

MAY 23, 2019



WHAT YOU DON'T KNOW CAN HURT YOU: 5 Employment Law Hot Topics & Trends

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PARTICIPATING WITH POLL EVERYWHERE VIA TEXT OR THE WEB

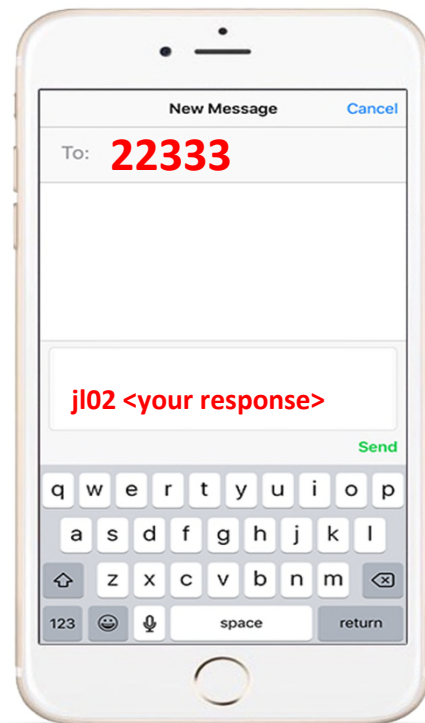
Text Voting

Step 1:

Text **JL02** to **22333** once
to join

Step 2:

Text only your
response
(A, B, etc.)



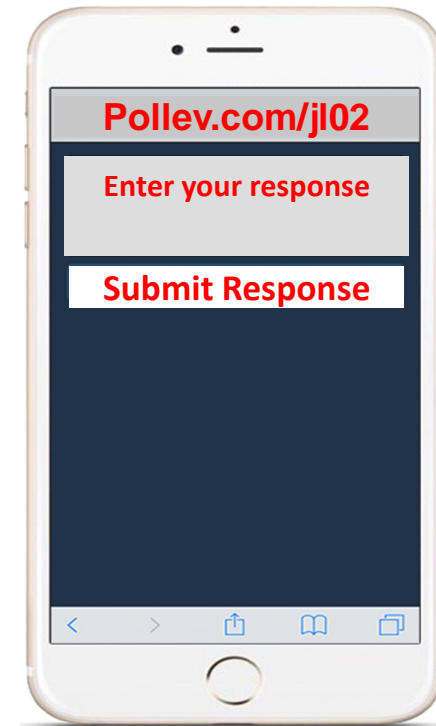
Web Voting

Step 1:

Enter url **Pollev.com/JL02**
to join

Step 2:

Select your
response



Why did you attend this event today?

Knowledge building

Beats working in the
morning

My boss made me

I'm here for the swag

I never miss an Avery
Prime/Deb Ford event!

WHAT WE'LL DISCUSS



Pay Equity Issues

Hiring Challenges

Realistic Social Media Policies

Millennial & Gen Z Employees

Drug Testing Laws & Implementation

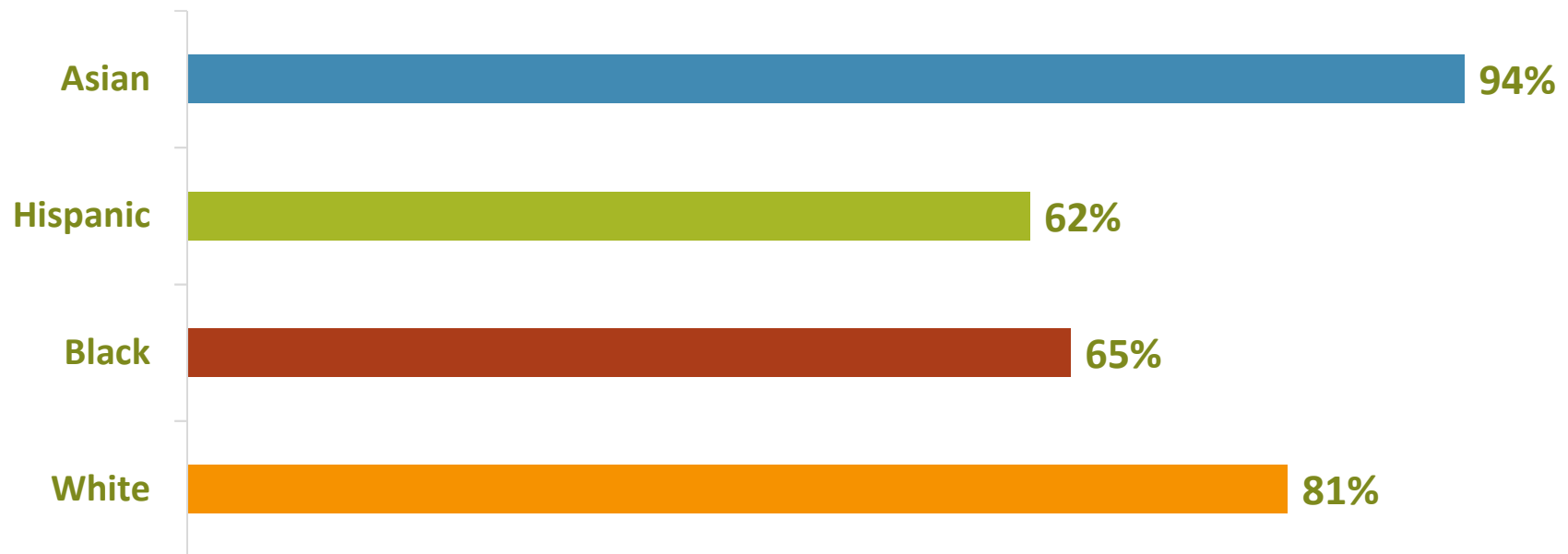
SECTION 1. EQUAL PAY AND FAIR COMPENSATION

5 HOT EMPLOYMENT LAW TOPICS & TRENDS

THE ISSUE: GENDER

Comparison of Women's Weekly Earnings to White Male Counterparts

Women on average earn **81%** of what their male colleagues earn



Source: *The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity*, Institute for Women's Policy Research, March 7, 2019

CLOSING THE GAP

At the current pace, the gender pay gap for women
won't be eliminated until:

- ***2060** for Caucasian women
- ***2119** for African American women
- ***2224** for Hispanic women

Source: The Gender Wage Gap: 2018 Earnings Differences by Race and Ethnicity, Institute for Women's Policy Research, March 7, 2019

OTHER GENDER-RELATED FACTORS AFFECTING PAY

- * On average, mothers earn **4%** less *per child* of what their male counterparts earn
- * By contrast, fathers earn **6.2%** more than their childless male counterparts, simply because they are fathers

Source: The Fatherhood Bonus and The Motherhood Penalty: Parenthood and the Gender Gap in Pay, Michelle J. Budig, Ph.D., University of Massachusetts Amherst, 09/02/2014

SALESFORCE

- * Global US-based company that sells customer relationship management software online
- * In 2016-17 Salesforce spent **\$6 Million** in continuing efforts to close the gender pay gap of its employees
- * Rated #1 Fortune's "100 Best Companies to Work For" (2018)
- * Salesforce's quarterly revenue continues to grow and jumped **22%** to **\$3.01 Billion** over a year's period

EQUAL PAY ACT (EPA): UPDATE

Rizo v. Yovino, 586 U.S. ____ (2019)

- * April 2018: 9th Circuit Court of Appeals decision that an applicant's prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the EPA
- * The Court rejected the employer's argument that the pay differential was lawful because it was related to her prior salary - a "factor other than sex" under the EPA
- * The Court stated that accepting this argument would "perpetuate rather than eliminate the pervasive discrimination at which the Act was aimed" and that a "factor other than sex" was limited to "legitimate, job-related factors such as prospective employee's experience, educational background, ability, prior job performance"
- * February 2019: U.S. Supreme Court overturned the decision because the judge who authored the April 9 decision had died on March 29
- * **Outcome:** The opinion is no longer a majority decision which would have constituted precedent that all future 9th Circuit panels would have to follow

PENDING LEGISLATION: FEDERAL

Paycheck Fairness Act

- * Purpose: to amend the Fair Labor Standards Act (FLSA) to:
 - ▶ Prohibit employers from using salary history
 - ▶ Protect against retaliation for discussing pay with colleagues
 - ▶ Ensure equal pay for equal work
 - ▶ Equalize discrimination claims based on gender, race, ethnicity
 - ▶ Support employers and employees to achieve fair pay practices
- * Status:
 - ▶ 03/27/2019 - Passed the House 242/187
 - ▶ 04/03/2019 - Placed on Senate Calendar

LEGISLATION: STATE

Massachusetts – Pay Equity Law (Eff. 07/01/2018)

- * Prohibits employers from asking about an applicant's salary history prior to making job offer; employees may disclose their salary history but cannot be compelled to do so
- * Prohibits employers from discriminating "on the basis of gender" in the payment of wages and from paying any person in their employ "a salary or wage rate less than the rates paid to employees of a different gender for comparable work"
- * Prohibits retaliation against employees who discuss their own compensation level with others

Vermont – Salary History Equity Law (Eff. 07/01/2018)

- * Prohibits employers from asking prospective employees about/seeking information about their compensation history
- * Employers may inquire about general salary expectations
- * If prospective employees voluntarily disclose their salary history, employer may seek to confirm or request the applicant to confirm the disclosed salary after making an employment offer

LEGISLATION: STATE

Maine – Act Regarding Pay Equality (signed 04/12/2019, eff. 09/17/2019)

- * Prohibits employers from inquiring about or otherwise seeking or using compensation history of a prospective employee prior to offer of employment (including all terms of compensation) being made
- * If an applicant voluntarily offers such information, the employer/employment agency may seek confirmation or permit the prospective employee to confirm the information prior to making an offer of employment
- * Employers may not prohibit employees from disclosing their own wages - or the wages of another employee - for purposes of enforcing equal pay protections

New Hampshire (HB 211)

- * Purpose: Prohibits salary history inquiries before an offer with compensation has been negotiated and made
- * Status: Committee hearing 04/11/2019; Ought to Pass with Amendment

SOLUTIONS TO CONSIDER

- * Consider removing salary history inquiries from applications or tailor applications to jurisdictional requirements
- * Train recruiters and talent acquisition team not to ask about salary history in jurisdictions prohibiting such inquiries
- * Train those involved in pay-setting decisions to set pay without reliance on prior pay
- * Consider implementing written guidelines for establishing starting pay

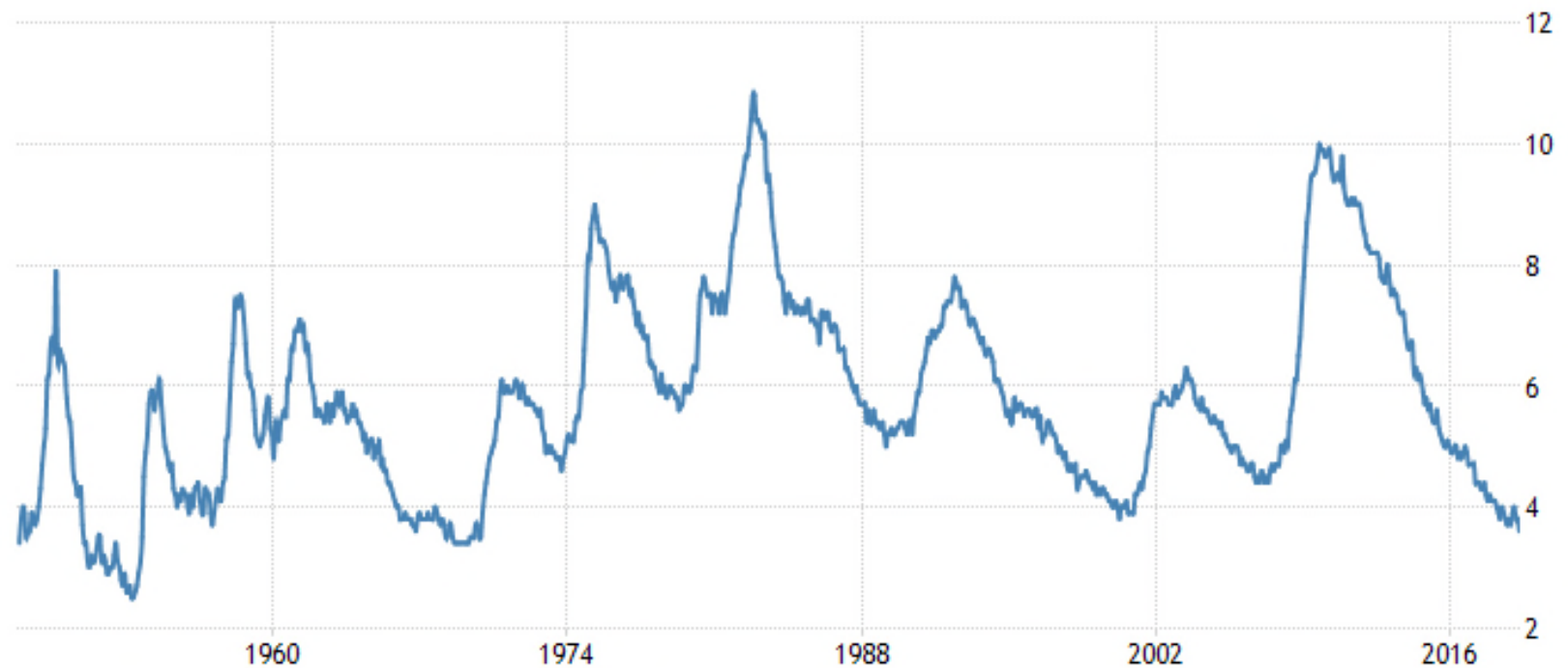
SOLUTIONS TO CONSIDER

- * Conduct an internal review of pay of others in similar positions for equity
- * Document the reasons for pay differences, particularly in starting pay rates
- * Under attorney-client privilege, consider conducting a broader pay equity analysis to determine if reliance on prior salary history has perpetuated wage gaps in the organization and, if so, take remedial steps to address any issues

SECTION 2. NEW HIRING CHALLENGES

5 HOT EMPLOYMENT LAW TOPICS & TRENDS

APRIL 2019 U.S. JOBLESS RATE LOWEST SINCE 1969 AT 3.6%



SOURCE: TRADINGECONOMICS.COM | U.S. BUREAU OF LABOR STATISTICS

NATIONAL NUMBERS BY WORK GROUP

- * The unemployment rates declined in April 2019 for:
 - ▶ Adult Men **3.4%**
 - ▶ Adult Women **3.1%**
 - ▶ Whites **3.1%**
 - ▶ Asians **2.2%**
 - ▶ Hispanics **4.2%**
- * The jobless rates for Blacks (**6.7%**) and teenagers (**13.0%**) remained unchanged
- * In April, the number of persons unemployed less than 5 weeks declined by **222,000** to **1.9 million**

**Source: Tradingeconomics.com*

LOCAL NUMBERS – NEW ENGLAND

New England's
unemployment
rate for April
2019 = **3.1%**

*VT = **2.2%**

*NH = **2.4%**

*MA = **2.9%**

*ME = **3.3%**

*RI = **3.7%**

*CT = **3.8%**

HIRING IN A RED-HOT ECONOMY

- * Candidate-centric market
 - ▶ Everything revolves around the candidate & their wants & needs
- * Organizations need to work diligently & have progressive incentives to attract & retain talent

PRACTICAL TIPS:

- ▶ Make the job ad/job description as personal as possible
 - What makes your organization attractive in this red-hot market?
 - Why would I want to work for you?
 - Glassdoor: Are your pages up to date? What are they saying? How are you trending? Who are you targeting?
- ▶ Is your organization's digital footprint strong enough to attract talent?

HIRING IN A RED-HOT ECONOMY

- * Company website:
 - ▶ Is it user-friendly? Mobile platform?
 - ▶ Have you self-tested your process for improvements?
- * Personalized message to candidates
 - ▶ The standard “reply all” message or electronic response message doesn’t show your authentic interest
 - ▶ If you see candidates in the job market, how are you personally connecting to them?
- * What sets your benefits apart from your competitors? Are all discretionary benefits highlighted in recruiting efforts?
 - ▶ Benefits are becoming a game-changer for candidates
 - ▶ Your health care, PTO & discretionary benefits may be more important than base salary
- * Be able to define a career path – educational/training opportunities & career advancement within the organization
 - ▶ Upcoming workforce wants to know what their future looks like & how you are going to invest in workplace development/ advancement

New Hiring Challenges

USE OF SOCIAL MEDIA



What You're Likely To Find On Social Networking Sites

- * Education history
 - * Work history
 - * Career interests
 - * Hobbies
 - * Memberships
 - * Favorite movies
- * Family information
 - * Drug use
- * Poor judgment vacation photos
 - * Party photos
- * Links to profiles of friends
 - * Links to blogs
 - * Political views

- * **24** million American users leave their Facebook profiles mostly public
- * **73%** of social media profiles can be found through a public search engine
- * **77%** of social network users do not restrict access to their photos

WHO'S USING SOCIAL NETWORKING SITES AND WHY

49% of managers who use social media to screen candidates decided not to hire a candidate because of:

- * Provocative/inappropriate photos/information ➡ **46%**
- * Candidate drinking/using drugs ➡ **43%**
- * Discriminatory comments related to race, religion, gender, etc. ➡ **33%**
- * Bad-mouthing of previous company/co-workers ➡ **31%**
- * Poor communication skills ➡ **29%**

USING SOCIAL NETWORKING SITES IN HIRING

Advantages

- * Verify statements made in resume and/or interview
- * Learn more about employers/experiences/publications cited in resume and/or interview
- * Learn about an applicant's background generally instead of being tied to just a resume, interviews and references
- * Discover personal details that call an applicant's judgment into question, e.g.
 - ▶ Use of discriminatory language
 - ▶ Negative commentary on former employers and other organizations
 - ▶ Posts that demonstrate a serious lapse in judgment

USING SOCIAL NETWORKING SITES IN HIRING

Drawbacks

- * Learning about a protected characteristic:
 - ▶ Simple Google search may reveal an applicant's disability, religion, sexual orientation, military status, marital status, etc.
- * Learning other protected information, i.e., workers' comp claims, bankruptcy filings, criminal/arrest histories, consumer reports
- * Learning a personal detail that causes discomfort or is otherwise stigmatizing:
 - ▶ Individual (lawfully) owns/uses firearms – perhaps several;
 - ▶ Individual is a smoker;
 - ▶ Individual clearly enjoys drinking (on their own time only)
- * Invasion of privacy/Password Laws/intrusion upon seclusion

SOLUTIONS

- * Ensure appropriate employment decisions are made based on lawful verified information
- * Designate non-decisionmaker to conduct search to filter out protected information
- * Non-decisionmaker then provides “scrubbed” information to decisionmaker for consideration
- * Consider searching social networks only after initial in-person interview with applicant
- * Identify legitimate, non-discriminatory reason for hiring decision with documentation supporting decision

New Hiring Challenges

EMPLOYMENT APPLICATIONS

EMPLOYMENT APPLICATIONS

- * Federal and state law requires that employers request only **job-related information** prior to an offer of employment being made
- * Requesting information unrelated to a particular job often raises an inference of unlawful discrimination
- * Avoid questions:
 - ▶ That may reveal that an applicant is a member of a protected class
 - ▶ That may reveal an applicant's financial status or social affiliations

EMPLOYMENT APPLICATIONS

PROPER OR IMPROPER?

Are you available to work (*you are not required to indicate the need for time off due to religious practices*):

- Full Time** (Please circle available shifts: **1st** **2nd** **3rd**)
- Part Time** (Please circle available times: **Mornings** **Afternoons** **Evenings**)

Are there any dates or times you will not work? _____

Proper or Improper?

Proper

Improper

PROPER

- * EEOC religious discrimination guidelines: employers' inquiries about applicants' availability for work often have an exclusory effect on employment opportunities of persons with certain religious practices
- * EEOC considers those inquiries to be discriminatory
 - ▶ Unless employer can show it didn't have any exclusionary effect on applicants needing accommodations for religious practices or any exclusionary effect was justifiable by business necessity

EMPLOYMENT APPLICATIONS

PROPER OR IMPROPER?

EDUCATION

	High School	College/University	Graduate/ Professional
School Name/Address			
Years Completed (circle years completed)	9 10 11 12	1 2 3 4	1 2 3 4
Years Attended			
Diploma/Degree Type/Name			
Course of Study			

Proper or Improper?

Proper

Improper

IMPROPER

ISSUES

- * Years Attended: May reveal protected information regarding applicant's age
- * Diploma/Degree: May tend to have disparate impact on minorities who graduate & obtain degrees at all levels of education less frequently than non-minorities

BEST PRACTICE:

- * Ask instead: Highest grade completed at each level of education
- * Where a degree or professional license is required for a particular position, the question can be asked during the interview

EMPLOYMENT APPLICATIONS

PROPER OR IMPROPER?

Have you ever been terminated from a previous job? ? YES NO

If yes, please explain: _____

Are you currently in a lay-off status or subject to recall? YES NO

Have you previously signed a Nondisclosure or Non-Compete Agreement with your current employer? YES NO

Proper or Improper?

Proper

Improper

PROPER

WHY?

- * **Prior Termination:** Discussion of prior termination should give information about applicant's performance & depending upon explanation, insight into his/her behavior, ability to work collaboratively, etc.
- * **Layoff/Recall:** Relevant to know if applicant is only looking at position as short-term employment
- * **Nondisclosure/Non-Compete:** Relevant to know if there are restrictions on applicant's ability to perform the job

New Hiring Challenges

INTERVIEWING

MOCK INTERVIEW QUESTION

PERMISSIBLE OR NOT?

Interviewer: I see from your resume that you have many years' experience but it looks like the last ten years you have been working in a management capacity. At this point in your career, do you think you'll be able to step down, so to speak, into a non-managerial role?

Permissible or Not?

Permissible

Not
Permissible

WHY?

- * Valid question about applicant's attitude
 - ▶ But be careful not to phrase questions that may be construed as making reference to applicant's age

BEST PRACTICE:

- * Avoid questions/comments about older applicant being “over-qualified”, having “too much experience” for the position

PERMISSIBLE

MOCK INTERVIEW QUESTION

PERMISSIBLE OR NOT?

Interviewer: You would likely be much more senior than most of your peers, including some of your supervisors. Would that be a problem?

Permissible or Not?

Permissible

Not
Permissible

WHY NOT?

* *Potential Issue: Age Discrimination*

- ▶ Question clearly references applicant's age vs. preceding question that inquires into applicant's attitude, i.e., willingness to work in a less senior position

BEST PRACTICE:

- ▶ Unless the position has lawful age requirements, don't ask questions or make comments about age in any manner
- Includes: age of applicant, average age of company's/department's workforce overall, applicant's potential co-workers

NOT
PERMISSIBLE

MOCK INTERVIEW QUESTION

PERMISSIBLE OR NOT?

Interviewer: One of the things that might be required of this position is overnight travel occasionally. Would that be a problem for you?

Permissible or Not?

Permissible **A**

Not
Permissible **B**

WHY?

- *OK to ask about travel if it is essential function of position
 - ▶ *Potential Issue: Gender Discrimination*
 - Would tend to have discriminatory impact on applicants with families, particularly women

BEST PRACTICE:

- *Inquiry is permissible if it's made of both male & female applicants

PERMISSIBLE

MOCK INTERVIEW QUESTION

PERMISSIBLE OR NOT?

Interviewer: Have you ever been fired or asked to leave a company?

Permissible or Not?

Permissible

Not
Permissible

WHY?

- * Information/discussion about prior terminations should lead to relevant information about applicant's job performance, view of management, ability to work collaboratively

BEST PRACTICE:

- * Good segue into questions about prior employment:
 - ▶ Discussion of specific job duties
 - ▶ Discussion about recent performance evaluation at prior job
 - ▶ How did you get along with your supervisor?
 - ▶ Have you ever been disciplined on the job?

PERMISSIBLE

MOCK INTERVIEW QUESTION

PERMISSIBLE OR NOT?

Interviewer: Well, it was great meeting you today, Mike. Hope you have a good weekend. Who will you be rooting for in the Super Bowl on Sunday?

Permissible or Not?

Permissible

Not
Permissible

WHY NOT?

- ◆ *Potential Issue: Gender Discrimination*
 - ◆ Initiating conversations with male applicants about sports or female applicants about cooking may be viewed as gender stereotyping

BEST PRACTICE:

- ◆ Questions about home life, social interests, hobbies can be inappropriate if they put interviewer at risk of making assumptions & stereotyping

NOT
PERMISSIBLE

SECTION 3. REALISTIC SOCIAL MEDIA POLICIES

5 HOT EMPLOYMENT LAW TOPICS & TRENDS

THE NATIONAL LABOR RELATIONS ACT (NLRA)

The NLRA & Protected Concerted Activity

- *Section 7 of the NLRA provides:
 - ▶ "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and **to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**"
- *The NLRA applies to union **&** non-union employees

THE NATIONAL LABOR RELATIONS ACT (NLRA)

National Labor Relations Board (NLRB)

- *The NLRB is a federal agency with exclusive jurisdiction over private sector labor relations - interprets the NLRA
- *Under the Trump administration, the Board now has a Republican majority
 - ▶ It has & it's expected it will continue to issue more employer-friendly decisions

LEGAL CONSTRAINTS ON EMPLOYEE DISCIPLINE FOR ONLINE ACTIVITY

Unlawful Restrictions

- * Prohibiting the sharing of information concerning other employees:
 - ▶ Wages
 - ▶ Hours
 - ▶ Terms & conditions of employment
- * Difference between protected activity & griping

LAWFUL OR UNLAWFUL?

- * After a mega-department store employee had a run-in with the store's new assistant manager, he posted on his Facebook page:
 - ▶ **"Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are going to quit!"**
- * Some co-workers responded:
 - ▶ **"bahaha like! :)."**
 - ▶ **"What the hell happens after four that gets u so wound up??? Lol"**
- * Employee then posted a response filled with profanity in which he referred to the assistant manager as a **"super mega puta"**
- * Employee was disciplined & warned that he might be terminated if the behavior continued

Would terminating the employee be lawful or unlawful?

Lawful

Unlawful

*The NLRB's General Counsel declined to take action despite the fact other employees responded to the posts. The General Counsel advised that protected comments "must look toward group action," while the charging party's Facebook postings were no more than "an expression of an individual gripe" with the assistant manager.

Wal-Mart Advice Memorandum

LAWFUL

LAWFUL OR UNLAWFUL?

- * Recovery specialist for residential facility for the homeless with significant mental health issues, while working an overnight shift, engaged in a Facebook conversation with two friends in which she made unflattering comments about some residents & stated:

"Spooky is overnight, third floor, alone in a mental institution, btw Im [sic] not a client, not yet anyway"

- * Neither of employee's friends were coworkers
- * Former client of facility saw the posts & reported it to employer, who terminated employee

Was the employee's termination lawful or unlawful?

Lawful

Unlawful

*The NLRB General Counsel found the communication to be unprotected because it did not involve any other employee.

Martin House Advice Memorandum

LAWFUL

LAWFUL OR UNLAWFUL?

- * After the August 2017 "Unite the Right" Rally in Charlottesville, VA, a movement was started to identify as many of the protestors as possible and to expose their identity.
- * Once their identities were revealed, their private employers faced public shaming and economic pressure to fire these employees for their political beliefs.



Is it lawful or unlawful to terminate an employee known to be a white supremacist?

Lawful

Unlawful

- *It is not illegal for private-sector employees to be terminated for off-duty conduct that, in the employer's view, reflects poorly on it
 - ▶ Being a white supremacist likely falls under this umbrella

LAWFUL

LAWFUL OR UNLAWFUL?

- * A photo of Juli Briskman on her bicycle flipping off President Trump's motorcade went viral. Juli posted the photo to her personal social media.
- * There was nothing in the photo or on Briskman's social media identifying who she worked for, but she told her Employer about the photo and posts.
- * Briskman was terminated for violating the Employer's social media policy which prohibits "lewd" and "obscene" social media content. The Employer said Briskman's actions could jeopardize their government contracts.



Was Juli Briskman's termination lawful or unlawful?

Lawful

Unlawful

- * Notably several months earlier, a male senior director at Akima posted the following response to a coworker in a Facebook discussion about Black Lives Matter:
 - ▶ **"You're a f*cking Libtard a**hole"**
- * He was not terminated
- * April 2018: Briskman filed suit against Akima in state court alleging violation of a Virginia state law that bars employers from terminating employees because of fear of unlawful government retaliation
- * Lawsuit was dismissed as judge found there was no First Amendment protection for private sector employees

LAWFUL

COMPANY POLICIES

Many Employers Are Still Behind

- ***45%** of employers do not have an electronic communications policy
- ***28%** are working on developing one
- ***27%** have a policy in place

GEN Y AND GEN Z ARE TECHNOLOGY-ORIENTED

* Company policies on the use of social media, mobile devices & the Internet in the workplace matter:

▶ **64%** of Millennials ask about a company's social media policies during job interviews

▶ **56%** of college students said if they encountered a company that banned access to social media, they would either not accept a job offer or would join & find a way to circumvent corporate policy

SOCIAL MEDIA & DISCIPLINE

Before Taking Action, Ask Yourself:

- * Does the social media post:
 - ▶ Seek to initiate, induce or prepare group action?
 - ▶ Reference conversations with co-workers that occurred before postings were made so that the posting is a logical outgrowth of those conversations?
 - ▶ Seek to bring group complaints to the attention of management?
 - ▶ Result in any co-worker responding to the online post?
 - If so, what was the nature of that response?
 - ▶ Reference, involve, or concern wages, hours, benefits, working conditions or other terms and conditions of employment?
- * Is it so outrageous, disloyal, or disparaging of the Agency's products or services so as to lose the protection of the Act?

PRACTICAL TIPS

- * Develop a social media policy
- * Develop procedures for monitoring compliance and uniform enforcement
- * Implement guidelines for use in hiring
- * Create disclosures, notices or releases to use in hiring process

PRACTICAL TIPS

- * Communicate policy
- * Supervisors should not “friend” subordinates
- * Realize this is a rapidly changing area of the law and further changes to policies and practices may be necessary
- * Beware LinkedIn recommendations of prior/current employees

SECTION 4. MILLENNIAL (GEN Y) & GEN Z EMPLOYEES

5 HOT EMPLOYMENT LAW TOPICS & TRENDS

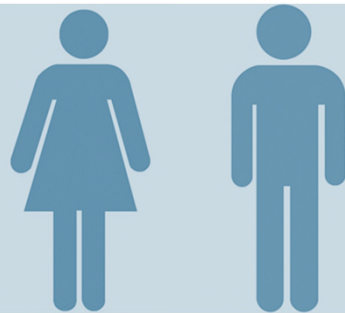
WHO ARE WE TALKING ABOUT?

Baby
Boomers



1946-1965

Gen X



1966-1976

Gen Y
aka Millennial



1977-1994

Gen Z



1995-2012

WHY DO WE CARE?

- * Millennials/Gen Y (born 1977-1994) will make up **60%** of the U.S. workforce by 2020
- * Gen Z (born 1995-2012) are just starting to enter the workforce but by 2025, they'll be the largest generation at **29%** of the population

THE MYTHS

- * Need constant praise
- * Too sensitive to criticism
- * Constantly question authority
 - * Lazy
 - * Entitled
- * Lack commitment
 - * Job-hoppers
- * Don't want to work 9 to 5
 - * Want to work remotely

THE TRUTH

- * Achievement-oriented
 - * Tech-savvy
 - * Collaborative
 - * Ambitious
 - * Flexible
 - * Optimistic
- * Enjoy challenges
 - * Eager to learn
- * Global viewpoint
- * Want to make a difference/contribute

THE NUMBERS



- *Mentorship is very important
 - ▶ Among millennials with mentors, **83%** are satisfied with their working lives
 - ▶ Millennials intending to stay with their organizations are **twice as likely** to have a mentor

WHAT MILLENNIALS WANT IN THE WORKPLACE

- * Factors that make an organization an attractive employer:
 - ▶ **52%** Opportunities for career progression
 - ▶ **44%** Competitive wages/other financial incentives
 - ▶ **35%** Excellent training/development programs
 - ▶ **21%** Flexible working arrangements
- * **75%** of Millennials would like to more frequently work from home or other locations where they feel more productive

Source: 2016 Study by PWC (Millennials at Work, Reshaping the Workplace)

TRAINING MILLENNIALS (GEN Y) & GEN Z

- * Be tech savvy
- * Regular, ongoing training
- * Positive and truthful feedback
 - ▶ **80%** prefer real-time feedback vs. traditional reviews

SECTION 5. DRUG TESTING LAWS & IMPLEMENTATION: MARIJUANA ISSUES

5 HOT EMPLOYMENT LAW TOPICS & TRENDS

MARIJUANA: STILL ILLEGAL UNDER FEDERAL LAW

- * Under the federal Controlled Substances Act, marijuana is a Schedule I illegal drug that may not be used, possessed, manufactured or distributed, even for medical purposes.
- * Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment.

21 U.S.C. § 812(b)(1)

U.S. DOT-REGULATED EMPLOYEES MAY NOT USE MARIJUANA

- * DOT's Drug and Alcohol Testing Regulations – 49 CFR Part 40 – do not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee's positive drug test result
 - ▶ **It remains unacceptable for any safety-sensitive employee subject to drug testing under the DOT's drug testing regulations to use marijuana**

RECENT LITIGATION TREND DOES NOT FAVOR EMPLOYERS

- * Outside of the federal DOT regulations, the trend (in both state legislation & court cases) is very pro-marijuana-user & anti-employer
- * Prior to 2017, employers always prevailed in litigation involving applicants or employees who used medical marijuana
- * Since 2017, employers generally have not prevailed in litigation involving medical marijuana users
- * Many courts no longer factor in that marijuana is illegal under federal law

RECREATIONAL MARIJUANA LAWS

- * 10 states + DC now have **recreational** marijuana laws:
 - ▶ AK, CA, CO, DC, ME, MA, MI, NV, OR, VT and WA
 - ▶ NJ and NY are considering recreational marijuana laws
- * ME: (revised) law eff. 5/2/18
- * VT: law eff. 7/1/18
- * MA: legal since 2016; retail sales legal eff. 11/20/18
- * NH: 04/04/19 passed by the House; now before the Senate; Governor promises to veto

RECREATIONAL MARIJUANA LAWS

- * None of the recreational marijuana laws prohibit employment discrimination
- * Recreational marijuana can be analogized to alcohol – legal substance, but employers are not required to tolerate its use at work
- * With recreational marijuana, the use is not connected to an employee's disability
- * Put employees on notice of your policy

MEDICAL MARIJUANA LAWS

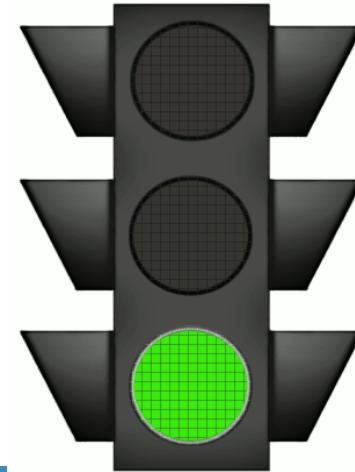
*34 states + DC now have **medical** marijuana laws:

▶ AK, AZ, AR, CA, CO, CT, DE, DC, FL, HI, IL, IA, ME, MD, MA, MI, MN, MO, MT, NV, NH, NJ, NM, NY, ND, OH, OK, OR, PA, RI, UT, VT, WA and WV

MEDICAL MARIJUANA ISSUES

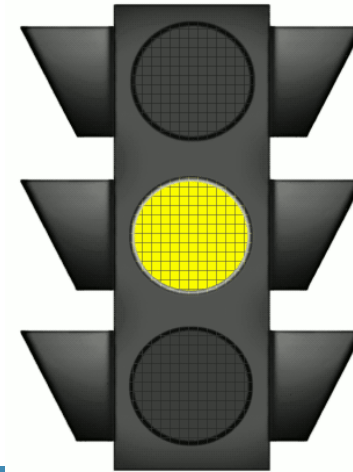
- * In all states with medical marijuana laws: it is permissible for employers to prohibit the use, possession, and being under the influence of marijuana while at work
- * Difficulty re: workplace drug testing or when an employee volunteers that they use medical marijuana off-duty
- * Drug-testing context - marijuana stays in the body for days or weeks
 - ▶ A medical marijuana user will always test positive on a workplace drug test, even if they never use it at work

- ***FL** and **OH**: laws prohibit legal claims against employers who take action against marijuana users
- ***CA, CO, MI, MT, NM, OR, WA**: lawsuits where employers have prevailed



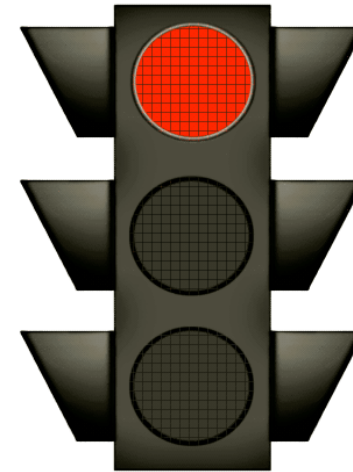
MEDICAL MARIJUANA:
EMPLOYER-FRIENDLY OR
LOW RISK STATES

- *AK, DC, HI, MD, NH, ND, UT, VT: law doesn't address employment discrimination and/or no case law
- *MO: law permits employers to take action against applicants/employees who are working "under the influence" but does not define that term



MEDICAL MARIJUANA:
STATES WHERE RISK IS
UNCERTAIN

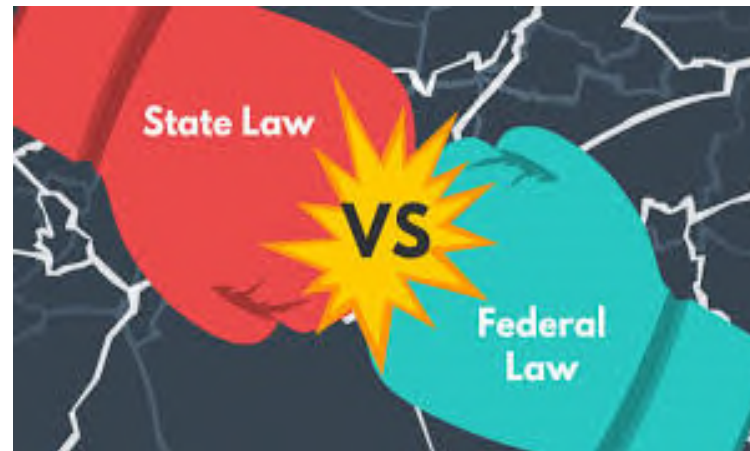
- *State medical marijuana laws contain anti-discrimination provisions or case law is in favor of employees: AR, AZ, CT, DE, IL, ME, MA, MN, NJ, NY, NV, OK, PA, RI, WV
- *OK's law prohibits employers from taking adverse action solely based on a positive marijuana drug test without evidence of actual on-duty use or impairment (with some exceptions)



MEDICAL MARIJUANA:
STATES WITH HIGH
LEGAL RISK FOR
EMPLOYERS

EMPLOYERS CANNOT SIMPLY FOLLOW FEDERAL LAW

- * Some courts (**CT, MA, RI**) have held that there is no conflict between the federal Controlled Substances Act (which says marijuana is illegal) & state medical marijuana laws that prohibit discrimination



INDIVIDUALIZED ASSESSMENT

- * Train your HR employees and other managers/supervisors on handling the “interactive dialogue,” the “individualized assessment” and “direct threat analysis” required by the ADA and comparable state laws
- * These are complex issues - you may need to obtain additional information from the employee’s treating physician
- * Do not make stereotyped assumptions about whether the employee can perform the job, or whether his/her medication is too dangerous

INDIVIDUALIZED ASSESSMENT

- * Must make an individualized assessment as to whether the employee's marijuana use actually affects his/her ability to safely perform the job
 - ▶ Cannot just “speculate” about “possible safety concerns”
 - ▶ Determination must be based on “the best available objective evidence”
- * Must engage in interactive process to determine whether a reasonable accommodation exists that would allow the employee to perform his/her job duties in a safe manner, such as:
 - ▶ Temporary reassignment
 - ▶ Leave of absence (beyond FMLA)
 - ▶ Modification of equipment, devices or shift
 - ▶ Job restructure

DISABILITY DISCRIMINATION

- *The success of most disability discrimination cases will depend upon:
 - ▶ Employer's interactive process
- AND
- ▶ Attempts at reasonable accommodation

TO TEST
OR
NOT TO
TEST?

- * Low unemployment numbers = diminishing applicant pool
- * **64%** of the US public support marijuana legalization
- * Pre-employment screening for marijuana, in particular, *may disqualify a large portion of otherwise qualified applicants*, especially in states with legal recreational marijuana use

REASONS NOT TO TEST

- *Public attitudes regarding marijuana have changed
- *Pre-employment screening can cause applicants to look elsewhere
- *Random screening can hurt employee morale
- *Costs of pre-employment and random screening may not be worth it
- *Increased risk for legal challenges in states with legal medical and/or recreational marijuana

REASONS TO TEST

- *A drug-free workplace is necessary for safety
- *Legal liability if employee under influence of marijuana causes accident resulting in injury/death – even in states permitting marijuana use
- ***7 in 10** employees are affected by prescription drug abuse (2017 National Safety Council survey)
- *Substance abuse can lead to lost productivity, employee health problems, increased business costs

POSSIBLE SOLUTIONS

- * Stop drug screening except for safety-sensitive positions, federal contracts, regulated industries
- * Drop marijuana from mandatory drug screening panel in states where marijuana is legal
- * Consider type of job duties when deciding whether to test for marijuana

BEST PRACTICES

- *Following federal law may no longer be a best practice, as evidenced by the court decisions in **CT, MA** and **RI**
- ***It's all about safety**
 - ▶ If you employ safety-sensitive employees, you must weigh whether to comply with state medical/recreational marijuana laws against the greater legal risk that a known marijuana user causes an accident that injures/kills people

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- * Best Labor and Employment attorney in New Hampshire, Business New Hampshire Magazine
- * Listed in Top New Hampshire Lawyers in Labor and Employment, New Hampshire Magazine
- * Elected as a Fellow to the College of Labor and Employment Lawyers
- * Listed in New England Super Lawyers (Top 100 attorneys in New England)
- * Listed in New England Super Lawyers (Top 50 Women in New England, Employment & Labor)
- * Listed in Chambers USA as one of the top Lawyers in Labor and Employment

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