

# **20 Tips for Avoiding Employer Liability – Practical Suggestions You Can Take Away**

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## 1. Use best practices to hire the best people.

- a. Begin with the end in mind. S. Covey, *The 7 Habits of Highly Effective People*.
  - i. Know thyself.
    1. Organizational culture.
    2. Organizational mission, vision, values.
    3. Hire people who not only have (or can be taught) the necessary skills to do the job, but who also fit the organization's values / culture.
  - ii. Know the job to be filled and use updated and accurate job descriptions. See Appendix A. Many forms are available online; make sure your source is reputable.
- b. Know the protected classifications that must not be considered when making hiring (or any job-related) decisions.

Minnesota Human Rights Act, [Minn. Stat. § 363A.08](#):

*Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of **race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age** to:*

- (1) refuse to hire ...; or*
- (2) discharge an employee; or*
- (3) discriminate against a person with respect to ... employment.*

Similar laws include: Title VII of the Civil Rights Act of 1964, [29 U.S.C. § 2000e](#); Equal Pay Act of 1963, [29 U.S.C. § 206\(d\)](#); Age Discrimination in Employment Act of 1967, [29 U.S.C § 621, et seq.](#); Americans with Disabilities Act, [42 U.S.C. § 12101, et seq.](#); Genetic Information Nondiscrimination Act, 42 [U.S.C. § 2000ff-1, et seq.](#)

- c. Use care when conducting background checks.
  - i. Double check application and other screening materials and procedures to make sure you have "banned the box." Minnesota's "Ban the Box" law, [Minn. Stat. § 364.021\(a\)](#):

A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.

- ii. To the extent you are taking criminal history into account, make an individualized assessment for each hire, which means considering:
  1. The ***nature and gravity of the offense*** or conduct;
  2. The ***time that has passed*** since the offense or conduct and/or completion of the sentence; and
  3. The ***nature of the job*** held or sought. *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977). See also [EEOC's Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 \(April 25, 2012\)](#).
- iii. Don't forget about the [Fair Credit Reporting Act \("FCRA"\), 15 U.S.C. § 1681](#).
  1. If using third party to conduct a background checks on candidates, the report is likely a "consumer report," which requires FCRA compliance.
  2. FCRA compliance includes
    - a. Written disclosure to and permission from applicant.
    - b. Certification of you FCRA compliance to the vendor.
    - c. Pre-adverse action notice to applicant / employee.
    - d. Post-adverse action notice to applicant / employee.
  3. See also Federal Trade Commission's publication, [Using Consumer Reports: What Employers Need to Know](#).
- d. Obtain employment authorization (I9 Compliance). "Federal law requires that every employer who recruits, refers for a fee, or hires an individual for employment in the U.S. must complete Form I-9, Employment Eligibility Verification. Form I-9 will help you verify your employee's identity and

employment authorization.” [United States Citizenship and Immigration Services](#).

- i. Obtain only approved eligibility documentation.
- ii. Complete the I-9 form on time (within 3 business days of the date of hire, which means the first day of work for pay).

**iii. Use the correct (current) form.**

1. Current version has been required for all employees hired since September 18, 2017 and is valid through August 31, 2019.

<p><b>Note:</b> the prior version was also valid through August 31, 2019 so be sure to use the one with the 07/17/17 date in lower left-hand corner.</p>
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2. Download the correct form from [USCIS](#).

**2. Properly classify workers as employees unless they can truly be classified as an “independent contractor.”**

a. Resources

i. IRS

1. Publication [Understanding Employee vs. Contractor Designation](#): focus is on
  - a. behavioral control;
  - b. financial control; and
  - c. relationship and interaction between worker and employer.
2. Use IRS [Form SS-8](#) as a tool to assess employee / contractor.

ii. U.S. DOL

1. [Fact Sheet No. 13](#): Focus is on the “economic realities” of the relationship.

- iii. MN Department of Revenue publication [Independent Contractor or Employee](#): focus is basically the same as the IRS’s.

iv. [Minn. Stat. § 181.173](#): establishes a nine-factor test applicable to construction contractors.

b. The standards vary, but the common thread running through all of them is *control*.

**3. Keep your employee handbook or policy manual up to date, and implement one if you do not have one.**

a. MN CLE has good basic annotated template; forms from other reputable sources are available.

i. Do not merely pirate a form from a colleague who is willing to share or from a free on-line source (you get what you pay for).

ii. Have it reviewed by counsel.

b. Key Elements

i. EEO statement.

1. Identify the legally protected classifications.

2. Clearly and strongly state that discrimination, including harassment, based on any legally protected classification is against the law and is strictly prohibited.

***Sample EEO statement:*** Employer is an equal opportunity employer. This means that Employer will make all decisions regarding a person's employment without regard to that person's race, creed, color, religion, sex, national origin, marital status, status with regard to public assistance, disability, age, membership on a local human rights commission, sexual orientation, veteran status, familial status, registration on the Minnesota Medical Cannabis Registry, veteran status, or any other legally-protected classification. Discrimination, harassment and retaliation / reprisal based on any of these classifications is unlawful. Therefore, employer strictly prohibits discrimination, harassment and retaliation or reprisal based on any of these protected classifications. This policy applies to all decisions regarding a person's employment, including hiring, assignments, compensation, promotion, discipline and discharge.

ii. Anti-discrimination / harassment policy.

1. Definitions.
2. Examples.
3. Reporting mechanism (with multiple options).
4. Investigative / response process.
5. Sanctions.
6. Confidentiality language.
7. Non-retaliation language.
8. Dating issues. See Appendix B.
9. Application to electronic communications, social media, etc.
10. Anti-tolling clause in light of [Pederson v City of Minneapolis \(Minn. 2017\)](#) (held: tolling provision of Minn. Stat. § 363A.28, Subd. 3(b) applies to employer's internal complaint/grievance procedures when those procedures are a voluntary dispute resolution process for claims under MHRA).

***Sample Anti-Tolling Clause:*** The purpose of this policy is to prevent unlawful discrimination and harassment and to stop it if it does occur. This policy is not a dispute resolution process; therefore, utilizing this process does not toll any applicable statute of limitations.

iii. At will employment statement & contractual disclaimers.

***Sample at-will statement:*** Employment at Employer is at-will, meaning that your employment is for no particular duration, and either you or Employer may end our employment relationship at any time, with or without notice or cause.

Sample

**Sample contractual disclaimer:** This Handbook is for general informational purposes only, and it does not form a contract between Employer and any employee. Employer retains the discretion to add to, delete, or modify any policy stated herein with or without notice.

- iv. If the handbook is a revised version of a prior handbook, include language to revoke the old one.

**Sample revocation clause:** This handbook replaces any and all prior handbooks and policies of Employer, whether written or oral, and all such prior policies are hereby rescinded.

- v. Discipline policy
1. Performance Improvement Plans / Last Chance Agreements are useful tool for documenting a performance issue and a plan for resolving it.
  2. Preserve discretion; do not jeopardize at-will status.

**Sample preservation clause:** Because every situation is different, Employer retains the discretion to take the steps it deems appropriate under the circumstances. Therefore, Employer may skip or repeat certain steps in the process, tailor other disciplinary action to fit the situation and / or proceed to immediate discharge from employment. Neither this policy nor any application of it modifies the at-will employment status of any employee.

- vi. Time off policies (vacation, sick leave, PTO, bereavement, personal, etc.). See §8 below.
- vii. Employment status (exempt/non-exempt determinations, part-time / full-time, etc.).
- viii. Attendance expectations.
- ix. Hours of work and breaks.

1. General hours of operation / shifts.
  2. Rest breaks & meal breaks. See §14 below.
- x. Social media and technology policies.
  - xi. Expectations regarding workplace privacy, including the use of company tech resources (email, phones, texting, etc.).
  - xii. Rights of nursing mothers per [Minn. Stat. § 181.939](#).

***Sample policy for nursing mothers:*** Unless it would unduly disrupt operations, Employer will allow employees who are nursing infant children to have adequate breaks and privacy for purposes of expressing breast milk for the infant child. The space provided to express milk will: be in close proximity to the work area; be a room other than a bathroom or toilet stall; be shielded from view; be free from intrusion from coworkers and the public; and include access to an electrical outlet. When the need arises, employees should coordinate with her supervisor or the director of human resources to arrange an acceptable space and schedule. Whenever possible, employees are to express milk within the break times specified in this handbook. The break will be paid if it runs concurrently with a break that would otherwise be paid.

- xiii. Wage disclosure statement.

***Note:*** Having such a statement is required by [Minn. Stat. § 181.172](#), but the statute does not expressly say what this notice must say. It only says, "An employer that provides an employee handbook to its employees must include in the handbook notice of employee rights and remedies under this section."

***Sample wage disclosure policy:*** Employer complies with the Minnesota law that prohibits restricting any employee's right to disclose his or her wages or retaliating against any employee for disclosing his or her wages or discussing another employee's wages that were disclosed voluntarily. However, the unauthorized access to another employee's private financial data is strictly prohibited. In addition, no employee may, without the written consent of Employer, disclose Employer's proprietary information, trade secret information, or information that is otherwise subject to a legal privilege or protected by law. If you have questions about your compensation, Employer encourages you to discuss it with your supervisor or the director of human resources.

- xiv. Check for out of date policies or policies that are not actually “the way things work around here.”
- c. Note posting requirements, even if handbooks or written policies are not required. *Don't buy them.*
  - i. Minnesota Department of Labor and Industry, [Mandatory Workplace Posters](#).
  - ii. EEOC's ["EEO is the Law" Poster](#).
  - iii. United States Department of Labor, [Workplace Posters](#).

**4. Anticipate how you want handle drug and alcohol issues so that you are not scrambling to address them when the need arises.**

- a. Employers are not required to have a testing policy, but the Minnesota Drug and Alcohol testing in the Workplace Act (“MDATWA”), [Minn. Stat. 191.950, et seq.](#), prohibits testing unless you have a policy, forms, consents, etc., that comply with the law.
- b. Employers may still prohibit use, consumption, possession and being under the influence of illegal drugs and alcohol while on the job, using company equipment or vehicles, etc. However, *testing* is prohibited without a MDATWA-compliant policy and forms.
- c. Assuming you have a MDATWA-compliant policy in place, have a pre-selected testing vendor arranged, and have the proper forms on hand for use when the need to test arises.
- d. Medical cannabis.
  - i. Legal in Minnesota.
    - 1. Requires a person to get on the Registry.
    - 2. Only certain conditions recognized for Rx (chronic pain and PTSD recently added to the list).
  - ii. Employment Discrimination provisions, [Minn. Stat. § 152.32, Subd. 3:](#)

(c) Unless a failure to do so would violate federal law or regulations or cause an employer to lose a monetary or licensing-related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

(1) the person's status as a patient enrolled in the registry program under sections 152.22 to 152.37; or

(2) a patient's positive drug test for cannabis components or metabolites, unless the patient used, possessed, or was impaired by medical cannabis on the premises of the place of employment or during the hours of employment.

(d) An employee who is required to undergo employer drug testing pursuant to section 181.953 may present verification of enrollment in the patient registry as part of the employee's explanation under section 181.953, subdivision 6.

5. **Eliminate overly restrictive confidentiality or other communication requirements which infringe on NLRA rights and/or MN wage disclosure statute.**

As noted by the National Labor Relations Board:

Employees who are not represented by a union also have rights under the NLRA. Specifically, the National Labor Relations Board protects the rights of employees to engage in "concerted activity", which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. A single employee may also engage in protected concerted activity if he or she is acting on the authority of other employees, bringing group complaints to the employer's attention, trying to induce group action, or seeking to prepare for group action.

A few examples of protected concerted activities are:

- Two or more employees addressing their employer about improving their pay.
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
- An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.

6. Use contracts when you *intend* to use them.

a. Inadvertent contracts / at-will waivers.

i. Poorly written employee handbooks.

1. Lack of contractual disclaimer and at-will employment clauses.

2. Mandatory progressive discipline policies.

a. Samples of poorly written policies:

i. "If the need arises to take disciplinary action, the follow steps will be taken...".

ii. "When employer has concerns about an employee's performance, employer will give employee a verbal warning, followed by a written warning, and termination as a last resort."

b. Watch for language that retains employer discretion as to whether or not to apply progressive discipline, but then obligates the employer to follow certain steps once the process is started.

ii. Job offer letters that read like contracts

***Sample Bad Offer Letter:***

Dear X,

We are happy to offer you employment as CFO for our company. Upon successful completion of your pre-employment drug and alcohol test and background screening, your first day of employment will be July 1, 2018. After successful completion of your 90-day probationary period, we will be able to enjoy a long and prosperous relationship together. Your salary during your first year of employment will be \$100,000.00 paid in roughly equal bi-weekly installments per our customary payroll schedule. You will also receive the benefits provided to similarly-situated permanent full-time employees. To confirm your acceptance of these terms, please sign below and return this letter to me by June 1, 2018.

- iii. Performance Improvement Plans (PIP's) or other corrective action documents that assure continued employment for as long as certain conditions are met or while the plan is in place.
- b. Intentionally use contracts when they could be helpful.
  - i. Certain employees.
    - 1. Executives and other key employees.
    - 2. Employees with access to sensitive information.
  - ii. Whenever you want to make the terms / relationship more defined.
  - iii. Complexity and terms may vary depending on the nature of employee and employment.

## **7. Protect intellectual property.**

- a. Non-Competes.
  - i. Generally, enforceable if needed to protect employer's legitimate business interests, supported by consideration, and reasonable in terms of duration, geography and other restrictions.
  - ii. Can be very challenging to enforce in court, so use with caution.
- b. Non-disclosure / confidentiality / trade secrets.
  - i. Trade secret protection exists without agreements per Minnesota Uniform Trade Secrets Act, [Minn. Stat. Chapt. 325C](#), and the federal Defend Trade Secrets Act, [18 U.S.C. § 1836](#).
  - ii. Contracts can provide added protection, but some of same challenges that apply to non-competes also apply.
- c. Be consistent in use and enforcement; otherwise courts less likely to find employer has a legitimate interest to protect.
- d. Establish and follow policies and processes for recovering property / data upon termination, especially electronic data that could be on flash drives, external hard drives, personal devices, etc.

## 8. Employers must allow time off (leave) for a wide variety of reasons.

- a. Not all leave statutes apply to all employers or employees.
- b. There are a myriad of state and federal laws that require employers to provide time off for specified issues.
  - i. Family, pregnancy and health / medical issues.
    1. Family and Medical Leave Act, [29 U.S.C. §§ 2601, et seq.](#)
      - a. Not all employers are "covered," and not all employees are "eligible."
      - b. Documentation and timing requirements are tricky.
      - c. Poster is required.
      - d. Policy must be included in employee handbook, or if none, then to new employees upon hire.
    2. Minnesota Pregnancy and Parenting Leave Act, [Minn. Stat. § 181.941](#).
    3. Leave for Adoptive Parents, [Minn. Stat. § 181.92](#).
    4. Minnesota Worker's Compensation Act, [Minn. Stat. Chapt. 176](#).
    5. Care of Relatives, [Minn. Stat. § 181.9413](#).
    6. Bone Marrow and Organ Donor Leave, [Minn. Stat. § 181.945](#); [Minn. Stat. § 181.9456](#).
    7. Minnesota Time off for School Conferences and Activities Act, [Minn. Stat. § 181.9412](#).
    8. Americans with Disabilities Act, [42 U.S.C. § 12101, et seq.](#) and Minnesota Human Rights Act, [Minn. Stat. Chapt. 363A](#) (when time off is reasonable accommodation).
  - ii. Court proceedings.
    1. Safety Leave, [Minn. Stat. § 181.9413](#).
    2. Court appearances by crime victims and witnesses, [Minn. Stat. § 611A.036](#).

3. Jury duty, [Minn. Stat. § 593.50](#).

iii. Election / political reasons.

1. Time off to vote, [Minn. Stat. § 204C.04](#).

2. Service as election judge, [Minn. Stat. § 204B.19](#).

3. Serving in elected office, Minn. Stat. § .

4. Attendance at certain political meetings and conventions, [Minn. Stat. § 202A.135](#).

iv. Military reasons.

1. Uniformed Services Employment and Reemployment Rights Act (USERRA), [38 U.S.C §§ 4301, et seq.](#)

2. Exigency leave under FMLA, [29 U.S.C. § 2612\(a\)\(1\)\(E\)](#).

3. Time off for employee who has a family member who serves in the military and is killed or injured while on active duty, [Minn. Stat. § 181.947](#).

4. Attending certain military ceremonies, [Minn. Stat. § 181.948](#).

5. Service in the Civil Air Patrol, [Minn. Stat. § 181.946](#).

**9. Recognize when the need to reasonably accommodate an employee may arise and how to approach it.**

a. Employee might raise the issue.

b. Employee might not raise the issue but is struggling.

i. Focus on the employee's performance, not on what you may think (or even know) may be happening in terms of the employee's health.

ii. When raising the issue with the employee, not the performance issue, then ask if there is anything you, as the employer, can do to help the employee be successful.

c. Be very open minded in terms of what sorts of accommodations may be required.

- i. Job modifications.
- ii. Appliances / tools.
- iii. Removal of barriers.
- iv. Restructured hours.
- v. Time off.
- vi. Etc.

## 10. Returning an employee to work is not always as easy as it may seem.

### a. Fitness for duty requirements.

#### i. FMLA ([29 C.F.R. § 825.312](#)).

1. Allowed when uniformly applied.
2. Employee's duty to cooperate applies.
3. Only allowed to check employee's SHC which necessitated the leave.
4. Need for FFD certification must be noted in the designation notice.

#### ii. ADA ([29 C.F.R. § 1630.14](#)).

1. OK if job-related and consistent with business necessity.
2. OK to inquire into employee's ability to perform the essential functions of her/his job.

**Note:** "100% recovered" requirements are ill-advised. Per the [EEOC](#):

Employer policies that require employees on extended leave to be 100 percent healed or able to work without restrictions may deny some employees reasonable accommodations that would enable them to return to work.

## 11. Personnel Records Issues.

- a. Minnesota Personnel Records Act, [Minn. Stat. §§ 181.960, et seq.](#)
  - i. Applies to employers with 20 or more employees (does not apply to the state or political subdivisions).
  - ii. Defines what a “personnel record” is and is not.
  - iii. Describes employees’ (and former employees’) rights to review, request revisions, deletions and inclusion of personal statement in the file.
  - iv. Outlines an employer’s response obligations.
- b. Keep medical documentation separate.
- c. Use a separate “supervisory” and / or “investigative” file when looking into disciplinary.
- d. Consider when to redact sensitive / personal information about others.

## 12. Let them Speak, Part 1: Whistleblower and Retaliation / Reprisal Issues.

- a. Many employment-related laws include some form of anti-retaliation or anti-reprisal component. See, e.g., MHRA, work comp laws, OSHA, Title VII, etc.
- b. Minnesota’s Whistleblower Act
  - i. [Minn. Stat. § 181.932](#):
 

**Prohibited action.** An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because:

    - (1) the employee, or a person acting on behalf of an employee, in good faith, reports a violation, suspected violation, or planned violation of any federal or state law or common law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official;
    - (2) the employee is requested by a public body or office to participate in an investigation, hearing, inquiry;

(3) the employee refuses an employer's order to perform an action that the employee has an objective basis in fact to believe violates any state or federal law or rule or regulation adopted pursuant to law, and the employee informs the employer that the order is being refused for that reason;

(4) the employee, in good faith, reports a situation in which the quality of health care services provided by a health care facility, organization, or health care provider violates a standard established by federal or state law or a professionally recognized national clinical or ethical standard and potentially places the public at risk of harm ... [provisions regarding certain public sector employees omitted].

ii. [Friedlander v. Edwards Life Sciences \(Minn. 2017\)](#).

1. Eliminated the need for an employee to prove that a report was made to "expose an illegality."
2. Made it easier for a plaintiff to prevail under the 2013 amendments to § 181.932 by ruling that an employee's report is made in "good faith" if it is "not knowingly false or made with reckless disregard of the truth."
3. Reinforces need for employers to make sure that any adverse action against an employee is for a legitimate business reason and not because of a good faith report made under §181.932.

### **13. Let them Speak, Part 2: Politics at work.**

- a. The workplace is for work, so if political discussions become a distraction from work, focus on the distraction, not the content.
- b. Be wary of unlawfully discriminatory discussion that are disguised as "political" discussions.
- c. Be wary of "political" discussions that are really discussions about wages, hours and /or other terms and conditions of employment, as those discussions may be concerted activity protected by NLRA.
- d. Foster a respectful workplace (again being aware of the NLRB's dislike of the term) where people can have healthy discussions.

### **14. Pay what the law requires.**

- a. Review workforce to make sure employees are properly classified as exempt or non-exempt under the FLSA.

- i. Some employers mistakenly assume that they only need to satisfy the “salary” test under the FLSA when assessing exemption issues; the “duties” test must also be satisfied.
  - ii. Some employers mistakenly assume that an employee’s title (manager, supervisor, administrator, etc.) matters more than it does.
  - iii. The DOL’s Wage and Hour Division publishes numerous “fact sheets” that summarize these tests (see, e.g., [Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act \(FLSA\)](#)).
  - iv. Periodically review actual work vs. job descriptions, as duties may change.
- b. Allow breaks required by law.
- i. Reasonable paid break to use restroom for each four hour shift. [Minn. Stat. §177.253](#).
  - ii. Reasonable unpaid break to eat a meal for each eight hour shift. [Minn. Stat. § 177.254](#).
  - iii. U.S. DOL considers short breaks (5-20 minutes) to be compensable work time, but meal breaks (30 minutes or more) to be not compensable.
- c. Do not withhold money from an employee’s paycheck for loss or damage without written consent after the fact.
- i. [Minn. Stat. § 181.79, Subd. 1](#):

**Deduction requirements.** (a) No employer shall make any deduction, directly or indirectly, from the wages due or earned by any employee, who is not an independent contractor, for lost or stolen property, damage to property, or to recover any other claimed indebtedness running from employee to employer, unless the employee, after the loss has occurred or the claimed indebtedness has arisen, voluntarily authorizes the employer in writing to make the deduction or unless the employee is held liable in a court of competent jurisdiction for the loss or indebtedness. Such authorization shall not be admissible as evidence in any civil or criminal proceeding. Any authorization for a deduction shall set forth the amount to be deducted from the employee's wages during each pay period.

(b) A deduction may not be in excess of the amount established by law as subject to garnishment or execution on wages.

(c) Any agreement entered into between an employer and an employee contrary to this section shall be void. This section shall not apply to the following:

(1) in cases where a contrary provision in a collective bargaining agreement exists;

(2) any rules established by an employer for employees who are commissioned salespeople, where the rules are used for purposes of discipline, by fine or otherwise, in cases where errors or omissions in performing their duties exist; or

(3) in cases where an employee, prior to making a purchase or loan from the employer, voluntarily authorizes in writing that the cost of the purchase or loan shall be deducted from the employee's wages, at regular intervals or upon termination of employment.

ii. Observe local minimum wage rates.

1. Only Minneapolis has tried in Minnesota; ordinance being challenged in court.

2. Some other major US cities have passed them (Chicago, several in CA, DC, NYC).

**15. Growing pains: Recognize that as a company grows, so do the number of laws that apply.** For example:

- a. MHRA: All MN employers with one or more employees (except 15 or more employees needed for "reasonable accommodation" requirement of disability discrimination aspect of the law to apply). [Minn. Stat. §§ 363A.03, Subd. 43, 363A.08, Subd. 6.](#)
- b. State school and activities leave: 1 or more employees.
- c. Title VII of the Civil Rights Act of 1964, [29 U.S.C. § 2000e](#), and related federal laws: 15 or more employees.
- d. State personnel records law, [Minn. Stat. § 181.960, Subd. 3](#): 20 or more employees.

- e. State pregnancy/parenting leave and care of relatives leave, [Minn. Stat. § 181.940](#): 21 or more employees.
- f. FMLA: 50 or more employees.
- g. MN CLE's annotated employee handbook as good summary of when these various laws apply.

**16. Recognize the risk of liability for acts of violence that may occur in the workplace.**

- a. Negligence theories apply (employer has duty to protect employees from foreseeable harm)
  - i. Negligent retention
    - 1. Duty owed a duty to exercise reasonable care in employer's retention of the employee in question;
    - 2. Breach of duty by retaining without appropriate action an employee who it knew or should have known was unfit for duty;
    - 3. Harm to plaintiff; and
    - 4. Employer's breach of duty is proximate cause of the plaintiff's injury.
  - ii. Negligent hiring – basically, same as negligent retention, only knowledge of unfitness arises before the employee is hired.
- b. Precautions will vary depending on the nature of the employment.
- c. Suggestions:
  - i. Zero tolerance of workplace violence.
  - ii. Implement a safety plan.
  - iii. Do not ignore clues.
  - iv. Offer an EAP or other programs to help struggling employees.
  - v. Handle discipline & discharge with compassion and respect.

**17. Think of discipline as an opportunity to help an employee recognize and change poor performance or behavior so that ultimately you get a “model” employee, or you help that employee transition to a new position that better suits them and you (either within or outside your organization).**

- a. Document the issue accurately and completely.
- b. Describe the problem.
- c. Describe the required change.
- d. Set a timeline, but don't alter at-will status. Sample: “Although we expect you to achieve these goals within the next 90 days, this does not change your at-will employment status.”
- e. Do not use “verbal warnings.”
  - i. Verbal warnings exist only in someone's memory.
  - ii. If a “verbal” warning is documented, it becomes a “written” warning, so why call it a “verbal” warning?
  - iii. If something is significant enough to warrant a “warning,” why not document it?
- f. Do not ignore red flags that expose the employer to negligence claims, including problems that escalate.
- g. Make the tough decisions.
- h. Identify Legitimate Business Reasons for Discipline.
- i. Be consistent.
  - i. Inconsistency = actual or perceived unfairness.
  - ii. Inconsistency weakens legitimate business reasons for the adverse action.

**18. Investigate complaints quickly and thoroughly.**

- a. Do not ignore a problem and hope that it goes away; it rarely does and will probably get worse.
- b. Legal obligation to prevent and end discrimination harassment is not met if action is not taken.

- c. Delay can toll the statute of limitations (see §3.b.ii.10 regarding [Pederson v City of Minneapolis](#)).

**19. Try to never let a dismissal be a surprise, and handle the discharge with as much compassion, dignity and respect as possible.**

- a. By having good communication about performance and / or other disciplinary issues before dismissal, employees are less likely to react negatively.

- b. Be prepared to describe your legitimate business reasons for discharge.

- i. But wait! Isn't Minnesota is an "at-will" state so that I don't have to give a reason?*

- ii. Even in at-will setting, best practice is to be able to articulate a legitimate business reason for the discharge.

- 1. Helps employee understand that it was not random at best or unlawful at worst.
    - 2. Lays foundation for defense of discrimination and other wrongful discharge claims.
    - 3. Employees have the right to request reasons for termination, so be prepared to answer that question.

- c. Be consistent in your explanation.

- i. If termination is challenged, you want to offer LBR for the decision.

- ii. Inconsistency in the explanation damages the credibility of the LBR

- 1. Saying one thing at the discharge meeting, another thing in response to the employee's request for reasons, then another thing in the UIMN claim, and yet another thing in response to the MDHR or EEOC charge, etc.
    - 2. Being internally inconsistent (HR says one thing, supervisor says another, owner says something else, etc.)

- d. Have final paycheck ready to go

- i. Upon discharge, final pay is due immediately (within 24 hours of employee's demand). [Minn. Stat. § 181.13\(a\)](#).
  - ii. If a resignation, final pay is due at next regularly scheduled payday. [Minn. Stat. § 181.14, Subd. 1\(a\)](#).
- e. Responding to Reference Checks.
  - i. Keep to the bare minimum (dates of employment, positions held, final rate of pay) unless employee consents to you saying more.
- f. Loss of intellectual property.
  - i. Take any confidentiality or non-compete agreements into account.
  - ii. Remember how easy it may be for an employee to walk out the door with a flash drive containing your data or to upload it to the cloud.

## **20. Review insurance policies for possible employment practices coverage.**

- a. General liability policy alone probably does not cover employment practices liability.
- b. Not all EPLI policies are alike.
  - i. Some include defense costs in the limit.
  - ii. Types of covered claims will vary.
  - iii. Point at which insurance kicks in may vary (demand letter from plaintiff's attorney; agency charge; lawsuit; etc.)
- c. Pre-coverage underwriting
  - i. Carrier might require an "audit" of employment practices & policies.
  - ii. Carrier might require changes in employment practices & policies before agreeing to insure.
  - iii. Disclosure of known issues (can't "crash your car today and insure it tomorrow.")

**Appendix A  
SAMPLE JOB DESCRIPTION**

**Job Title:** Office Manager

**Reports to:** CEO

**FLSA Status:** Exempt

**JOB SUMMARY:**

**MAJOR AREAS OF ACCOUNTABILITY:**

Financial Administration:

Human Resources:

Meetings:

Communication and Public Relations:

Other:

**CRITICAL SKILLS/EXPERTISE:**

Physical Involvement:

Intellectual Involvement:

Working Conditions:

Supervision of Other Employees:

**MINIMUM QUALIFICATIONS:**

Education:

Experience:

Special Knowledge or Skills:

Equipment, Machines, Tools, Electronic Devices, Software:

**JOB OUTCOMES:**

**COMPENSATION:**

*This description describes the general nature and work expected of an individual assigned to this position. Employees may be required to perform other job-related duties as requested by their supervisor. All requirements are subject to the potential for reasonable accommodation.*

## **Appendix B**

### **SAMPLE OFFICE RELATIONSHIPS POLICY**

Employer recognizes that consensual relationships sometimes exist between employees which are, or have the potential of becoming, sexual in nature. Employer strongly discourages such relationships, particularly those between a supervisor and subordinate and those in which differences in age, background, or other characteristics of the two individuals compromise the ability of either one to make an informed decision about participating in the relationship. Employees who are in such relationships must disclose them to the office manager. The following policies also apply with regard to such relationships:

1. Employees are not prohibited from dating each other or having personal relationships outside of work, but they also have an absolute right to say "NO" if they do not want to start or continue such a relationship.
2. If you feel that you are being pressured to start or continue an unwelcomed personal relationship with another employee, please report the situation to your supervisor or the director of human resources.
3. If such a relationship develops between a supervisor and a subordinate, the supervisor must disclose it to his or her supervisor or to the director of human resources.
4. If such a relationship develops, Employer reserves the right to re-assign the employees, change their job descriptions, eliminate any supervisor/subordinate relationship that may exist, ask one or both of the employees to leave the company and/or take whatever action Employer deems necessary under the circumstances.