

# Employment Law: Mythbusters, COVID-19 Updates, and Effective Documentation



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# COVID-19 Employment Law Update

Sarah Stula

# Agenda

- Review of medical leave and accommodation laws
- Vaccinating the workforce
- Minimizing risk of liability

# Medical Leave and Accommodation Laws

Families First Coronavirus Response Act (FFCRA)

Americans with Disabilities Act (ADA)

Family and Medical Leave Act (FMLA)

# Families First Act Update

- Paid leave for employees with a qualifying reason related to COVID-19
  - 80 hours of emergency paid sick leave
  - 10 weeks of paid emergency FMLA
- FFCRA leave is now voluntary
- Private employers eligible for tax credits
- Clock does not restart on leave
- Expires March 31, 2021



# FMLA

- Normal FMLA certification process
- Underlying serious health condition
  - Claiming need for FMLA leave due to heightened risk of COVID complications
  - Fear of contracting COVID at work
- Employee need to care for spouse, child, parent related to COVID issues

# ADA

- Underlying health conditions that place employee in a higher risk group may constitute a covered disability under ADA.
- Need to consider potential reasonable accommodations
- Unless the need is obvious, employee must ask for a reasonable accommodation.
- Reasonable accommodation requirement does not extend to caring for a family member.
  - BUT, be aware of potential for associational discrimination claim.

# Vaccinating the Workforce

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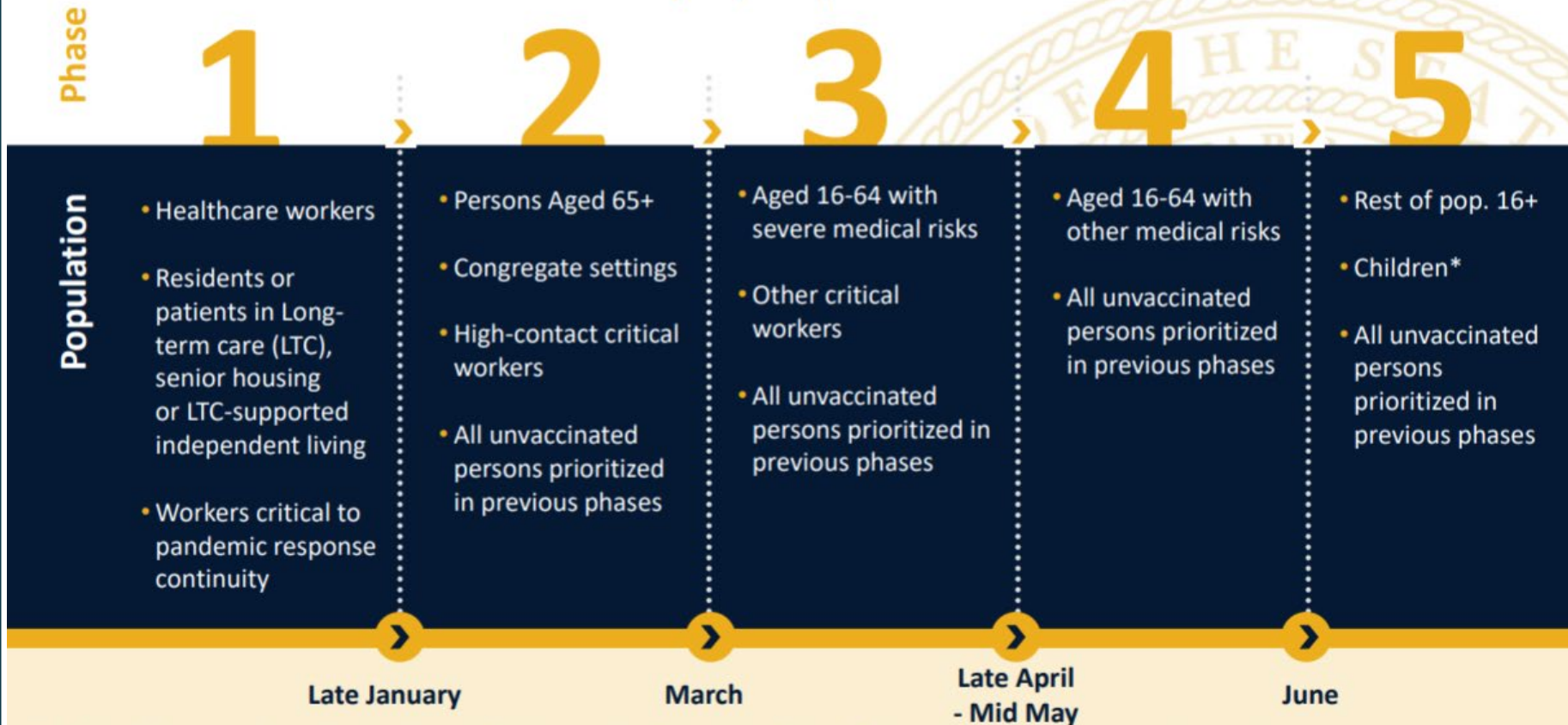
# COVID-19 Vaccination Process

- What COVID-19 vaccines are approved?
- The role of federal, state, and local health officials
- How do I get the vaccine?



# Kansas Vaccination

## Kansas Vaccination Phases | By Population



\*Subject to further research on Vaccine risks and effectiveness for children; Note: Dates of phases are dependent upon vaccine supply.

# Can We Require Employees To Get the COVID-19 Vaccine?

- ADA
- Title VII
- Employer-administered vaccines
- Practical considerations – you may want to encourage vaccination without making it mandatory



# ADA Issues

- Direct threat assessment
- Reasonable accommodations
- Medical examinations and disability-related inquiries



# Employer-Administered Vaccines

- ADA
- GINA
- Medical examinations



# Title VII Issues

- Religious objections
- Reasonable accommodations
- Comparison to accommodations required by ADA



# Practical Considerations

- Knowledge of your workforce
- Vaccination policies for other illnesses
- Type of workplace

# Encouraging Vaccination

## Incentives

- Too much of a good thing?
- ADA and Title VII issues
- Types of incentives

## Penalties

- Wage issues
- ADA and Title VII issues





# Vaccination Policy Tips

- Explain
  - Why vaccination is important to protect employees
  - That employees should follow physician's advice
- Keep records of employee vaccination confidential
- Keep current infection-control policies in place
- Reserve the right to modify, as health guidance develops

# Vaccination Policy Tips – Mandatory Programs

- Provide an HR point person for any disability- or religious- related inquiries
- Document any requests for disability or religious accommodation

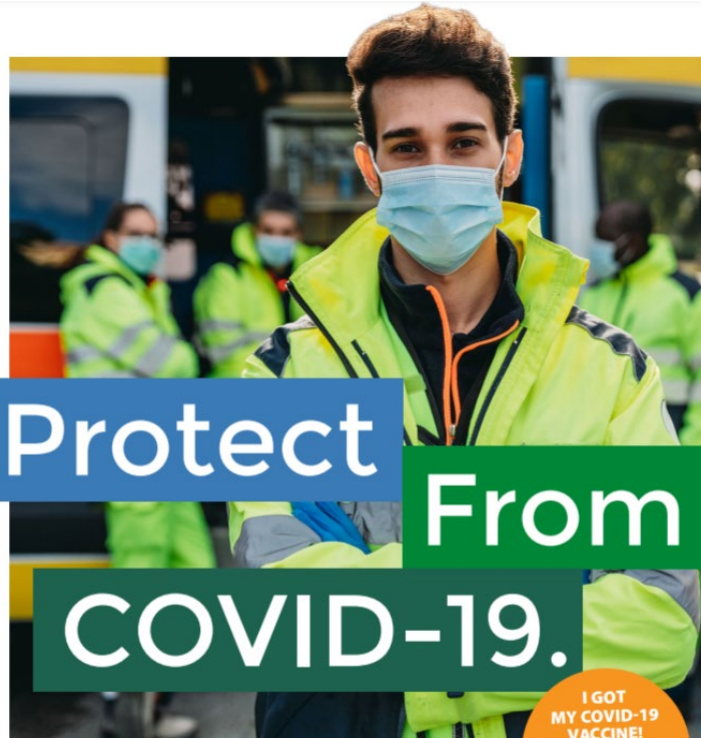


# CDC Guidance for Workplace Vaccination Programs

- Coordinate with local health department
- Bring in a third party
- Provide CDC vaccine information
- Encourage vaccination
- Stagger vaccination schedules



# Vaccination Messaging: CDC Toolkit

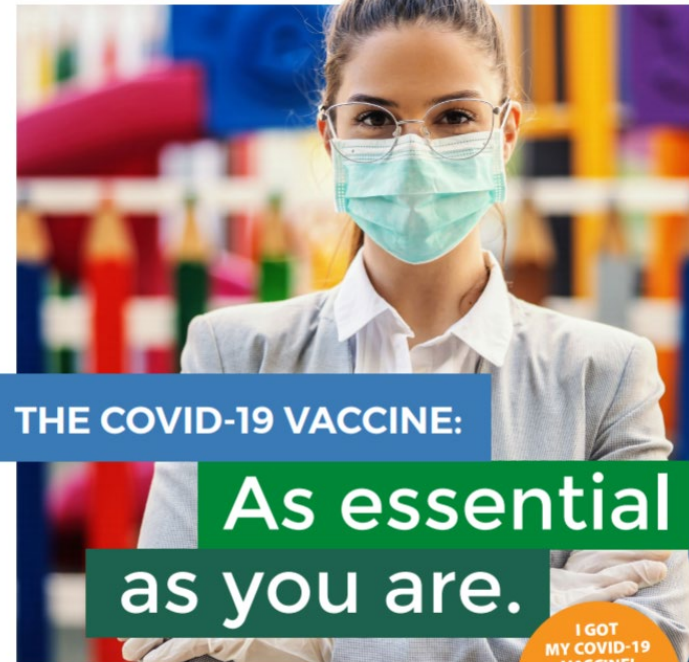


Protect  
From  
COVID-19.

You risk being exposed to people with COVID-19 every day.



A safe and effective vaccine to protect against COVID-19 is now available.  
Learn more: [cdc.gov/coronavirus/vaccines](https://www.cdc.gov/coronavirus/vaccines)



THE COVID-19 VACCINE:  
As essential  
as you are.

Add one more layer of protection to keep you and your family safe.



Learn how you can get a COVID-19 vaccine.  
[cdc.gov/coronavirus/vaccines](https://www.cdc.gov/coronavirus/vaccines)

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html>

# There's an App for That...

CDC's "V-safe" app:

- Track side effects after vaccination
- Health check-ins by call or text



# Minimizing Risk of Liability

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# OSHA Tips

- Like the flu shot, bring in a third party
- Be careful in your contract
- Provide a space free of work-site hazards



# Liability for Adverse Reactions to Vaccine

- Worker's Compensation Act is likely implicated
- Public Readiness and Emergency Preparedness Act (PREP Act) may provide some protection



# PREP Act

- Immunity for injury caused by administration of vaccine or vaccine program
  - Exception: willful misconduct
- Can include employer-run programs
- Must follow strictest applicable public-health guidance



# Collective Bargaining

- Mandatory vaccination subject to collective bargaining
- Check collective-bargaining agreement
- Concerted activities to protest vaccination program are protected
- No retaliation

# Continue Safety Protocols

- Vaccination doesn't preclude transmission
- Continue to:
  - Social distance, wear masks, and sanitize
  - Self-check for symptoms
  - Follow close contact and quarantine rules
- Remote work



Good  
Documentation:  
How To Do It and  
Why It's Important

Teresa Shulda

# Good Documentation

# Documentation

## What

- Discipline
- Informal counseling
- Reports of misconduct
- Complaints
- Investigations
- Performance discussions
- Requests for accommodation

## When

- Document immediately, so you remember and nothing happens in between

# Clarity and Details Are Important ...

- Describes the event
- Answers the 5Ws and an H



# Good Documentation Will...

- Help us remember an event or what happened at a particular time
- Provide a snapshot of our notes and thoughts at the time of the event, instead of relying on memory
- Help support our case if we have to respond to a grievance, government agency, or a court



# Good Discipline Documentation Will...

- Explain the issue
- Not make unsupported conclusions
- Be timely
- Be legible
- Be dated
- Be signed

# Good Discipline Documentation Will...

- Refer to previous discipline, especially if it's related to current issue
- Explain expectations
- Explain the consequences
- Record the employee's response, BUT it's not a take-home assignment
- Get employee acknowledgement
- Provide a copy to the employee

# Let the Employee Explain?

- First, the employee may be right and you may not want to discipline, or at least allows you to check further
- Pins employee down to the information he provided you **at the time** – so employer can say it acted on the information it had at the time, not what the employee says later
- General fairness

# Bad Documentation

# Unsigned or Undated Documents

*I interviewed Jack Walker today. He told me that he raised his voice with Sally during the discipline meeting but denied using profanity or pounding the table.*

# Illegibility

Call with Get a  
find a Morgan, and  
washed. I ~~to~~ be  
that she need to  
be a ~~with~~ pen + ink  
you ~~can~~ see.

My name  
T-T-R

# Late Documentation

August 1, 2020

Three months ago, I interviewed Sue about her complaint regarding her co-worker's inappropriate conduct.

I followed up with her today to see if everything was going ok.

Harry

# Inaccuracy

*Watercooler conversation  
between Randy and Harry:*

**Randy:** I've heard a rumor that Sue is spending a lot of work time surfing the internet. I haven't seen it myself, but other people have told me that she's buying stuff off eBay and Craigslist when she's supposed to be working.

**Harry:** I'll make a note of that.

*Note to file:  
August 1, 2020*

*Randy told me that he saw Sue on surfing Facebook, but he wasn't sure if she was on a break or not.*

*Harry*



# Unsupported Conclusions

## Bad

- Joe was drunk.
- Joe was defensive and belligerent.

## Good

- I smelled alcohol on Joe's breath, and he was stumbling and had slurred speech.
- Joe denied that he committed the misconduct and raised his voice during the meeting. He called his co-worker a "snitch," and threw the documents I showed him on the floor.

# Incomplete Sentences and Disjointed Sequences

- Bob and Steve inappropriate hand gestures. Joe laugh.
- Bob wants promotion. Thinks Sue not qualified.
- Steve - Joe is know-it-all.

# Components of Appropriate Corrective Action

# Determining Appropriate Corrective Action

- Depends on seriousness of offense
- Consistent with employer's policies
- Consistent with past practices
- Reasonably calculated to end/correct the conduct

# Corrective Action

- Discipline – verbal or written
- Transfer/reassignment
- Demotion
- Suspension
- Additional training
- Monitoring
- Last Chance Agreement
- Termination

# The Verbal Warning



# The Real World – Effective Corrective Action

- *Adler v. Wal-Mart* (10<sup>th</sup> Cir. 1998)
  - Employee alleged sexual harassment by co-workers but did not identify harassers
  - Manager warned other managers in area to keep their employees out of his work area – harassment stopped
  - Employee alleged another incident of harassment and identified co-worker
  - Manager gave co-worker verbal warning – harassment stopped
  - Employee sued, arguing employer did not take effective remedial action
  
- Result?

# The Real World – Ineffective Corrective Action

- *Turley v. ISG Lackawanna* (New York)
  - Black employee at steel mill claimed harassment by co-employees
  - Harassment continued for three years without effective management or HR intervention
  - No employees were terminated
  - Turley sued, alleging race discrimination and harassment
- Result?



# Performance Evaluations

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# Failure to Give an Honest Assessment

- Honesty is best for employer AND employee
- Don't sugarcoat it!
- Having difficult (but still respectful) conversations is part of the job

# Failure to Give an Honest Assessment

## *Carney v. Healthcare Services Group, Inc.*

- Josephine Carney began working for HSG in 2002 as a full-time housekeeper
- In 2008, Carney filed a lawsuit against HSG asserting sexual harassment and pregnancy discrimination
- Days later, Carney was terminated for being involved in an altercation with a co-worker on the premises during work hours

# Failure to Give an Honest Assessment

## *Carney v. Healthcare Services Group, Inc.*

- At trial, witnesses testified that Carney was challenging and combative—a “problem employee”
- Only one written performance evaluation in 2004
- Immediate supervisor rated Carney as an overall good employee and satisfactory in the area of cooperation

# Failure to Give an Honest Assessment

## *Carney v. Healthcare Services Group, Inc.*

- Court found employer liable for retaliation
- Awarded one year's back pay and damages for emotional distress
- Employer couldn't prove Carney was a problem employee because there was only one performance evaluation and it was favorable

# Arbitrary Rating Systems

- Scores should be accompanied by consistent comments
- Begin with “meets expectations” and go up or down
- Ask: How does the employee compare with his/her peers?
  - But don't forget to consider the experience level of the employee in that comparison

# Timing Issues

- Reflect the ENTIRE time period evaluated, not just the end
- Address deficiencies from prior evaluation periods only to extent they remain
- Late appraisals lessen credibility

# Surprises

- Employees need regular input from their supervisors
- Evaluations should not be an ambush
- Evaluations should not be the first time an ongoing problem is raised
- Performance evaluation is a year-round process



# Referencing Protected Absences/Accommodations

- Absenteeism v. LOA/absences due to disability
- Performance deficiency v. deficiency due to a disability that hasn't been accommodated

# Inconsistent Application of Performance Standards

- “Like Me” Bias
- Do you consistently apply work rules/standards?
- Do your “friends” get away with more than others?

# Inconsistent Application of Performance Standards

- Watch out for stereotyping

**“Lack of  
Commitment”**

**“Not a  
good fit”**

**“Not aggressive  
enough” or “too  
aggressive”**

# Inconsistent Application of Performance Standards

## *Hopkins v. Price Waterhouse*

- Female consultant denied partnership
- Comments by male partners revealed stereotypes of how women should behave
- Female criticized for being “macho,” “difficult,” and “aggressive”
- Advised to walk, dress, and talk “more femininely”

# Inconsistent Application of Performance Standards

## *Hopkins v. Price Waterhouse*

- Male consultants with same characteristics as Hopkins were not given similar comments nor denied partnership
- Supreme Court ruled in Hopkins' favor recognizing "gender stereotyping" as a form of sex discrimination

# Absence of Goals

- Specific
- Measurable
- Attainable
- Realistic
- Timely

# One-Sided Dialogue

- Ask employees for input on the feedback you give them
- If an employee disagrees and is right, change the evaluation

# *Long v. Teachers' Ret. Sys. of Illinois (7th Cir. 2009)*

- Employer addressed and documented numerous performance deficiencies.
- Manager had consistently disciplined/terminated other employees for same types of performance deficiencies.
- Employee applied for and was granted disability leave.
- Performance issues continued after employee returned to work.
- Employer terminated employee (a few months after disability leave ended).
  
- Successful disability claim?



# *Cutcher v. Kmart Corporation* (6th Cir. 2010)

- Employee had four years of good evaluations
- Employee requested and took disability leave
- Final evaluation (completed shortly after request for disability leave) was significantly lower than previous evaluation.
- Final evaluation comment: “Poor customer and associate relations. LOA.”
- Employee terminated for performance.
- Successful disability claim?

# Documentation Workshop

# What's Missing?

“Sam was late three times last week. If he is late again, more action will be taken.”

- Which week? Which day? Which year?
- Late by how much? (a minute or five hours?)
- What does Sam say? Was he late because he got into a car accident, or was he at home because he slept through his alarm?
- What future action? Termination?

# Filling in the Gaps

- Explain the problem and refer to earlier discipline:
  - Sam – You were 10 minutes late on October 9, 2018, 15 minutes late on October 11, 2018, and 10 minutes late on October 12, 2018. This is a written warning for ongoing tardiness issues.
  - You received a documented oral warning on September 28, 2018, for tardiness, and were instructed that further incidents of tardiness would lead to further discipline.

# Filling in the Gaps

- Record the employee's response
  - When you received discipline on September 28, you said that you knew that you needed to get to work on time.
  - On each of the three October dates above, you stated that you had overslept because your alarm clock did not go off.

# Filling in the Gaps

- Explain the expectations and consequences:
  - You are expected to be at work and ready to start work at the beginning of your shift start time.
  - Your continued tardiness violates the Attendance and Tardiness procedure.
  - Any further incidents of misconduct, including tardiness, will result in further discipline, up to and including immediate suspension and/or termination.

# “You’re Just Building a File on Me”

- Accurate and timely documentation helps defend against claims.
- If you don’t timely document, you will be accused of building a file.
- It’s fine to build a file if you do it correctly
  - Your memory of your 50 decisions will fade
  - Your employee’s memory will not
  - Consistency is critical

# What's Missing

Jessica Carter told me that she's being harassed by her team leader. She said that everybody in the shop has seen him harassing her. She said it's been going on for some time now.



Date

August 21, 2020

Who Present

Interview with Jessica Carter  
Present: TLS and Rob Smith

Problem

Jessica says that her team leader, Joe Preston, has harassed her.

Examples:

1. Stares at her constantly and takes notes.

Yesterday (8/20), in the shop

Last week (8/14), in the shop

Witnesses: work partner, Stella Frank

2. Yelled at her for coming late to morning huddle - called her lazy.

Monday (8/19), in Cafeteria during lunch

Witnesses: Co-EEs, Judy Rain & John Dell

Details – the 5Ws and an H

Why

Why: Jessica used to date Joe's brother (Stewart) and broke up with Stewart two weeks ago.

# What's Missing

Patty thinks her manager gave her an unfair performance evaluation. Patty said manager told her that she was not meeting his expectations on several projects, and to pick up the pace. Patty says her manager used profanity during meeting.

# Additional Information

- Date of meeting
- Who present
- Job position
- Job duties
- Specific projects
- Specific requirements of job
- What exactly did supervisor say using profanity
- Compare work to other employees in same job/level
- How failing – details
- Demeanor of employee – actions, not interpretations
- Why?

# Employment Law Mythbusters

Travis Hanson

# Privacy and Workplace Surveillance

# Myth(?) 1: Workplace Privacy

Employees have no right to privacy on work computers, servers, or other devices, and employers can surveil, monitor, and track employees' use of such devices.

- A. True
- B. False

# Myth(?) 1: Workplace Privacy

Employees have no right to privacy on work computers, servers, or other devices, and employers can surveil, monitor, and track employees' use of such devices.

- A. True
- B. False

A. True

- Employer generally is free to surveil email and internet usage on its computer systems and devices – have a policy in place!
- BYOD – Generally no privacy, but many other issues arise. What does your policy say?
- Employees have greater privacy protection in personal phone calls and voicemail.
- Special rules in some states – e.g., California.

# Wage and Hour Issues



# Myth(?) 2: Mandatory OT Pay & Work

Employers must pay overtime to non-exempt employees who work overtime hours, unless the employer has a company policy that prohibits overtime, and the employee acknowledges the policy in writing.

- A. True
- B. False

# Myth(?) 2: Mandatory OT Pay & Work

Employers must pay overtime to non-exempt employees who work overtime hours, unless the employer has a company policy that prohibits overtime, and the employee acknowledges the policy in writing.

- A. True
- B. False

## **B. False**

- Employer must pay for all work “suffered or permitted” to occur.
  - If employer knows or has reason to believe an employee is working, it must pay the time, even if the employee did not have permission or was prohibited from working.
- But the employee nevertheless may be disciplined for violations of published and enforced time & attendance policies.

## Myth(?) 3: Mandatory Break Time

To ensure no gaps in worker coverage, an employer pre-schedules 15-minute breaks every other hour for non-exempt workers. Because these breaks are scheduled and mandated by the employer, the employees must clock out for these breaks.

- A. True
- B. False

# Myth(?) 3: Mandatory Break Time

To ensure no gaps in worker coverage, an employer pre-schedules 15-minute breaks every other hour for non-exempt workers. Because these breaks are scheduled and mandated by the employer, the employees must clock out for these breaks.

- A. True
- B. False

## **B. False**

- Any break that lasts 20 minutes or less must be paid and counted toward hours worked for OT purposes.
- Neither the FLSA nor any other federal or Kansas law requires employers to provide such breaks.
- Again, employers can discipline employees who violate time & attendance rules (such as taking unauthorized breaks).

# Myth(?) 4: FLSA Exemption for Managers

The FLSA recognizes a safe-harbor that allows employers to treat all managers as “exempt.”

- A. True
- B. False

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- A. True
- B. False

## B. False

- Job title is not dispositive.
- Position must satisfy both the job duties and the salary test.
  - Job Duties: Executive; Administrative; Highly Compensated Worker
  - Salary Test: \$684/wk; \$107,432 for HCW

# Hostile Work Environment





# Myth(?) 5: Hostile Bosses Create Hostile Workplaces

Which situation created an actionable hostile work environment?

- A. Treatment of interrupting employee
- B. Reaction to unsatisfactory report
- C. Treatment of employee making personal phone call
- D. None of the scenarios individually, but all of them together
- E. What hostility?

# Myth(?) 5: Hostile Bosses Create Hostile Workplaces

Which situation created an actionable hostile work environment?

- A. Treatment of interrupting employee
- B. Reaction to unsatisfactory report
- C. Treatment of employee making personal phone call
- D. None of the scenarios individually, but all of them together
- E. What hostility?

**E. There is no hostile work environment.**

- Federal anti-discrimination rules do not create a “code of civility.”
- Hostile work environment is actionable only if it relates to a protected category (such as race or gender).
- High legal threshold: conduct based on protected category so severe and pervasive that a reasonable person would consider it intimidating, hostile, or abusive.

# Discrimination

# Myth(?) 6: Age-Related Terminations

The Age Discrimination in Employment Act (ADEA) prohibits employers from terminating older workers (workers age 40 or older), except for good cause or in a generalized shut-down or layoff.

- A. True
- B. False

# Myth(?) 6: Age-Related Terminations

The Age Discrimination in Employment Act prohibits employers from terminating older workers (workers age 40 or older), except for good cause or in a generalized shut-down or layoff.

- A. True
- B. False

## **B. False**

- The ADEA prohibits employers from discriminating against “older” workers – age 40+.
- Like KAAD, it does not alter an “at-will” employment relationship; employers may terminate older workers for any reason or no reason, so long as the reason is not discriminatory.
- Unlike with race/gender, some employment decisions can be made “because of” age, but only if age is a “bona fide occupational qualification.”

# Myth(?) 7: Pregnancy Discrimination

The Pregnancy Discrimination Act prohibits discrimination against current employees because they are pregnant or able to become pregnant. It also protects pregnant job applicants from discrimination in hiring, but only if the applicant has disclosed her pregnancy.

- A. True
- B. False

# Myth(?) 7: Pregnancy Discrimination

The Pregnancy Discrimination Act prohibits discrimination against current employees because they are pregnant or able to become pregnant. It also protects pregnant job applicants from discrimination in hiring, but only if the applicant has disclosed her pregnancy.

- A. True
- B. False

## *B. False*

- The PDA prohibits discrimination in all employment decisions including hiring decisions.
- Pregnant job applicants are not required to disclose their pregnancy.

## Myth(?) 8: Retaliation

If a current or former employee does not prevail on their underlying discrimination or harassment claim, they cannot prevail on their retaliation claim.

- A. True
- B. False



# Myth(?) 8: Retaliation

If a current or former employee does not prevail on their underlying discrimination or harassment claim, they cannot prevail on their retaliation claim.

- A. True
- B. False

## **B. False**

- This is 100% false.
- In fact, in many cases, the employer will have a sound defense to the underlying claim, but still be found liable on the retaliation claim.

# Termination

# Myth(?) 9a: Post-Termination References

It is illegal to reveal anything more than dates of employment, job title, and rate of pay in a job reference.

- A. True
- B. False

# Myth(?) 9a: Post-Termination References

It is illegal to reveal anything more than dates of employment, job title, and rate of pay in a job reference.

**B. False**

A. True

B. False

# Myth(?) 9b: Post-Termination References

It is a crime (punishable by jail and a fine) to try and keep a former employee from getting another job.

- A. True
- B. False

# Myth(?) 9b: Post-Termination References

It is a crime (punishable by jail and a fine) to try and keep a former employee from getting another job.

**A. True**

A. True

B. False

# Myth(?) 9: Post-Termination References

## What you can't say or do:

- An employer (or its agent or employee) who prevents or attempts to prevent a former employee from obtaining employment by anyone else (by word, sign, or any writing) commits a misdemeanor.
  - \$100 fine and 30 days in jail for each offense.
- Any person convicted criminally can be liable civilly for treble damages and attorneys' fees.
- Also possible tort claims: *e.g.*, defamation, interference with prospective business relations.

## What you can say or do:

- Criminal exception: Can furnish in writing, upon request, the cause of termination.
- Absolute and Qualified Civil Immunities:
  - Employer & Designee has QI for any disclosure about current or former employee to prospective employer.
  - Employer has AI for:
    - Dates of employment; pay level; job description and duties; wage history.
    - Written response to written request: stating whether employee left (in)voluntarily and reason for separation; providing copies of pre-termination written evaluations (with copy to employee upon request).
- Truth is a defense— *if* you can prove it!

# Myth(?) 10: Political Terminations

Because of your First and Second Amendment rights, you cannot be fired for participating in an armed insurrection at the Capitol.

- A. True
- B. False



# Myth(?) 10: Political Terminations

Because of your First and Second Amendment rights, you cannot be fired for participating in an armed insurrection at the Capitol.

- A. True
- B. False

## **B. False**

- Federal law does not protect employees from being fired or disciplined for their political beliefs or activities.

# Myth(?) 11: Resignations

When an employee quits, he or she can no longer sue for wrongful termination.

- A. True
- B. False

# Myth(?) 11: Resignations

When an employee quits, he or she can no longer sue for wrongful termination.

- A. True
- B. False

## **B. False**

- Employees can (and often do) sue for wrongful termination under a “constructive discharge” theory after resigning.
- Higher burden of proof. Employee must show:
  - Work environment so adverse that a reasonable employee in his or her shoes would have felt compelled to resign; and
  - The employer intended to force the employee to resign or had knowledge of the intolerable work environment.

# Employee Releases & Waivers

# Myth(?) 12: Settlement Peace of Mind

Following best practices, any Release Agreement with an employee or former employee should include the following:

- A. A release of any past claims for wages under federal and state wage laws.
- B. A release of future claims (particularly for current employees).
- C. A promise that the employee will not file charges against the employer with the EEOC or KHRC.
- D. A & B only
- E. All of the above
- F. None of the above

# Myth(?) 12: Settlement Peace of Mind

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- B. A release of future claims (particularly for current employees).
- C. A promise that the employee will not file charges against the employer with the EEOC or KHRC.
- D. A & B only
- E. All of the above
- F. None of the above

## *F. None of the above*

- As a matter of public policy, the law does not allow employees (who typically have less bargaining power than employers) to waive certain types of rights.
- Options A, B, and C each identify rights that cannot be waived as a matter of law.

# Myth(?) 13: Pre-Empting Lawsuits

Employers can force employees to sign an agreement not to file any lawsuit and not proceed against the company as a class.

- A. True
- B. False

# Myth(?) 13: Pre-Empting Lawsuits

Employers can force employees to sign an agreement not to file any lawsuit and not proceed against the company as a class.

- A. True
- B. False

## A. True

- Employers may condition employment on an arbitration agreement.
- The Supreme Court held in 2018 that class waivers—requiring individual arbitration in lieu of any class or collective action—do not violate the NLRA and are enforceable.
- Is an arbitration agreement good for you?



# **FMLA: Terminating Benefits & Employment**

# Myth(?) 14: Employees on FMLA Leave

Once an employee has exhausted their 12 weeks of FMLA leave, the employer may terminate employment if the employee's doctor reports it could be another 3-4 weeks before the employee can return to work.

- A. True
- B. False

# Myth(?) 14: Employees on FMLA Leave

Once an employee has exhausted their 12 weeks of FMLA leave, the employer may terminate employment if the employee's doctor reports it could be another 3-4 weeks before the employee can return to work.

- A. True
- B. False

## B. False

- Without any extenuating circumstances, an additional 3-4 weeks of unpaid leave likely would be considered a “reasonable accommodation” under the ADA, even after FMLA is exhausted.
- Extended leave with no prospect of returning to work or other scenario could constitute an undue hardship beyond the employer's ADA duties.



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## Travis D. Hanson, *Associate*

### Wichita

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### Admitted to Practice

- U.S. District Court for the District of Kansas, 2017
- Kansas, 2017

### Education

- University of Kansas School of Law
  - J.D., 2017
  - CALI Excellence for the Future Award - Agriculture Law & Contemporary Food Production
- St. Cloud State University
  - B.S., Sociology, *magna cum laude*, 2013

### Practice Areas

- Employment & Labor
- Litigation & Disputes

### Practice Emphasis

Travis Hanson is a member of the Kansas City Litigation and Employment practice group. He regularly assists clients with a broad range of employment issues primarily focusing on allegations of discrimination, harassment, and retaliation. Travis handles administrative charges and litigation matters and is experienced in drafting employment agreements and employee handbooks, handling workplace investigations, and providing day-to-day HR consulting. Travis is also a frequent contributor to publications such as the Kansas Employment Law Blog and the Kansas Employment Law Letter.

### Professional Memberships, Affiliations & Honors

- Kansas Bar Association
- Wichita Bar Association
- Johnson County Bar Association
- Kansas City Metropolitan Bar Association

### Presentations

- "A View From the Plaintiff's Side," Foulston Siefkin HR Training Series, October 2020
- "Employment Policies and Practices," Foulston Siefkin HR Training Series, August 2019
- "HR's Guide to the (Hiring) Galaxy - Tips and Tricks to Avoid Common Hiring Pitfalls," Foulston Siefkin Kansas Employment Law Institute, May 2019
- "Anatomy of a Complaint: From Charge to Lawsuit," Foulston Siefkin HR Training Series, August 2018

### Publications

- *Coronavirus: New York Court Vacates Portions of FFCRA Regulations* (Foulston Siefkin Issue Alert, August 2020)
- *Employer's Statements and Actions Send Implied Contract Dispute to Trial* (Kansas Employment Law Letter Vol. 26, No. 3, May 2019)
- *Longtime Employee's Tenure Ends With Arrival of New Supervisor* (Kansas Employment Law Letter Vol. 26, No. 2, April 2019)
- *Governor Kelly Reinstates LGBT Protections for State Workers* (Kansas Employment Law Blog, January 2019)
- *A Kansas Employers' Guide to the New Year* (Kansas Employment Law Letter Vol. 25, No. 11, January 2019)
- *Supreme Court Update: Employers Take All* (Kansas Employment Law Letter Vol. 25, No. 10, December 2018)

5, August 2018)

- *U.S. Supreme Court Takes a Pro-Employer Position in Arbitration Case* (Kansas Employment Law Letter Vol. 25, No. 3, June 2018)
- *An Employee by Any Other Name: Nail Technicians Misclassified as Independent Contractors* (Kansas Employment Law Letter Vol. 24, No. 12, March 2018)
- *Treat for Employers: Trump Administration Ends Obama-Era Equal Pay Rule* (Kansas Employment Law Blog October, 2017)
- *10th Circuit Gives Employers Tips About Tipping* (Kansas Employment Law Letter Vol. 24, No. 6, September 2017)
- *Former Public Defender Learns That Even Lawyers Can End Up in Hot Water* (Kansas Employment Law Letter Vol. 24, No. 6, September 2017)
- *Infrequent Offensive Comments Not Enough for Hostile Work Environment* (Kansas Employment Law Letter Vol. 24, No. 9, December 2017)



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## Admitted to Practice

- Kansas, 2008
- New Mexico, 2006
- U.S. District Court for the District of New Mexico, 2006
- Colorado, 2002
- U.S. District Court for the District of Colorado, 2002

## Education

- University of Kansas
  - B.A. Environmental Studies, 1994
- Yale School of Forestry and Environmental Studies
  - Master of Forestry, 1997
- University of Colorado School of Law
  - J.D., 2002
  - Colorado Journal of International Environmental Law & Policy

# FOULSTON

FOULSTON SIEFKIN LLP

## Teresa L. Shulda, *Partner*

### Practice Areas

- Employment and Labor
- Privacy & Data Security
- Startup/Entrepreneurship

### Practice Emphasis

Teresa Shulda, Vice-Chair of the firm's Employment and Labor Law Team, has been litigating employment disputes and advising on workplace law matters for more than a decade. Based in the firm's Wichita office, much of Teresa's practice is focused on employer-side issues. She represents businesses that range from some of the city's largest corporations with thousands of workers around the globe to small, closely held businesses with fewer than 10 employees.

Known for her deep understanding of federal regulations as well as Kansas employment laws, Teresa is a powerful advocate for her clients – both in and out of the courtroom. She regularly defends employers against discrimination claims, including those involving age, race, religion, national origin, gender, or disability allegations. In addition, Teresa handles disputes related to wrongful termination, breach of contract, civil rights, and whistleblower retaliation claims. She is particularly well-versed in federal statutes such as the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA), Title VII, the Age Discrimination in Employment Act (ADEA), and Pregnancy Discrimination Act, as well as the Kansas Wage Payment Act. Teresa also assists clients with labor-law matters, including the negotiation of collective bargaining agreements, litigating labor arbitrations, advising on day-to-day issues that arise under collective bargaining agreements, and providing guidance on National Labor Relations Act (NLRA) compliance to both unionized and non-unionized employers.

Teresa represents clients in federal and state courts, in regulatory agency proceedings, and in alternative dispute resolution forums. In a widely publicized age discrimination suit, she worked on the Foulston team that obtained a decisive victory for her client when the jury rendered a defense verdict in less than two hours, ending a 10-year litigation that originated as a collective action. Her enviable track record also includes numerous summary judgments on behalf of clients, several of which have been confirmed by higher courts. Teresa has also achieved many successful outcomes for her clients who are defending charges of discrimination filed with the Equal Employment Opportunity Commission (EEOC) or the Kansas Human Rights Commission. An accomplished negotiator, she has secured highly favorable settlements for her clients that averted prolonged litigation.

Much of Teresa's practice includes advising clients on compliance-related issues and litigation-avoidance tactics. Working hand-in-hand with human relations departments, company owners, and in-house legal counsel, she crafts strategies that meet the company's

goals and fulfill federal and state requirements. Because much of her early career was focused on employee representation, she applies her understanding of the workforce perspective when counseling employers.

Teresa is often asked to share her insights with human resources professionals and legal colleagues at seminars and meetings across the region. She serves as the co-editor of BLR's Kansas Employment Law Letter and frequently publishes articles and client alerts on timely topics and legal rulings.

## Prior Legal Experience

- Associate – Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, NM, 2005-2007
- Associate – Leavenworth & Karp, P.C., Denver, CO, 2002-2005

## Professional Memberships, Affiliations & Honors

- American Bar Association
- Kansas Bar Association
- Selected by peers for inclusion in *The Best Lawyers in America*® in the area of Employment Law – Management, 2017-2021
- Identified by *Chambers USA* as a leading lawyer in the United States in the area of Labor & Employment, 2017-2020
- Named a “Labor & Employment Star” by *Benchmark Litigation*, 2018-2019
- Wichita Business Journal Women in Business Honoree, 2019

## Publications & Presentations

- “Advanced FMLA Scenarios,” Foulston Siefkin HR Training Series, 2020
- “FMLA Nuts and Bolts,” Foulston Siefkin HR Training Series, 2020
- “COVID-19 and Employment Matters,” Kansas Women Attorneys Association, 31st Annual Conference, 2020
- “2020 Vision: A Look at the Latest (Non-COVID) Employment Law Cases, Issues, and Trends,” Foulston Siefkin LLP, Employment Law Institute (Webinar Series), 2020
- “Avoiding Common Employment Law Missteps in the New COVID World,” Foulston Siefkin Employment Law Institute (Webinar Series), 2020
- *Supreme Court Rules Title VII Prohibits LGBTQ Discrimination*, Foulston Siefkin Issue Alert, June 2020
- “COVID-19 Guidance for Hospital Employers - FFCRA, OSHA, and Confidentiality,” Kansas Hospital Association, 2020
- “Implementing the Families First Coronavirus Response Act (FFCRA),” Foulston Siefkin LLP, Coronavirus Webinar, 2020
- *Coronavirus: U.S. Department of Labor Issues Regulations Explaining Paid Sick Leave and Expanded FMLA Benefits Under FFCRA*, Foulston Siefkin Issue Alert, April 2020
- “EEOC Issues,” Foulston Siefkin HR Training Series, 2019
- “Leave of Absence,” Foulston Siefkin HR Training Series, 2019
- “The State of the Law: LGBTQ Rights and Religious Freedom,” Foulston Siefkin Kansas Employment Law Institute, 2019
- “When Worlds Collide: Strategies for Work Comp, ADA, and FMLA Compliance,” Kansas Employment Law Institute, 2019



- "Advanced Skills for Employee Leave Management," 2019 FMLA Master Class: Kansas, June 2019
- *Does Discrimination "Because of Sex" Cover Sexual Orientation and Gender Identity Discrimination? The Evolution of Title VII*, The Journal of the Kansas Bar Association, November/December 2018
- "Not as Easy as One, Two, Three: How the FMLA, ADA, and Workers' Compensation Interact with Employee Leave of Absence and Return to Work," Foulston Siefkin HR Training Series, November 2018
- "Anatomy of a Complaint: From Charge to Lawsuit" Foulston Siefkin HR Training Series, August 2018
- "Advanced Skills for Employee Leave Management," 2018 FMLA Master Class: Kansas, June 2018
- "The Weinstein Effect: Addressing Sexual Harassment in Today's Workplace," Foulston Siefkin Employment Law Institute, May 2018
- "Mental Illness in the Workplace: Staying Compliant with the FMLA and ADA," Foulston Siefkin Employment Law Institute, May 2018
- "In-House Counsel's Ethical Obligations Before and After a Cyber-Attack," Foulston Siefkin Ethics Seminar for Corporate Counsel, October 2015 & 2016

## **Community Involvement**

- Boys and Girls Clubs of South Central Kansas, Board Member



# FOULSTON

ATTORNEYS AT LAW

## Sarah E. Stula, *Associate*

### Kansas City

32 Corporate Woods  
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Overland Park, KS 66210-2000

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### Admitted to Practice

- Kansas
- Missouri
- U.S. District Court for the District of Kansas
- U.S. District Court for the Western District of Missouri
- U.S. Court of Appeals for the Tenth Circuit

### Education

- Case Western Reserve University School of Law
  - J.D., Litigation Concentration with Honors, *magna cum laude*, 2016
- Miami University
  - B.A., International Studies; Minors in English Literature and German, *magna cum laude*, 2011

### Practice Areas

- Employment & Labor
- Litigation & Disputes
- Appellate Law
- Trade Secret & Noncompete Litigation
- Insurance Defense Litigation
- Governmental Liability

### Practice Emphasis

Sarah Stula is a member of Foulston's litigation and employment practice group in the firm's Kansas City office. Her practice includes employment disputes, commercial litigation, governmental liability, and appellate advocacy.

Sarah is a litigator at heart and enjoys advocating for her clients in trial and appellate courts. She defends public and private employers from discrimination, harassment, and retaliation claims and reviews company policies for compliance with state and federal laws. She advises employers on a wide range of employment matters and contributes to several employment law publications. Sarah also litigates disputes involving commercial contracts and post-employment covenants.

Before joining Foulston, Sarah clerked at the Kansas Supreme Court for three years, gaining appellate expertise in a variety of commercial, criminal, and constitutional matters. She was recently selected for inclusion in Best Lawyers®: Ones to Watch in the area of Appellate Practice.

Born and raised in Overland Park, Sarah is a proud Kansan and lifelong KU fan. When she's not cheering on the Jayhawks, you can find her walking her dog at Shawnee Mission Park.

### Legal Experience

- Research Attorney, Hon. Caleb Stegall, Kansas Supreme Court, 2016-2019
- Judicial Intern, Hon. Solomon Oliver, Jr., U.S. District Court for the Northern District of Ohio, 2015

### Professional Memberships, Affiliations & Honors

- Selected by peers for inclusion in Best Lawyers®: Ones to Watch in the area of Appellate Practice, 2021
- The Kansas and Western District of Missouri Chapter of the Federal Bar Association, Civil Rights Law Section

- Kansas Bar Association, Young Lawyer Board's Publication Editor, 2018 – present; Young Lawyers Delegate
- Kansas Women Attorneys Association
- Johnson County Bar Association
- Kansas City Metropolitan Bar Association
- Topeka Bar Association
- Defense Research Institute
- Kansas Association of Defense Counsel
- The Earl E. O'Connor American Inn of Court

## Presentations & Publications

### 2021

- *Baby, It's COVID Outside: How To Return To Work Safely After the Holidays*, Midwest Employment Law Letter, Vol. 2, No. 1, 2021

### 2020

- "New COVID-19 Guidance for Hospital Employers." Kansas Hospital Association, 2020
- "COVID-19 and Employment Matters," Kansas Women Attorneys Association, 31st Annual Conference, 2020
- "An Employer's Guide to Coronavirus," Foulston Siefkin LLP, Coronavirus Webinar, 2020
- *Kansas COVID-19 Immunity Law Raises Questions for Employers*, Midwest Employment Law Letter, Vol. 1, No. 9, 2020
- Quoted in *Supreme Court Rulings Boost Employer Decisions Based on Religion*, HR Daily Advisor, July 9, 2020
- *Navigating Uncharted Waters: What Employers Should Know About FFCRA*, Midwest Employment Law Letter Vol. 1, No. 6, 2020
- *To Ink or Not to Ink? That is the Question*, Midwest Employment Law Letter Vol. 1, No. 4, 2020
- *Turning Down the Heat: How to Keep the Peace this Election Season*, HR Daily Advisor, March 24, 2020
- *Kansas City, Missouri Implements Salary Inquiry Ban*, Midwest Employment Law Letter Vol. 1, No. 1, 2020
- *Coronavirus: Families First Coronavirus Response Act Becomes Law*, Foulston Siefkin Issue Alert, 2020
- *Coronavirus: Employer Tips for Managing COVID-19*, Foulston Siefkin Issue Alert, 2020

### 2019

- *Coffee Break with Justices Marla Luckert and Caleb Stegall*, The Journal of the Kansas Bar Association, 2019
- *Kansas City, Missouri Implements Salary Inquiry Ban*, Foulston Siefkin Issue Alert, 2019