORNEYS

BACK TO THE BASICS

- Employer must complete I-9 Form within 3 business days of date of hire
 - Cannot be completed prior
 - Must be completed on first day of work for pay if job lasts less than 3 days
- Employee may choose which documents to present
 - Have employee review list of acceptable documents
- Must be original documents
 - Copies are never acceptable
 - Must be unexpired documents

BARRAN LIEBMAN
ATTORNEYS

I-9 FORMS & RECORD KEEPING

- Must retain I-9 Forms until the later of:
 - 1 year after termination
 - 3 years after hire
- Best practice to keep all I-9 Forms together in separate repository from all other personnel records for inspection



CHANGES TO THE I-9 FORMS



- Includes data fields for the employee's email address and phone number
- Information is optional, but employers should *encourage* disclosure to allow direct contact from USCIS
- Specifically allows "Authorized Agent" or the employer to complete the employer section of the form
- Permits outside vendors to process I-9 Forms



WHAT'S NEW ON E-VERIFY?

- USCIS issued an updated Tentative Nonconfirmation Further Action Notice
- Employers are directed to provide an updated "fact sheet" to employees who receive a TNC notice
- The fact sheet informs employees how to correct discrepancies between immigration records and information provided on the I-9 Form



QUESTIONS?



BARRAN LIEBMAN
ATTORNEYS

THANK YOU!

Professional Liability Fund: CLE
May 28, 2015

BARRAN LIEBMAN
ATTORNEYS
Employment | Labor | Benefits | Compliance
www.barran.com | 503.228.0500



HARRANG LONG
GARY RUDNICK P.C.
ATTORNEYS AT LAW

Professional Liability Fund

Supervision, Documentation, Discipline & Termination

Presented by

Shari L. Lane, Of Counsel Attorney
Vice Chair Labor & Employment Group

Harrang Long Gary Rudnick P.C.
Offices in Portland, Salem, Eugene

Phone (Portland): 503.242.0000

Or Toll Free: 1.800.315.4172

www.harrang.com

PROTECTED CLASSES

Federal	Oregon
<ul style="list-style-type: none"> ▪ Discrimination (including harassment/hostile work environment) based on race, color, national origin religion, gender, age (40 or older) ▪ Disability (discrimination, failure to accommodate) ▪ Association with a person of a protected class ▪ Retaliation for opposing an unlawful practice ▪ GINA ▪ Veteran status/military duty ▪ Family and Medical Leave Act (interfering with medical leave, failure to provide medical leave, retaliation for invoking FMLA) ▪ Whistleblowing ▪ Concerted Activity (NLRA) 	<ul style="list-style-type: none"> ▪ Discrimination, Association, Retaliation: Same as Federal (age protection starts at age 18) ▪ Disability ▪ Sexual orientation & gender identity ▪ Marital Status or Family Relationship ▪ Wage claim ▪ Oregon Family Leave Act (same as FMLA) ▪ Workers Compensation ▪ OSHA Complaint ▪ Credit history ▪ Retaliation for refusal to attend meeting related to religious or political matters ▪ Leave to attend criminal proceedings (crime victims), or address domestic violence, harassment, or stalking ▪ Whistleblowing

DOCUMENTATION

1. Why document?

At will employment does not change the fact that, in the event of a claim, the employer must still demonstrate a “legitimate non-discriminatory reason” for employment action. Employee may then show the stated reason is pretextual. Consistency, equitable treatment, and documentation support defenses.

2. Documentation

a. Handbook (with signed acknowledgment)

- i. CONFIDENTIALITY, Computer/Technology Use Policy
- ii. Social Media and other off duty acts
- iii. EEO Statement
- iv. Process for reporting harassment or discrimination
- v. Process for requesting accommodation (disability, religious)
- vi. Process for reporting on-the-job injury
- vii. Payroll, payday, advances, auto-deposit
- viii. Attendance policies; workweek defined; call-in and leave of absence policies
- ix. Safe Harbor language
- x. Termination: References, payment for unused leave, bonuses/commissions

b. Position Description: Accurate description of essential duties, other duties

c. Employment agreement: Generally only advisable for upper level management and/or employees with significant authority and discretion. May include information about bonuses/commissions, non-solicitation, non-competition, additional benefits not provided to all employees.

3. Americans With Disabilities Act Amendments Act of 2008/Oregon Law

- a. **Position description:** Essential functions, including attendance (if applicable), and physical requirements
- b. **Handbook:** Legal definition of disability, process for requesting accommodation, exceptions/undue burden on company; proof of receipt of handbook.
- c. **Documentation of Incidents:** Tardiness, performance problems, coaching, etc.
- d. **Documentation of:** Requests for reasonable accommodation, interactive process, outcome
 - i. **GINA:** Genetic Information Non-Disclosure Act statement to medical provider

Reminder: Requests for **Religious Accommodation** should be evaluated and documented in the same way.

4. Family and Medical Leave Act/Oregon Family Leave Act

- a. **Handbook:** Qualifying absences, procedure for asking for medical leave, accrual year.
- b. **Posters**
- c. **Forms:** Department of Labor forms are useful but MUST be revised to reflect differences in Oregon law (grandparent/grandchild, same-gender domestic partner and partner's family members, sick child leave, etc.).
 - i. Accrual and usage tracking
 - ii. Portland and Eugene Sick Leave Ordinances require additional documentation, notices, and posting.
 - iii. GINA (exception for request for medical leave to care for family member)

A Note About Medical Records: Documents related to ADA, FMLA/OFLA, workers compensation, fitness for duty exams, etc. must be kept separately from the regular personnel file, according to both state and federal laws, and only those with a need to know are authorized to access these records.

5. Whistleblowing/Complaints/Opposition to Unlawful Practices

Over 51 state and federal laws protect some kind of complaint, so when in doubt, assume the complaint may be protected.

- a. **Documentation:** Complaint, investigation (if any), and response
- b. **Employee Handbook:** EEO policy; Complaint Procedure; name/title/phone number of company contact for reporting; encourage internal reporting but don't require it; promise confidentiality *to the extent possible*.
 - i. **NLRB decisions:** Employers may not require employees to keep discipline confidential

6. Harassment

- a. **Unlawful if based on any protected class** (not limited to sexual harassment)
- b. **Definition:** Unwelcome verbal or physical conduct that is sufficiently severe or pervasive that it unreasonably interferes with work performance or creates a hostile, intimidating or offensive working environment.
- c. **Special considerations related to workplace "romance":** Fraternization policy, "quid pro quo" harassment (threats or promises related to acceptance or rejection of requests for dating/sexual relationship)
- d. **Affirmative Defense (Handbook):** No tangible employment action, policy in place to prevent/report harassment/hostile work environment, employer took prompt remedial action upon receiving complaint or employee unreasonably failed to report ("Faragher/Ellerth defense")

7. Safety and Workplace Injury

- a. **OSHA Safety Committee/Safety Meeting Minutes**
(Criteria: http://www.osha.org/pdf/pubs/fact_sheets/fs31.pdf)
- b. **Workers Compensation forms**
- c. **OSHA 300 Log**

8. Retaliation

- a. **Definition:** A “materially adverse” action which “might have dissuaded a reasonable worker from complaining”

9. Social Media

- a. Policies must be consistent (*i.e.* prohibit ALL personal computer use/social media while on duty, not just SOME personal social media)
- b. Employers MAY NOT prohibit “concerted activity”: discussions about the terms of employment (such as complaining that wages are too low, supervisors are unfair, or complaining about discipline) (NLRA)
- c. Confidentiality provisions: May prohibit disclosure of trade secrets, non-public financial information, client confidences; may not prohibit disclosure of “personnel information.”

10. After Hours Conduct: confidentiality; illegal behavior *that relates to the employer* – such as threats to co-workers, supervisors clients, or vendors; harassment of co-worker; defamation of co-worker or client, etc.

11. Manager/Supervisor Procedures and Training

- a. Recognize a request for reasonable accommodation, and/or a called-in absence that may qualify for medical leave
- b. Record misconduct and discipline AND positive incidents
 - i. Performance evaluations, performance improvement plans
- c. Never “blow off” an employee’s complaint
- d. Best practices NOT to be “Friends” with subordinates on social media
- e. Simplify documentation

12. Termination

- a. **Procedure:** Document Meeting; Witness (if possible); Explain the Basis for Termination
- b. **Final Paycheck:** Penalty of up to 30 days' pay plus attorney fees for missing statutory deadline to pay final paycheck
- c. **Unused Vacation or PTO, Bonuses, Commissions:** Earned wages unless handbook, and/or employment agreement outline conditions to payment
- d. **Recommendations/Letters of Reference**
- e. **Severance and Release:** If the employee is 40 or older, federal law requires certain terms in a severance and release, and severance amount may not be disbursed until 7 days after signature.
- f. **Unemployment:** Response to notice of claim must indicate whether termination was for misconduct connected with work, resignation, or layoff.
- g. **COBRA/Oregon Continuation Benefits:** 44 days to notify of COBRA rights (20 employees).

RESOURCES

- Oregon Bureau of Labor & Industries: <http://www.boli.state.or.us>
- Equal Employment Opportunity: <http://www.eeoc.gov>
- Department of Labor Website: www.dol.gov.htm
- Harrang Long Gary Rudnick, P.C.: www.harrang.com

