

# *PRACTICAL SOLUTIONS FOR COMMON EMPLOYMENT PROBLEMS*

TSSA-BIG IDEAS IN STORAGE

October 9, 2018

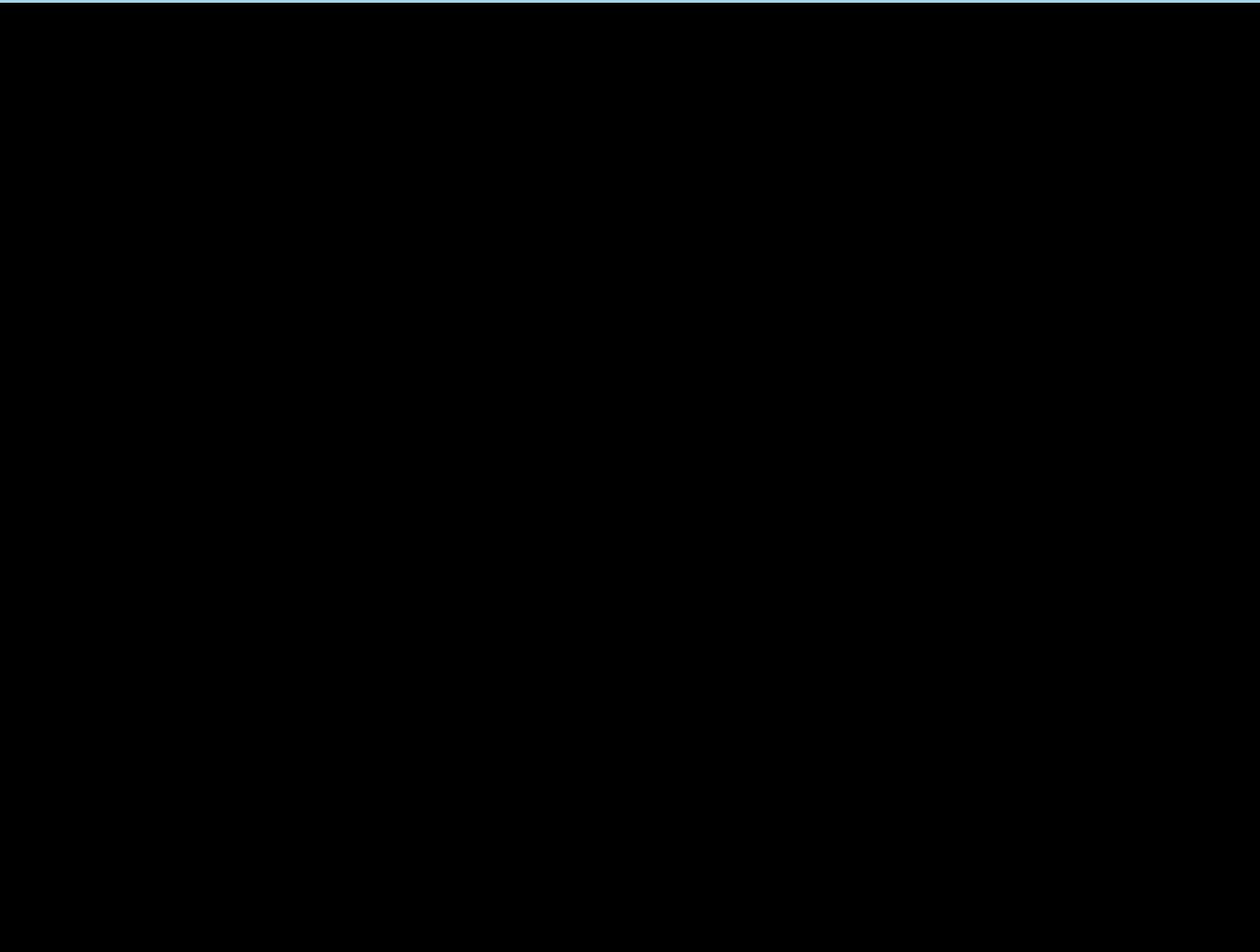
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# Congrats! You Are An Employer



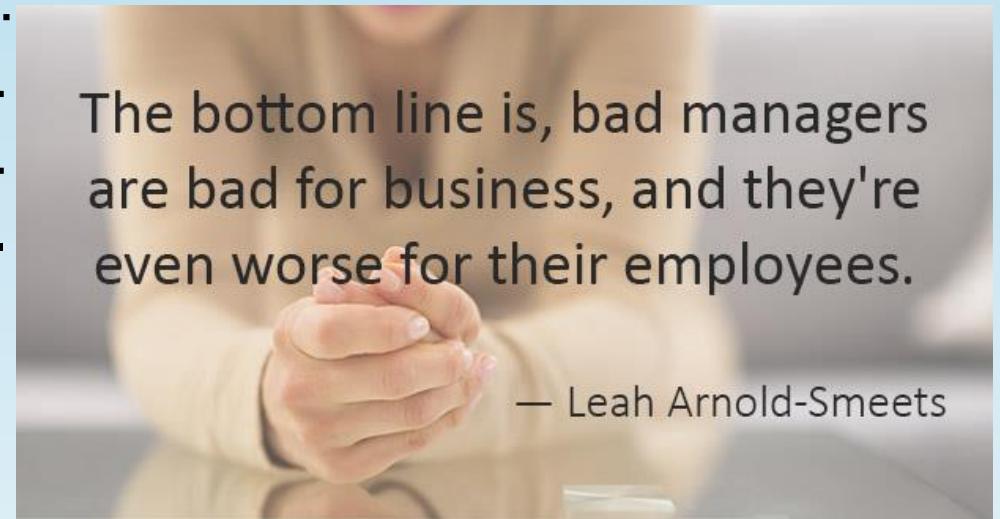
# COMMON DANGER AREAS

- ▶ Wage/Hour Requirements
- ▶ Worker's Compensation Issues
- ▶ Sexual Harassment
- ▶ Employee Theft
- ▶ Etc.....

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# WAGE AND HOUR BASICS

- ▶ Establish a “Work Week” (typically Sunday at 12:00 a.m. to Saturday at 11:59 p.m.)
- ▶ Bona fide meal periods (30 min or more) need not be paid—but worker must be completely relieved of duty for meal period not to be paid.



# WAGE AND HOUR BASICS

- ▶ Work week is 40 hours in a 7 day consecutive period.
- ▶ OVERTIME: Non-exempt employees get time and  $\frac{1}{2}$  for all hours over 40.
- ▶ Live on site?---must include cost of room and board and other facilities in total compensation for the week. (Tot. Comp / Tot. Hrs. worked = Regular Rate)



# WAGE AND HOUR EXAMPLE

## Pay Plus Apartment Benefits

Hourly Rate: \$10.00  $50H \times \$10 = \$500$

*Apartment / week:* \$200.00 + \$200

*Water:* \$50.00 + \$50

*Electricity:* \$100.00 + \$100

$\$850$  (total value)

Hours Worked: 50  $\$850 / 50H = \$17.00$

\$17.00 is the Regular Rate for Overtime Purposes

OVERTIME OWED:  $\$17.00 \times .5 = \$8.50$   $\$8.50 \times 10H = \$85.00$  OT

TOTAL PAID COMPENSATION:  $\$500$  (PAY) + \$85.00 = \$585.00

\*\*\* (Watch for Bonuses) \*\*\*

# OVERTIME EXCEPTIONS

- ▶ **Executives**—primary duty is management of enterprise—directs work of 2 or more employees—authority to hire, fire. Or—Own > 20% and actively engaged in management.
- ▶ **Professional Duties**: work requires advanced knowledge in specialized field (science, law, accounting, etc...)

There is no limit on how much free overtime you can work here....



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# OVERTIME EXCEPTIONS

- ▶ **Administrative**– Must have all three:
  - ▶ 1. Must make not less than \$455 / week.
  - ▶ 2. Primary duty–non-manual work directly related to the management of general business operations of the employer; and
  - ▶ 3. Primary Duty–includes discretion and independent judgment with respect to matters of significance.

There is no limit on how much free overtime you can work here....



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# WORKER'S COMPENSATION

-State Regulated insurance that ensures medical bills and some lost wages are paid for employees injured on the job.

-Provides immunity from work-related injury lawsuits with the exception of gross negligence in a wrongful death suit.

-Non-subscribers: Lose immunity from suits. 1% negligent is all that matters.



# WORKER'S COMPENSATION

## RETALIATION SUITS:

Labor Code 451: Employer cannot retaliate for employee filing WC claim; hiring a lawyer for their WC claim; or testifying in a WC proceeding.

-Employer must be a participant in WC system.

-"Discharge" or "in any other manner discriminate against employee."



# SEXUAL HARASSMENT CLAIMS



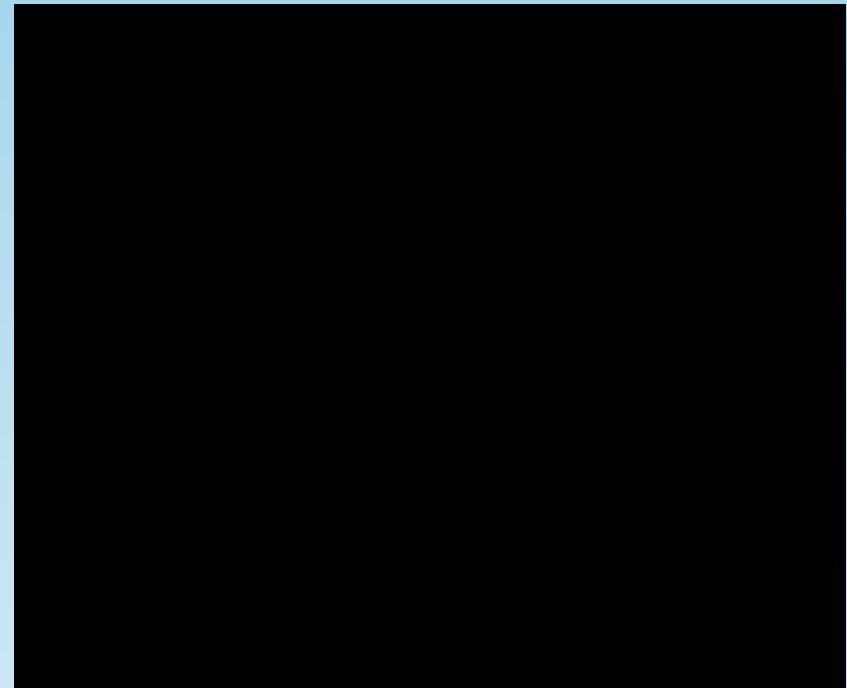
- ▶ The United States' Equal Employment Opportunity Commission (EEOC) defines workplace sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."

- 79% of victims are women, 21% are men
- 51% are harassed by a supervisor
- Business, trade, banking, and finance are the biggest industries where sexual harassment occurs
- 12% received threats of termination if they did not comply with their requests

# SEXUAL HARASSMENT CLAIMS

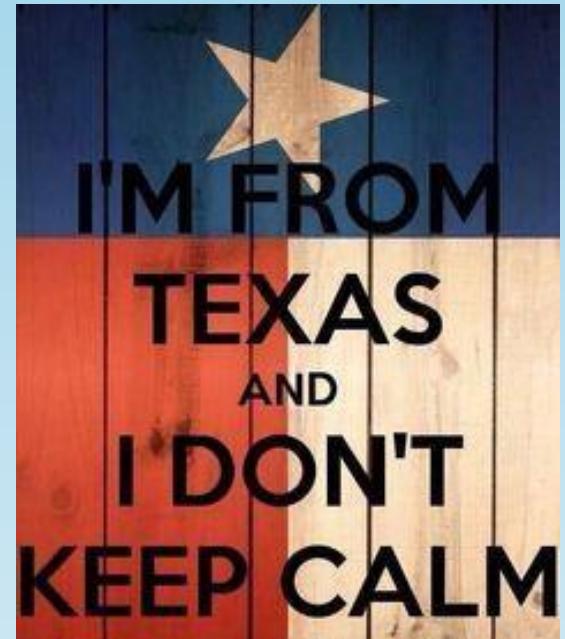
## ► Defenses:

- 1. It Didn't Happen
- 2. It Was Welcomed
- 3. The Conduct Was Not Based On Sex Or Was Not Sexual
- 4. First Amendment
- 5. Equal Opportunity Harasser (Bisexual Defense)



# Avoiding Employment Claims

1. Communicate Effectively
2. Document All Discipline
3. Own the Situation
4. Recognize Legal Issues
5. Think Before You Fire



# Avoiding Employment Claims COMMUNICATION

- 1. Some conversations will be difficult, but always be professional;
- 2. All Disciplinary Action (including verbal) must be in writing;
- 3. Email does not count as discipline;
- 4. Discipline Managers for failing to discipline their employees.

EMAIL:

Complete sentences with full words

State facts, not opinions

Avoid implying any tone of voice

Call if email is too long

Read and edit email before sending

# Avoiding Employment Claims

## DOCUMENT DISCIPLINE

1. Well maintained personnel files discourage lawsuits;
2. Good documentation wins unemployment benefit claims;
3. Employment lawsuits are won or lost based on documentation.

WHAT IS “GOOD”?

Signed and dated

Objective facts-no opinions

Appropriate detail (witnesses, event, etc...)

Reference to rule or policy

Identify prior discipline

Provide employee place to sign and state defense

# Avoiding Employment Claims

## OWN IT!

1. Take responsibility for the actions of your people;
2. Never avoid or ignore an HR issue;
3. Punting is prohibited;
4. Recognize your limits but never abdicate your responsibility to ensure action is taken.



# Avoiding Employment Claims

## RECOGNIZE LEGAL ISSUES

1. Look for buzz words: harassment, hostile work environment, retaliation, discrimination;
2. Be wary of horseplay and jokes;
3. Request to accommodate a medical issue or injury may implicate ADA.

Scary Phrases:

“I don’t want anyone getting into trouble but...”

“I am telling you as a friend, not a manager.”

“I want this to be confidential.”

“I don’t want to give names.”

“I just wanted you to know in case something happens.”

# Avoiding Employment Claims

## THINK BEFORE YOU TERMINATE

1. Is there good documentation to support the decision?
2. Was the employee given a fair opportunity to correct his behavior?
3. Was the discipline consistent with the employer's practices?
4. How long was the employee with the company?

Summarize the basis for termination—One 20-word sentence should suffice—if it takes too long to explain, the reason is usually weak;

Act quickly when evidence supports termination;

A lingering problem pollutes the workplace;

Failing to act timely creates opportunity for manipulation.

# EMPLOYEE THEFT



**It is estimated that 95% of all businesses experience employee theft and management is seldom aware of the actual extent of losses or even the existence of theft.**

# EMPLOYEE THEFT

## TYPICAL EXAMPLES

### Accounting Department

- Petty Cash
- Cash vs. Credit Deposits
- Fake Reporting
- Fake Expenses



# EMPLOYEE THEFT

## TYPICAL EXAMPLES

### Credit Card Abuse



# EMPLOYEE THEFT

## TYPICAL EXAMPLES

### Miscellaneous Types

- Personal Use of Company Property
- Vendor Theft
- Milking the Clock
- Trade Secrets

# Managing the Discovery of Theft

## Compiling Information



- Document, document, document!
- Who are the witnesses?
- Written evidence
- Outside witnesses (vendors, banks, etc..)
- Who else is involved?
- Auditing
- EMAIL!

# Managing the Discovery of Theft

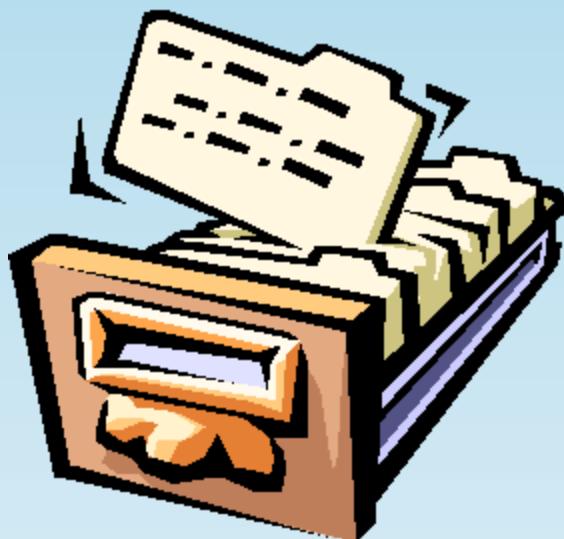
## Emotional Response vs. Attorney Review



- Anger, frustration, hurt
- Hard to stay rational
- Less objectivity
- Need an outside set of eyes
- Make sure it is substance over gut

# Managing the Discovery of Theft

## Reviewing Existing Employee File



- Who can look at it?
- HIPAA considerations
- Valuable information (SS#, bank info., email accounts, asset searches)

# Managing the Discovery of Theft

## Is this suit Civil or Criminal?



- Depends on the nature of the “taking”
- Company credit card
- Per diem restrictions
- Gas cards
- Commission agreements

# EMPLOYEE THEFT

## Criminal Route

- Faster
- Restitution
- Message to other employees
- Message to the community
- Future employers



## Civil Route

- Discovery for criminal prosecution
- Judgment
- Allocation of resources
- Two ways to collect money
- County to county considerations



# FIRING THE EMPLOYEE

## Attorney Involvement



- Emotional Response vs. Rational Response
- HR vs. Attorney
- Who should not be involved?
- How and When?
- Don't knee jerk!

# FIRING THE EMPLOYEE

## Opportunity to Get Money and Information



- Attorney is Bad Guy
- Opportunity to Repay
- Information on Others
- Affidavit / Settlement Agreement
- Neutral References

# Q&A

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