

The HUMAN Factor

PROTECT YOUR PRACTICE—
AND YOUR HARD-EARNED
PROFITS—WITH THIS
ESSENTIAL HR GUIDANCE.

by Mary K. Compton, PhD, CPC

When you're growing your eye care practice and building up your staff to handle more patients, it's easy to overlook a critical role—a job so important to your practice's solvency and profitability that without that position filled, you can pretty much scrap your plans for a successful expansion. The role? Human resources specialist.

It's tempting to cut corners as you look at growth expenses and simply assume that any added HR duties can be easily allocated to your practice manager or that the physician owners can manage the hiring and firing. After all, it's not that complicated. Anyone can take this on with a little extra training, right? Wrong. Without a dedicated HR specialist on your team, the risk you're taking on is like driving blindfolded.

Still not convinced? Try weighing in on these thorny HR scenarios posed by attorney Marcus Crider with Waller Lansden Dortch & Davis for attendees of the 2017 annual meeting of the Ambulatory Surgical Center Association. Then review the answers to see how you did.

POP Quiz

Is Your HR Compliance Knowledge Up to Par?

- 1.** An intake specialist is instructed by his manager not to refer females to a particular clinician. The intake specialist doesn't file a complaint but instead proceeds to refer female clients on an equal opportunity basis. Does the intake specialist's refusal to obey the order constitute protected activity?

A: No, the intake specialist must at least voice his opposition.
B: Yes, the intake specialist's noncompliance is protected opposition.
C: The intake specialist needs to file a complaint or grievance to comply with policy.
D: Yes. The intake specialist's manager and that therapist are both jerks!
- 2.** Your practice manager, Karen, believed that your facility was improperly denying certain requested reasonable accommodations under the ADA. After she reported this to supervisory management, she was transferred to a position with less responsibility and pay. Is this retaliation?

A: Maybe, but we need more facts.
B: No, as a manager, she is required to report this activity.
C: Yes, her reports of unlawful actions were protected.
D: All I can think about are those poor disabled employees. #teamkaren
- 3.** In response to a supervisor's repeated sexual comments, Leslie tells him, "Leave me alone and stop." A coworker intervenes on her behalf, also asking the supervisor to stop. Is this protected activity?

A: Yes, for both employees.
B: Yes, for Leslie, no for the second employee.
C: No for both. They should have reported the supervisor's behavior per the policy.
- 4.** Brandi, a tech, discussed with her coworkers that she believed she was being discriminated against because her pay was lower than male techs doing similar work. The practice code of conduct includes a gossip policy which prohibits discussing pay. Brandi is disciplined for violating the policy. Is this retaliation?

A: Not if she signed the policy.
B: Yes.
C: No, there is a difference between disciplining her for violating the policy and retaliating against her.
- 5.** Joe filed an EEOC charge alleging that he was racially harassed by his supervisor and coworkers who all deny they engaged in the conduct. There were no witnesses. HR assigned two employees to watch him and report back about his activities. Is this retaliation?

A: No, if HR is trying to help him by finding evidence of the harassment he reported.
B: No. HR has the right to conduct a thorough investigation into his claims.
C: No, if he remains in the same department, but yes if they transfer him.
D: Yes, if this deters him from making future complaints.
- 6.** Bill filed a suit against his former employer alleging that his supervisor sexually harassed and constructively discharged him. The suit was ultimately settled. Bill applies for a new job and has a conditional offer contingent on a reference check. When the new employer calls the old employer, his former supervisor says that he was a troublemaker, started a lawsuit, and was not anyone a medical practice would want to get mixed up with. Bill's job offer was withdrawn. Is this retaliation?

A: No, for the new practice. This is the reason we take the time to check references. Yes, for the former employer.
B: Yes, for the new practice; no, for the former employer.
C: Yes, for both.
D: No, you can't sexually harass a male. He probably liked it.
- 7.** A physician-owner receives an expletive-laced email from Sally about her manager harassing her. Sally has documented performance issues and insubordination. She is terminated, and the termination notice cites her performance and the email as reasons. The email is attached as the term cause email. Is this retaliation?

A: No, the email is not an example of insubordination.
B: Yes, her complaint is still protected.
C: Probably so.



QUIZ ANSWERS:

1. **B.**
2. **C.** Karen is a manager so this is her job and managers are still eligible for protected activities
3. **A.**
4. **B.** You can't prohibit discussion of pay. You can certainly have that policy but it might end up costing you. There are legal risks associated with barring employees from discussing their pay.
5. **D.**
6. **C.** Crider says that if he were defending the new employer, he would hope that the lawsuit was not "the reason" Bill wasn't hired. Bill would have to prove that it was because of the former employer's statement that his offer was rescinded.
7. **C.** Sally clearly was making a report but not in the best manner. What if she copied the entire practice on the email, or announced it on the loudspeaker? The manner in which you raise a complaint does count. That's why the answer is "probably" instead of "yes."

THE BOTTOM LINE: You need someone who understands employment law, emphasizes Suzanne Rupert, director of human resources and recruiting for Eye Care Leaders. Healthcare laws are changing all the time and you need an HR person who is staying up to date and keeping your staff informed. In an expanding practice, you'll also need a mediator as new employees are brought into an existing office culture. More people will be working closely together, and there will be flare ups, Rupert says. "The HR person has to listen, they have to mediate, and they have to be able to mitigate risk which is really important."



EYES OPEN

Get your doctors on board. Your HR hire needs the full support of your physician staff and your board of directors. Doctors don't always think like employers, advises Kat Park, director of RCM services at Eye Care Leaders. They're more concerned with patient lawsuits, aren't thinking about employment lawsuits, and frequently don't have training in employee issues. Early in the hiring process for new doctors, there needs to be buy-in to understand the value and necessity of an HR specialist so your doctors are open to advice and training from this staffer, says Park.



Watch your back

You can't run your practice—much less grow it—without properly managing your employees and clearly understanding how to protect yourself against liability. "If you have an employee, you have a risk of being sued in an employment related matter," emphasizes Crider, who has practiced employment law for 21 years. The more employees you have, the greater your risk of being sued, he adds.

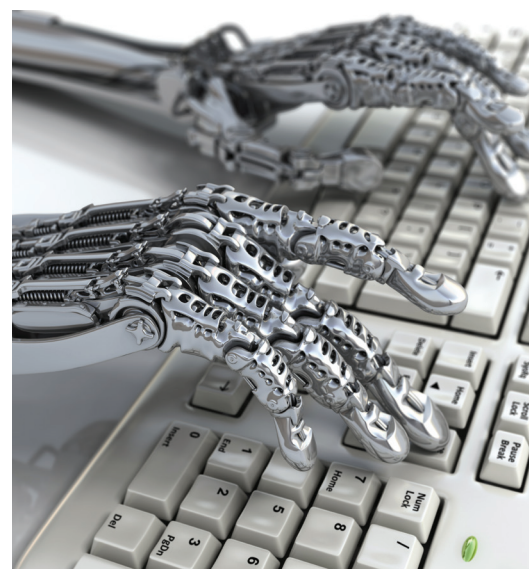
It's not only 'bad' employers that get sued. The hard truth is that no matter how great an employer you are, you could find yourself with a federal lawsuit on your hands from an angry employee. And a claim filed against you via the U.S. Equal Employment Opportunity Commission could quickly drain your coffers. The EEOC cites retaliation as the leading claim filed against employers. And it's the leading claim for a very logical reason, Crider says: It comes from a natural tendency to get back at somebody. "Retaliation is often an add-on to another claim and it is more difficult to defend against," he notes. It's also hard to get a court to dismiss it, and it ends up going to a jury, which is usually not good for defendants, he adds.



Dangerous TERRITORY

Having a seasoned HR specialist on board can help alleviate and even defuse a litigious employee situation that could sideline your expansion efforts and cost you a bundle in attorney fees. And while EEOC claims are often filed in spite of superlative HR, you'll find the risk is diminished when you have experienced HR personnel who can provide necessary staff instruction on some specific trouble areas, including:

DISABILITIES: If your practice has 15 or more employees, the Americans with Disabilities Act (ADA) "prohibits discrimination in hiring, promotions, training, pay, social activities, and other employment privileges" based on disability, speaker Marcia Brauchler, MPH, FACMPE, CPC, COC, CPC-I, CPHQ told attendees at MGMA16. Doctors often aren't aware of the ADA and will say things that could get them in trouble, according to Park. Your staff needs adequate training on what they can and can't say.



DON'T WAIT TO TAKE ACTION

Staving off expensive employment litigation requires specific preventive measures, which may not be intuitive. In other words, what you need to do to protect yourself might not be obvious. And if you're taking on more employees as you grow, you'll need expert help to manage it all.

STAY ALERT AND RESPOND. Keep your ears open, listen to your employees, react to anything you can react to, advises Crider. If you're made aware of something, you can't just pretend it didn't happen. You have to investigate it. "We have to live up to the commitments we make in our employee handbooks when we say that our employees will be free to work in our facility without threats or retaliation," says Crider.

BE EQUITABLE. Ensure equal treatment of similarly situated individuals. It's a good idea to take a hard look at your demographics and hiring trends so you're aware of—and can correct—biases that could get you in Title VII trouble.

UPDATE YOUR MANUAL. Have you got an obsolete employee manual? Make sure your manual reflects your current philosophy as a practice. For instance, Fortune 100 and most 500 companies made a decision years ago "to protect their employees from sexual orientation discrimination in their own companies regardless of what the courts say," says Crider.

MEDICAL LEAVE: Under the Family Medical Leave Act (FMLA), if your practice has 50 or more employees, your employees are entitled to up to 12 weeks of "job-protected leave during any 12-month period for the birth of a child, care of an immediate family member, the employee's own serious health condition, or if an immediate family member is on active military duty," Brauchler advises. The law was passed in 1993 and is enforced by the Department of Labor, Wage and Hour Division. Non-compliance can result in civil actions by employees. So, for instance, if someone's having a baby, you have to make sure you're initiating the correct paper work in the correct amount of time, says Rupert. If someone's hospitalized, you have to tell them if they're eligible, and so on.

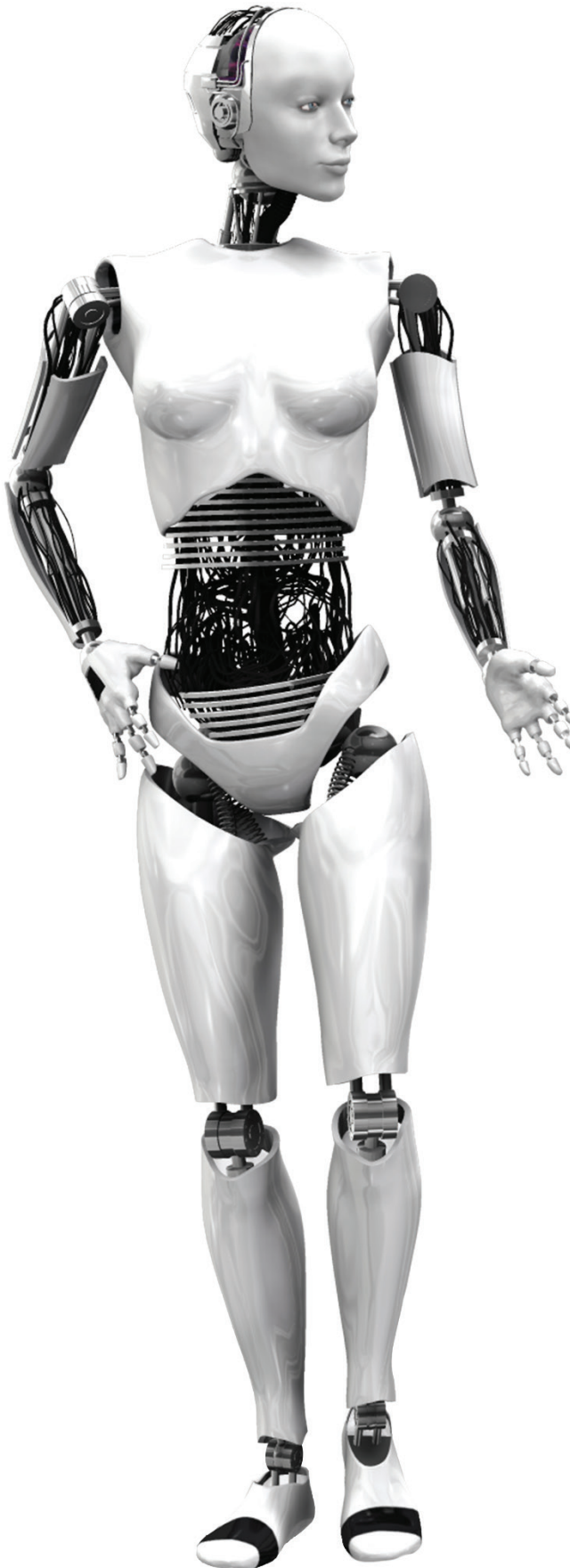
GENERATIONAL TRIGGERS: Loyalty toward your practice can have a lot to do with whether or not an employee turns into a retaliator and files an EEOC claim against you. Your younger employees may view their jobs as a temporary means of supporting their lifestyle, an attitude quite different from your older staffers' view which is that their work for you is a career and they're in it for the long haul. What this means is that a younger employee may be more likely to stand up for 'my concerns and causes,' and 'if you do something to me because I did that,' that's retaliation, Crider observes.

SEXUAL HARASSMENT: "Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964," Brauchler explains. Penalties that can result from litigation against your practice include lost wages, compensatory damages, and punitive damages. Given human nature, these complaints aren't going to go away, Crider emphasizes. It's fundamental to a workplace. What's evolving is the way harassment is communicated, he notes. Twenty years ago it may have been an actual love letter; now, it's texts. Texts (and email) often lack context. They can be made out to mean almost anything, increasing the potential of harassment claims.

GENDER STEREOTYPING: This is the next wave of concern. Practices need to be ready to address and define what sex or gender means and think about ways this issue could come up in the workplace. What happens, for instance, if there's a male or female who doesn't conform to the stereotype of what men and women look like, act like, talk like, and so on, asks Crider.

Court decisions are showing that we are coming closer and closer to interpreting Title VII of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, religion, sex, or national origin, as also including sexual orientation, according to Crider. While the Supreme Court has yet to make a formal ruling on this addition, practices need to be aware that discrimination on the basis of sexual orientation can "no longer be tolerated."

PRIVACY: Your HR person needs to understand HIPAA compliance—what's allowed to be shared and what's not, so this can be conveyed to staff, Rupert adds. But that's not all: privacy comes into play during the hiring process, too. If you utilize background checks, you'll want to make sure you comply with the Fair Credit Reporting Act and state-specific laws. And if you're going to do it at all, conduct background checks on every applicant, not just some. If you plan to obtain a credit report from an applicant, you need written permission from the applicant. You also must notify the applicant in writing that the credit report will be part of the employment decision. But beware: credit reports often contain inaccuracies and errors. It's best to obtain a credit report only if it's truly relevant to the position.



WILL YOUR HIRING AND FIRING DECISIONS STAND UP TO SCRUTINY?

As an experienced practice owner, you've done your share of hiring and firing, and if you're looking to expand your practice, it's likely that you've got a decent track record in this area. But it's a numbers game. Bringing on more employees exposes you to more liability in the hiring and firing process in new areas you may not even be aware of until you find out you're being sued.

You need a skilled professional with fresh understanding of compliant hiring processes to help you bring the right people on board, to help you retain your employees to prevent costly turnover, and to expertly handle the terminations that inevitably happen in any business.

There's a laundry list of legal issues that come up throughout the hiring process that you need to keep your eye on, warns Crider. For instance, as you select candidates for interviews and for employment offers, you need to be careful about not violating the ADA, which prohibits discrimination based on disability.

KEEP YOUR INTERVIEW PROCESS COMPLIANT

You can't leave anything to chance when you're hiring, and busy managers just won't have time to do the through checks on candidates that have to be done these days to protect your practice. Your HR specialist can manage the verification process: think of HR as Homeland Security for your office.



Since you're hiring people who will be working with protected patient data, you need to make sure you do a thorough reference/background check, advises Rupert. In eye care, techs need certain certifications, depending on the state, so that must be verified, as well, she says.

Your HR specialist will know what the no-go areas are for interviews and can help facilitate a process that won't backfire on you. For instance, you can't ask if candidates are married or pregnant, says Rupert.

And if you're hiring a lot of techs as part of your practice expansion, you'll want to develop a standard questionnaire for the interviews, Rupert says. That way, you can show that you were fair and that everyone had the same opportunity to answer those questions. The responses should be kept on file for a certain number of years, she adds, and someone needs to oversee that.

An HR expert will know what kind of behavioral interview questions to ask, says Rupert. For example, if someone's changed jobs frequently, the HR person will know how to probe without offending. A skilled interviewer will know how to ask questions that reveal how a candidate handles stress, whether they have leadership potential, whether they're team players, and so on, she adds. Situational questions like how a tech or nurse dealt with an agitated patient in the past, for instance, can be very telling when you're making a hiring decision.

It's going to be hard for someone who doesn't have HR experience to process all the hiring documents that have to be completed—such as the I-9 that has to be filed within three days of hiring—when you bring on new employee, Rupert cautions. You need someone to manage personnel file retention and know the limits and understand security so the confidentiality of the documents isn't compromised.



EYES OPEN

Your job offers should be crafted very carefully so that they're not construed as some sort of contract or guarantee, cautions Crider. Avoid creating the appearance of a contract, unless a contract is intended, he advises.

LET A PRO HANDLE YOUR DISCIPLINARY ACTIONS AND TERMINATIONS

You don't want amateurs handling problem employees or firing them. An HR professional will know how to impose discipline in a professional, impartial manner. What you want is a person who is positive, treats the employee with dignity, conducts the encounter privately, and is transparent about the process, according to Crider. The employee discipline process is typically progressive, he notes:

1. Counseling with a supervisor
2. An oral warning
3. A written warning
4. Suspension
5. Termination

Make sure you retain your right to make an immediate termination, if appropriate, says Crider. "If you bash in your manager's windshield, you don't just get counseling."

The importance of documentation in disciplinary action cannot be overemphasized, Crider advises. You may have to support your decision if it is subsequently challenged, he says. If you do not have the info, you cannot manufacture it later. And it's better to go "old school" with actual forms than rely on email documentation, which has "sort have softened up and rubbed down the corners of communication. Things can be misconstrued, taken the wrong way."

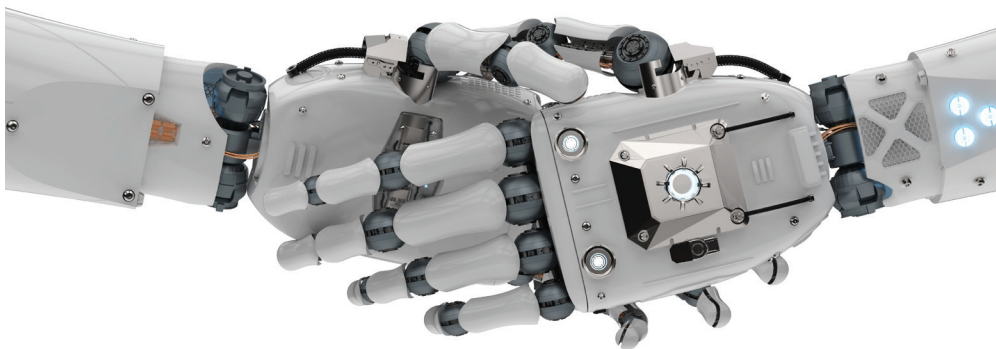
Terminations can be woefully mismanaged, and when that happens, you've got a mess on your hands. Worse-case scenario, an employee goes postal and you end up on the evening news.

Sometimes a terminated employee will get hostile, and you need to let them say what they have to say, advises Rupert. Give them a chance to respond, even though it's not going to change the outcome because they need to be heard. Thank them for the time they spent working with you. And always have a witness with you when you do a termination, says Rupert. It's a matter of safety, and you avoid a "he said/she said" scenario.

What you want is an impartial professional who has the diplomatic skills to handle these situations appropriately and who can keep a conversation from getting derailed, Rupert advises. If things do get hostile, they've had enough experience to handle it and won't panic.

During the termination conversation, your HR person will review such matters as when to expect the final paycheck, which can vary by state law, the vacation policy, the plan for returning practice property such as scrubs, keys, equipment, health insurance benefits and COBRA, and unemployment eligibility, says Rupert. And the HR person is the point of contact for further information or questions.

One of the benefits of having your HR person review all this during the termination conversation is that this employee is likely to be too upset to ask



TIP When providing oral or written warnings, never refer to protected status like age, physical condition, etc. Crider gives this example:

- **WRONG WAY:** Bob has to take care of his childcare issues before we can expect him to meet his goal of arriving to work on time.
- **RIGHT WAY:** Bob needs to arrive at work as scheduled.

these things, and doing so calms the person down and reassures them, says Rupert. And that goes a long way toward staving off retaliatory actions.

A GRACEFUL EXIT

"A great offer fell in my lap, and it's too good to pass up." Sound familiar? Chances are, you've been told this exact same thing by employees who have departed your practice. Did you believe them? If so, you might want to reconsider.

Most employees who leave want to do so quietly and with a minimum of drama. Unless you ask directly—and the employee feels really, really comfortable with you—you'll likely never find out the real reason for departure. "One of the biggest problems in the working world is that an invisible, impermeable wall can build up between what employees would love to say and what the leadership team can stand to hear," writes HR executive and author Liz Ryan in her March 2017 article for *Forbes*. That means missing out on valuable information you could use to improve your people skills, your practice, and your profitability.

Besides being a valuable source of information about the overall workplace quality in your practice, an exit interview can shield your practice from legal action—especially when the departing employee leaves on not-so-great terms. It provides the opportunity to identify compliance concerns and regulatory violations, while at the same time assessing the potential for litigation. During the exit interview, include questions that will draw out compliance and ethical concerns. The American Academy of Professional Coders recommends questions like:

- Do you know of any ethical or compliance issues that should be addressed?
- Has anything been left unresolved that you think someone needs to know about?
- Have you ever witnessed conduct you would categorize as unethical or illegal?
- Do you feel like practice leadership has supported ethics and compliance initiatives?
- Do you feel like you received adequate training and orientation regarding the practice's compliance policies?

If the exit interview results in reason for concern, it's a wise idea to consult with your practice's attorney. Don't forget: whistleblowers are entitled to a percentage of any monies recovered if a claim is prosecuted. If a departing employee—receptionist, coder, biller, or even physician—is already disgruntled, that kind of reward may be tough to turn down. The worst thing you can do is ignore the information.

An exit interview, when conducted correctly, can help you determine the real reason an employee is leaving and guide you in implementing changes to boost staff development and retention in your practice, says Elise Levine, MAG, CRC, who spoke to ophthalmologists during her presentation at the annual meeting of the American Academy of Ophthalmology in 2015. MGMA recommends following these guidelines to get the most out of an exit interview:

- **USE AN AGENDA.** Decide on your objectives for the interview in advance, and use them to draft a list of questions. Think about what information would be most useful for your practice. Consider sending the questions to the employee prior to the interview, allowing time for reflection.
- **DON'T BE DEFENSIVE.** The point is to obtain useful, honest feedback, and you'll only be able to do that if you have the right attitude. Listen carefully, allow the employee to speak, and don't try to argue or try to prove the employee wrong.
- **ASK THE RIGHT QUESTIONS.** Just like in a hiring interview, open-ended questions work best.
- **CONSIDER SCHEDULING.** While many organizations conduct exit interviews on the employee's last day, think about scheduling it a week or so after that via telephone. The employee might not be as honest as possible if they think there's a paycheck hanging in the balance, or if they're distracted by emotional goodbyes.
- **SET THE STAGE.** You need the employee to feel at ease. Instead of sitting behind a desk in "face-off" stance, think about using a conference room or other area that will feel more informal and natural. 🎧



QUICK-REFERENCE RESOURCES FOR HR COMPLIANCE

1. Non-Discrimination

eeoc.gov/laws/statutes/titlevii.cfm

2. Sexual Harassment

gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1604.xml

3. Family Medical Leave Act (FMLA)

dol.gov/whd/regs/statutes/fmla.htm
dol.gov/whd/regs/compliance/posters/fmlaen.pdf

4. Fair Labor Standards Act (FLSA)

dol.gov/whd/flsa/

5. Americans with Disabilities Act (ADA)

ada.gov/pubs/ada.htm
ada.gov/cguide.htm
ada.gov/archive/q&aeng02.htm

6. Occupational Safety and Health Act of 1970 (OSHA)

osha.gov/law-regs.html
osha.gov/dcsp/compliance_assistance/quickstarts/health_care/
osha.gov/Publications/osha3187.pdf
osha.gov/Publications/poster.html