

Spring Labor & Employment Seminar

May 12, 2011

huschblackwell.com

New Developments in Employment Law

Brad Hiles, Anthony Grice &
Brittany Ems

MHRA Amendments/ Whistleblower Protection Act

- April 13, 2011 – Legislation Approved
- Vetoed by Governor Nixon on April 29, 2011
- Legislative Session ends May 13, 2011

MHRA Amendments

- Discrimination
 - Burden of Persuasion now “motivating factor”
 - Damages capped
 - Excludes individuals from definition of employer
 - Requires MO courts to use federal interpretations of discrimination laws

Whistleblower Protection Act

- Codifies existing common law exceptions to at-will employment doctrine
- Protects individuals who:
 - Report unlawful acts of employer to proper authorities
 - Report to an employer serious misconduct of the employer “of a clear mandate of public policy”
 - Refused to carryout a directive of the employer that would be a violation of the law

Missouri Workers' Compensation

- *Robinson v. Hooker* (W.D. MO)
 - Co-employee not an employer, and therefore not immune from civil suit for negligence
- *Franklin v. CertainTeed*
 - Death from asbestos exposure not required to be filed as a Workers' Comp. claim

Missouri Workers' Compensation

- HB 162, SB 8
 - Significant difference in the treatment of occupational diseases
- As of May 4, 2011, Senate has requested Conference with House to reconcile bills

Illinois Workers' Compensation

- SB 1147
- Denies Workers' Comp. to people injured while:
 - Committing reckless homicide
 - Forcible felony
 - Driving under the influence
- Currently assigned to Labor Committee of Illinois House

Bridge to Justice

- Partnership between DOL and ABA
- Provides complainants with:
 - Attorney referral information
 - Information about DOL's investigation
 - Determination regarding violations
 - Calculation of back wages owed

Bridge to Justice

- Practice Points
 - Mark all financial and proprietary information “Confidential and Proprietary Commercial Information”
 - Quickly file FOIA request
 - Have process in place to review FOIA request for employer’s documents marked Confidential

Illinois Civil Union

- 750 ILCS 75/1, *et al.*
- Effective Date: June 1, 2011
- Affects
 - Leave of absence policies where “spouse” not defined
 - Statutory leaves such as Family Medical Leave Act
 - Family Military Leave Act
 - Other policies

ADAAA Final Regulations

- Effective May 25, 2011
- Broadens employees' rights
- Shift in focus from whether disabled to whether discriminated against
- "Per se" disabilities

ADAAA Final Regulations

- “Substantially limits”
 - Construed Broadly
 - “Expansive coverage”
 - “Maximum extent”
 - No mitigating measures
 - Episodic disabilities & disabilities in remission

ADAAA Final Regulations

- “Major Life Activity”
 - Sitting
 - Reaching
 - Interacting with others
- 23% increase in number of disability charges in FY 2010

Retaliation by Association

- *Thompson v. North American Stainless, LP*
 - Male employee fired after fiancée filed charge of discrimination
 - “Person aggrieved”
 - Be careful when employees are closely related

NLRB & Social Networking Policies

- Employer terminated employee after employee posted on social media website
- NLRB held termination improper
- Posting was “concerted activity”
- Avoid overly broad policies

NLRB & Tape Recording Policies

- Employer terminated employee who secretly tape recorded at work
- No tape recording policy
- State law allowed taping
- Taping was “concerted activity”
- Avoid overly broad policies

NLRB & Posting Notice

- Proposed rule
- Must advise employees of rights:
 - Unionize
 - Bargain Collectively
 - Picket or Strike
 - Be free from retaliation

National Labor Relations Board Policy Changes

(From Acting General Counsel Lafe Solomon)

1. Settlement Agreements
2. Preemptions of State Laws affecting Union elections
3. Deferral Policy (Arbitration v. ULP cases)

Mandatory Settlement Default Provisions

If the charged party does not comply:

- All allegations become admitted
- The Answer is withdrawn
- The Board issues an uncontested order
→ full remedy

OSHA is Bearing Down on Employers

- Record number of “Serious” Citations
- More citations per inspection
- More citations = higher penalties
- Criminal referrals

OSHA's Severe Violator's Enforcement Program

- Penalties increase four-fold
- Triggers:
 - A fatality
 - Catastrophes resulting in at least one Willful, Repeat or Failure-to-Abate Citation
 - Inspections expand to corporate-wide

Producing Medical Records in Response to Subpoenas

- New EEOC decision in an administrative appeal
- U.S. Postal Service released an employee's medical information
- Valid subpoena compelled the production
- Held: violation of privacy provisions of the ADA

What does this mean to you?

- EEOC will scrutinize disclosures of medical records made pursuant to subpoenas
- Consider obtaining the employee's consent
- Subpoenas issued by a lawyer or court clerk = NO disclosure
- Subpoenas signed by a judge – YES, disclose

GINA Safe Harbors:

- Social Media
- Authorized requests for medical information
- Wellness programs
- FMLA
- Commercially & publicly available information

Genetic Information Nondiscrimination Act (GINA)

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. ‘Genetic information,’ as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

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Frequently Asked Wage & Hour Questions

Terry Potter

**1. DO I HAVE
TO GIVE MY
EMPLOYEES
COFFEE
BREAKS?**



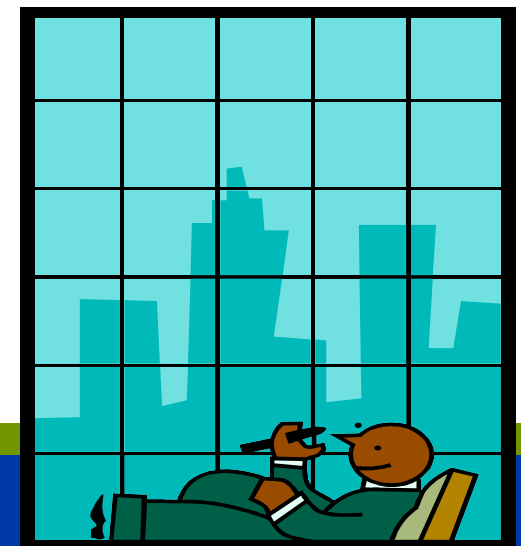
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**2. DO I HAVE TO
GIVE MY
EMPLOYEE 30
MINUTES FOR
LUNCH?**



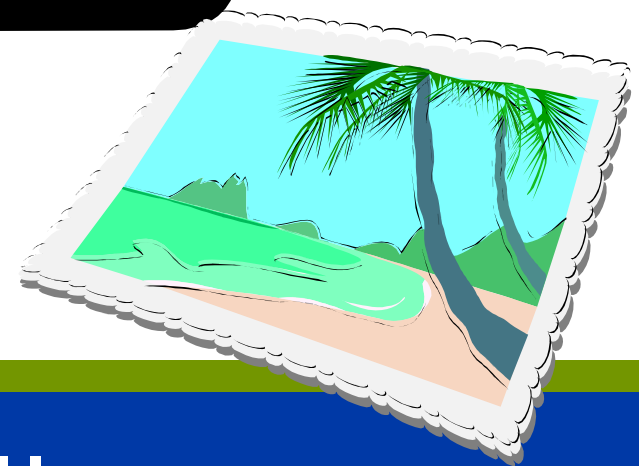
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**3. CAN I FORCE
MY EMPLOYEES
TO WORK OVER
8 HOURS PER
DAY?**

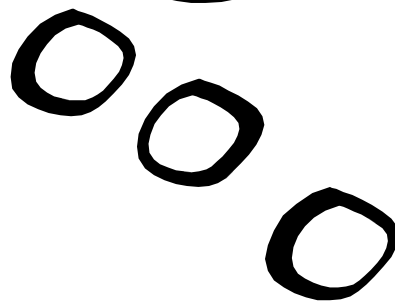


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**4. DO I HAVE
TO PAY
VACATION
PAY?**



**5. DO I HAVE
TO PAY
HOLIDAY
PAY?**

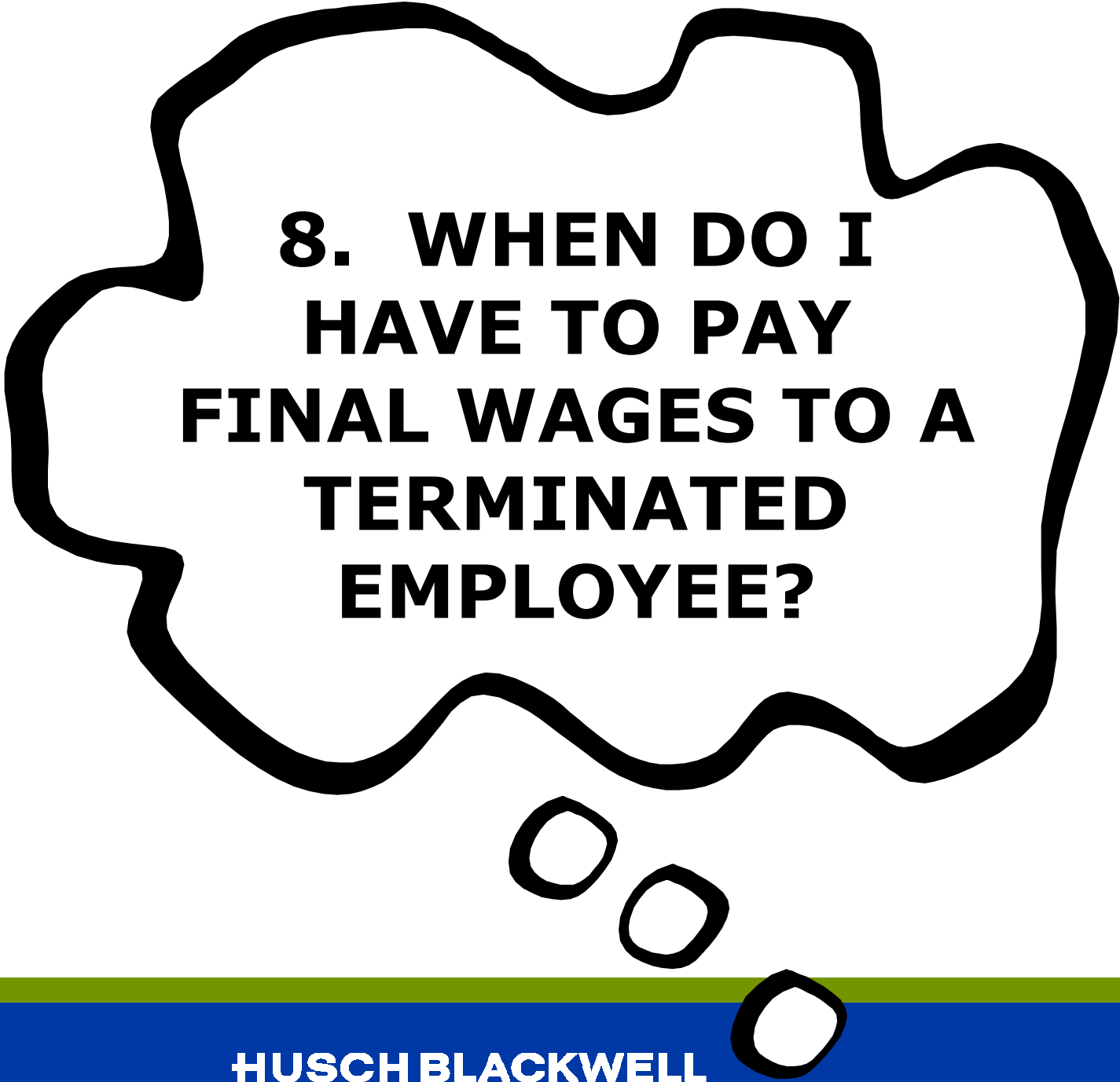




**6. DO I HAVE
TO PAY
SEVERANCE
PAY?**

**7. IS AN
EMPLOYEE
REQUIRED TO GIVE
2 WEEKS' NOTICE?**





**8. WHEN DO I
HAVE TO PAY
FINAL WAGES TO A
TERMINATED
EMPLOYEE?**

**9. DO I HAVE
TO HAVE A
TIME CLOCK?**



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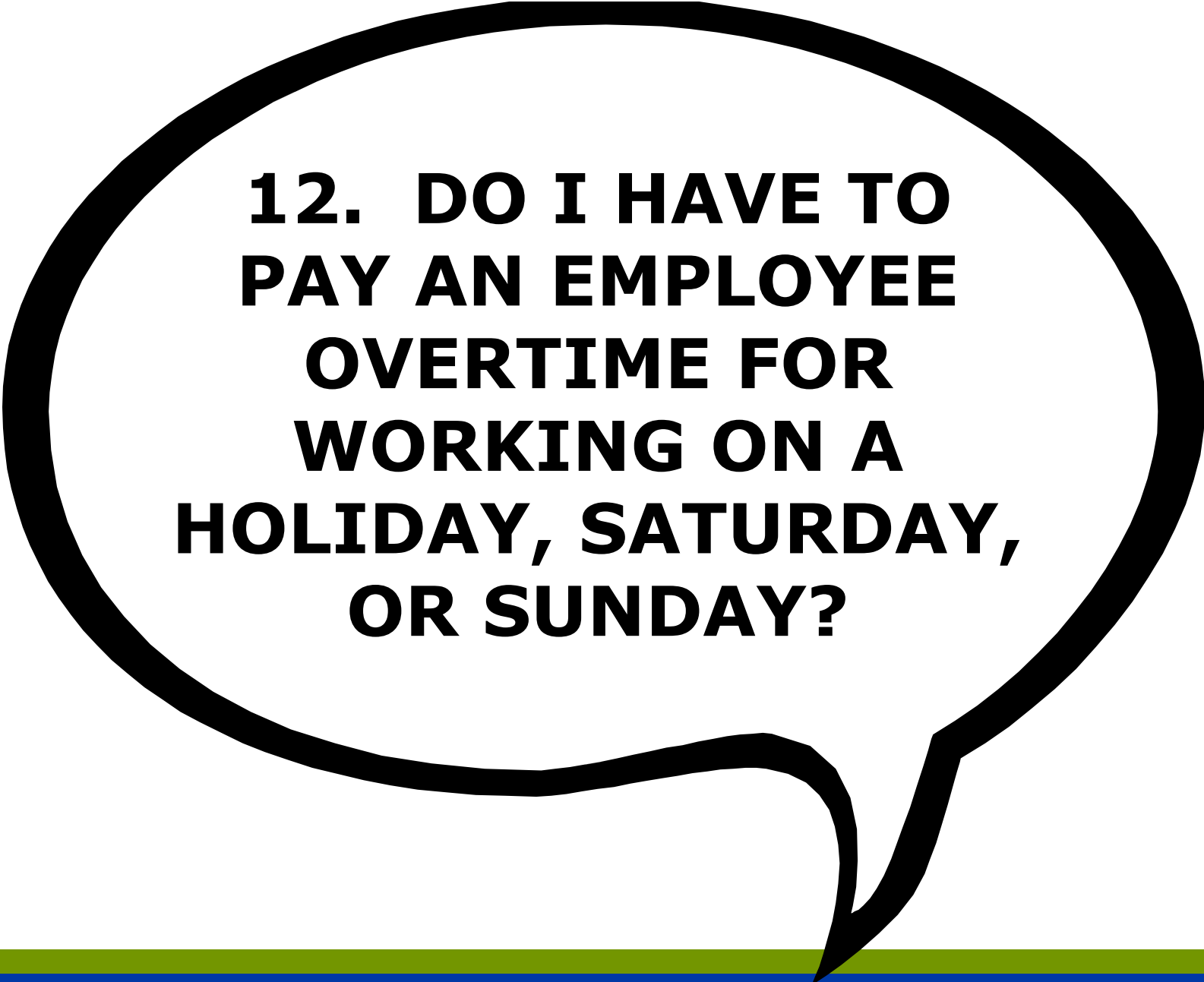
**10. DO
EMPLOYEES HAVE
TO SIGN THEIR
TIME CARD?**



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**11. DO I HAVE TO
PAY FOR ALL
TIME ON THE
TIME CARD?**



**12. DO I HAVE TO
PAY AN EMPLOYEE
OVERTIME FOR
WORKING ON A
HOLIDAY, SATURDAY,
OR SUNDAY?**



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**13. CAN I CUT AN
EMPLOYEE'S
WAGES OR
SALARY?**



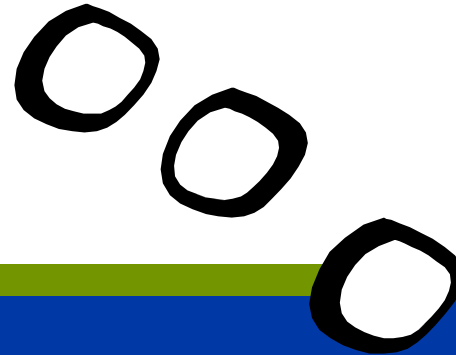
**14. IF AN EMPLOYEE
WORKS 40 HOURS AND
GETS 8 HOURS HOLIDAY
PAY = 48, DO I HAVE TO
PAY OVERTIME FOR THE
HOURS OVER 40?**

**15. DO I HAVE
TO PAY
OVERTIME FOR
WORK OVER 8
HOURS PER
DAY?**

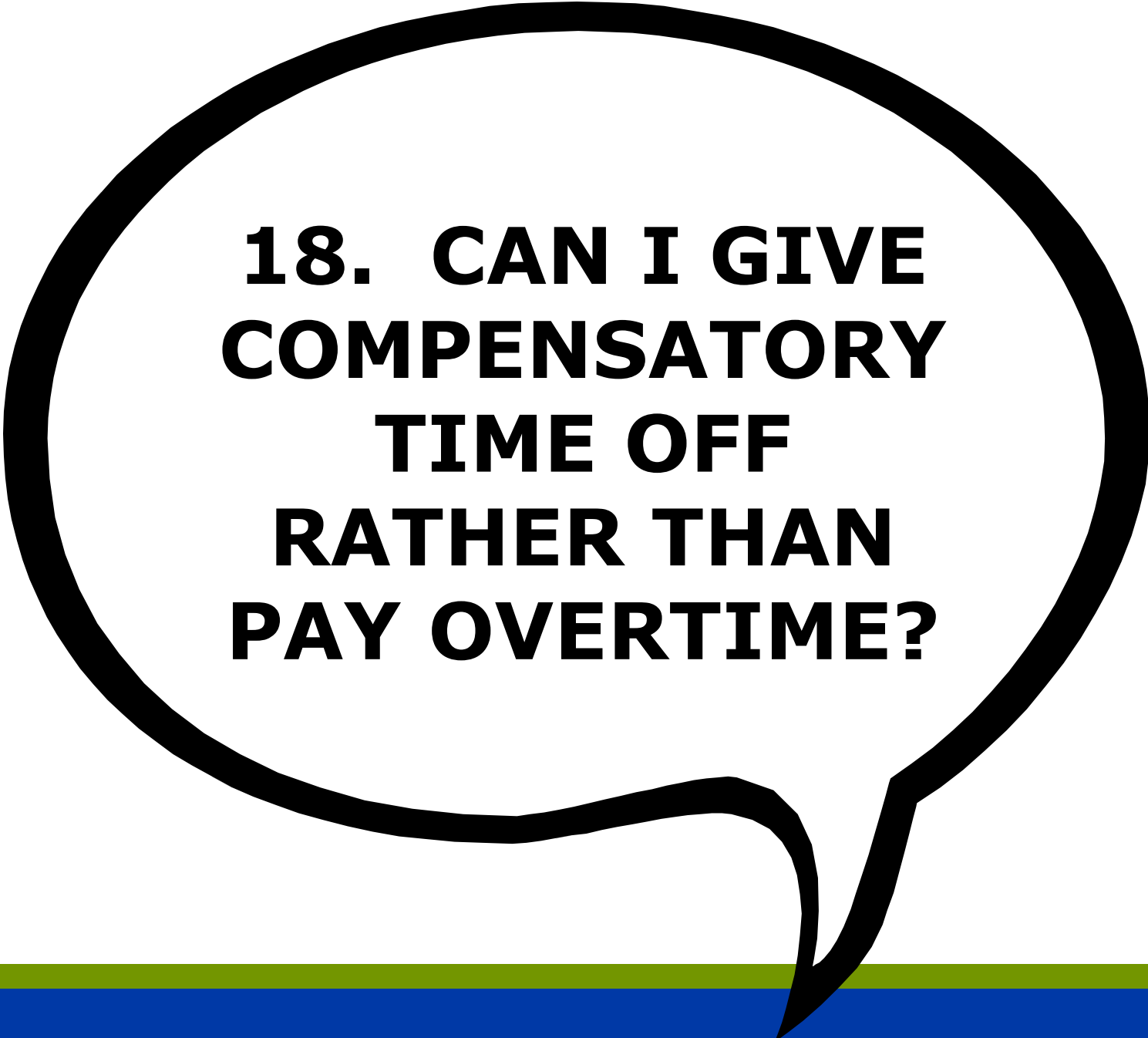


**16. IF AN EMPLOYEE
WANTS TO WORK
OVERTIME AND WILL
ACCEPT STRAIGHT
TIME, CAN HE WAIVE
HIS RIGHT TO
OVERTIME PAY?**

**17. CAN I PAY
YOUNG PEOPLE
UNDER 20 LESS
THAN THE
MINIMUM
WAGE?**



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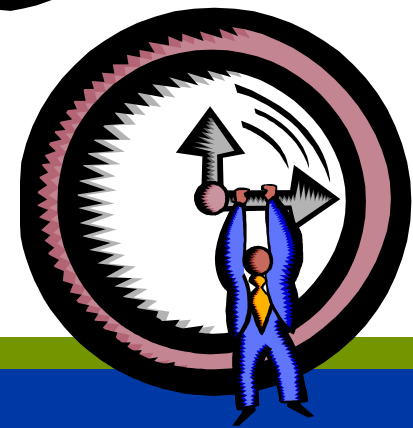
**18. CAN I GIVE
COMPENSATORY
TIME OFF
RATHER THAN
PAY OVERTIME?**

**19. HOW LONG
DO I HAVE TO
KEEP TIME
RECORDS?**



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**20. DO I HAVE
TO PAY FOR
WORK I DID
NOT REQUEST?**



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**21. WHAT MUST
BE INCLUDED IN
COMPUTING
OVERTIME?**



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**22. WHAT MAY BE
EXCLUDED WHEN
COMPUTING
OVERTIME?**

**23. HOW IS OVERTIME
COMPUTED FOR AN
EMPLOYEE
PERFORMING TWO OR
MORE DIFFERENT
TYPES OF WORK FOR
WHICH DIFFERENT
RATES ARE PAID?**

**24. IS ON CALL
TIME
COMPENSABLE?**



**25. DO I HAVE TO
COUNT ALL TIME
WORKED AT ALL
LOCATIONS WHEN
COMPUTING OVERTIME
EVEN IF THE WORK WAS
FOR DIFFERENT
COMPANIES?**

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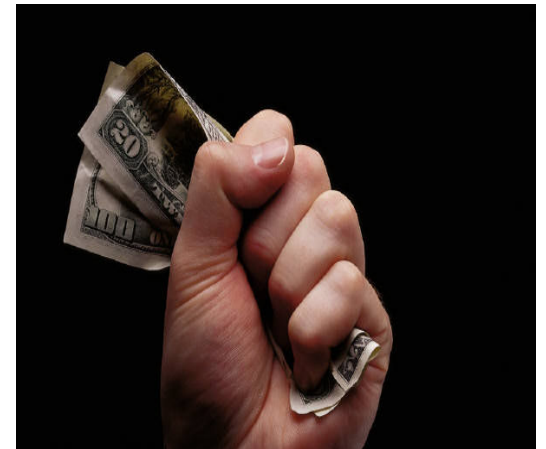




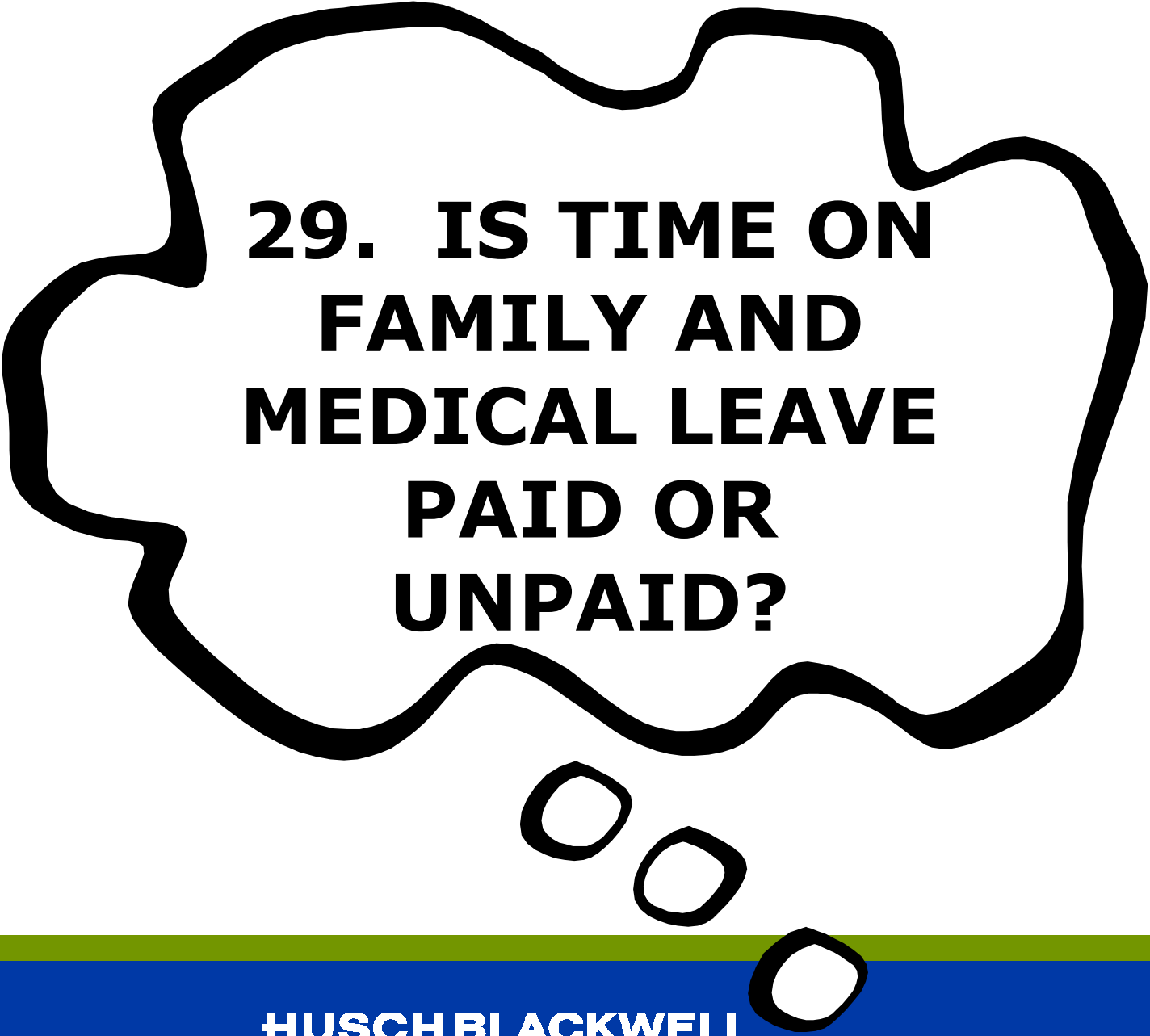
**26. MAY AN
EMPLOYEE ALSO
BE A
VOLUNTEER?**

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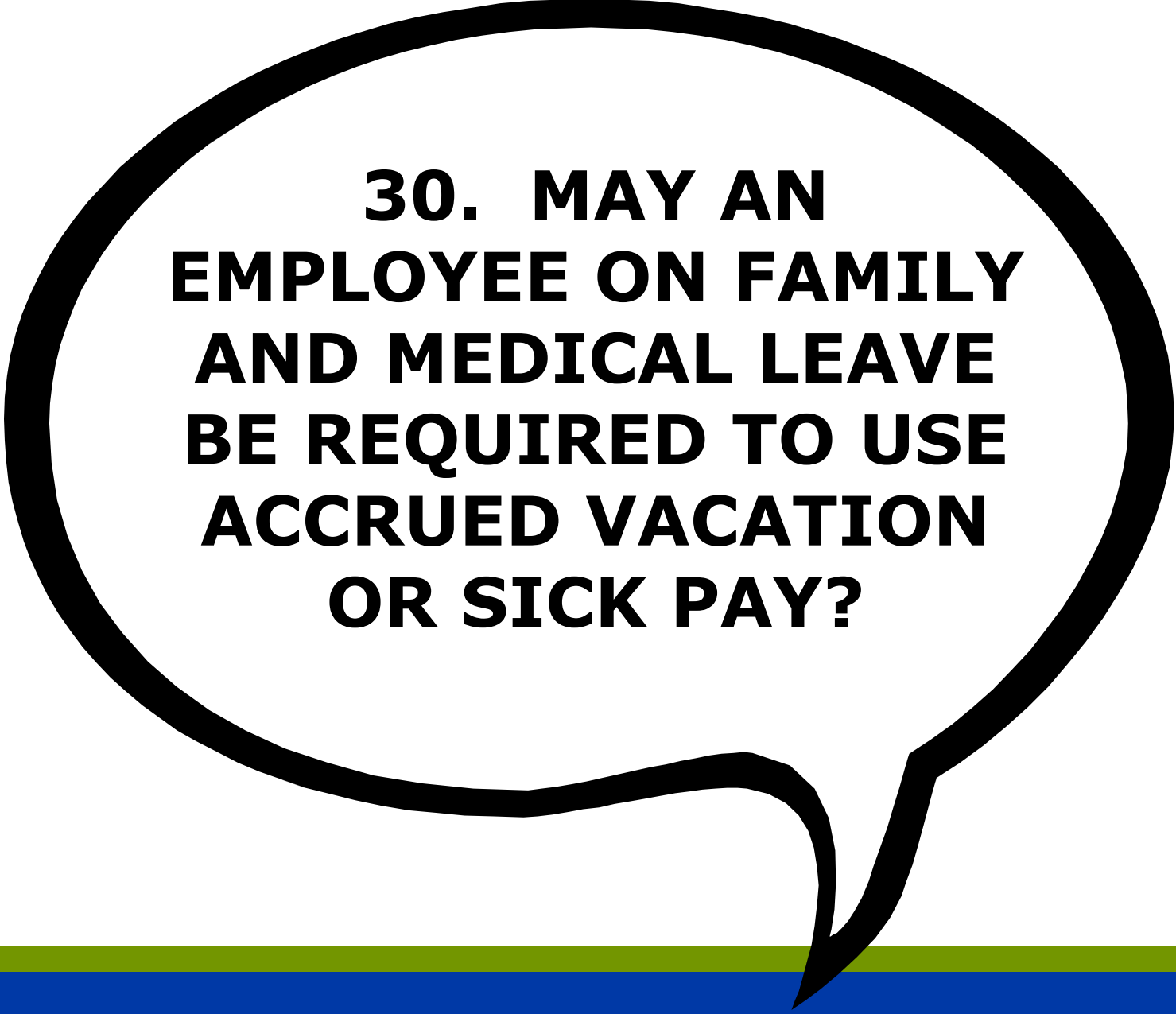
**27. MAY I
DEDUCT FOR
LOANS OR
ADVANCES?**



**28. MAY I DEDUCT
FROM THE LEAVE
BANK OF AN
EXEMPT EMPLOYEE
WITHOUT
IMPACTING THE
EXEMPT STATUS?**



**29. IS TIME ON
FAMILY AND
MEDICAL LEAVE
PAID OR
UNPAID?**



**30. MAY AN
EMPLOYEE ON FAMILY
AND MEDICAL LEAVE
BE REQUIRED TO USE
ACCRUED VACATION
OR SICK PAY?**

BREAK

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The New Era of Health and Disability: Employee Wellness Programs

Kate Heideman

What is a Wellness Program?

Any program designed to improve the health and well-being of an organization's employees.

Why Have a Wellness Program?

- Many advantages (e.g., increased productivity, employee morale)
- Biggest reason (for U.S. employers): saving on healthcare costs: \$1.65 saved for every \$1 spent

Common Wellness Programs

- Gym reimbursements
- Smoking cessation
- Premium discounts for nutrition classes

Laws Governing Wellness Programs

- PPACA
- HIPAA
- ADEA
- Title VII
- ADA
- GINA

PPACA: Federal Policy in Favor of Wellness Programs

- Grants for small businesses
- Technical assistance for employers
- Increased incentives
- Reporting requirements
- Ban on co-pays for preventative care

HIPAA: Federal Policy Against Discrimination in Health Plans (Eligibility or Benefits)

Applies only to programs that are:

- Tied to health plans
- That require employee to meet a "health status" standard

5 HIPAA Requirements

- Limits on value of award
- Promotes health or prevents disease
- Annual qualification
- Available to all similarly situated employees
- Disclosure of reasonable alternative or waiver

Other Forms of Discrimination Prohibited

- Beware of disparate impact claims
 - Age
 - Race
 - National Origin

ADA

- Reasonable accommodations for disabled employees
- No adverse actions based on disability
- No mandatory disability-related inquiries or medical examinations unless job related and consistent with business necessity

Exceptions to ADA: Health Risk Assessments

- Disability-related questions and examinations are permitted if:
 - Voluntary
 - Confidential
 - Not used to limit insurance eligibility or prevent advancement

Disability Related Questions

- Yes
 - Are you taking prescription drugs?
 - What is your blood pressure?
 - What is your weight?
- No
 - How often do you exercise?
 - What time do you eat dinner?
 - How many hours of sleep do you get?

“Voluntary” Under the ADA

- Regulations/EEOC offer no guidance but should be strictly construed
- No penalties
- Awards not explicitly prohibited (but risky)

GINA

- Prohibits requesting, requiring, or purchasing genetic information from employees
- Family medical history = genetic information

Exceptions to GINA: Health Risk Assessments

- Family medical history questions are permitted if:
 - Health or genetic services are provided (may be part of a wellness program)
 - Voluntary, knowing, and *written* authorization provided by the employee
 - Confidential

“Voluntary” Under GINA

- Very strict
- No incentives or inducements to provide genetic information

Other Laws to Watch Out For

- ERISA
- NLRA
- State laws, particularly “off-duty” conduct laws (like Colorado’s)

HIPAA: Tied to a “health plan”?

YES

NO

Required to meet health standard?

YES

NO

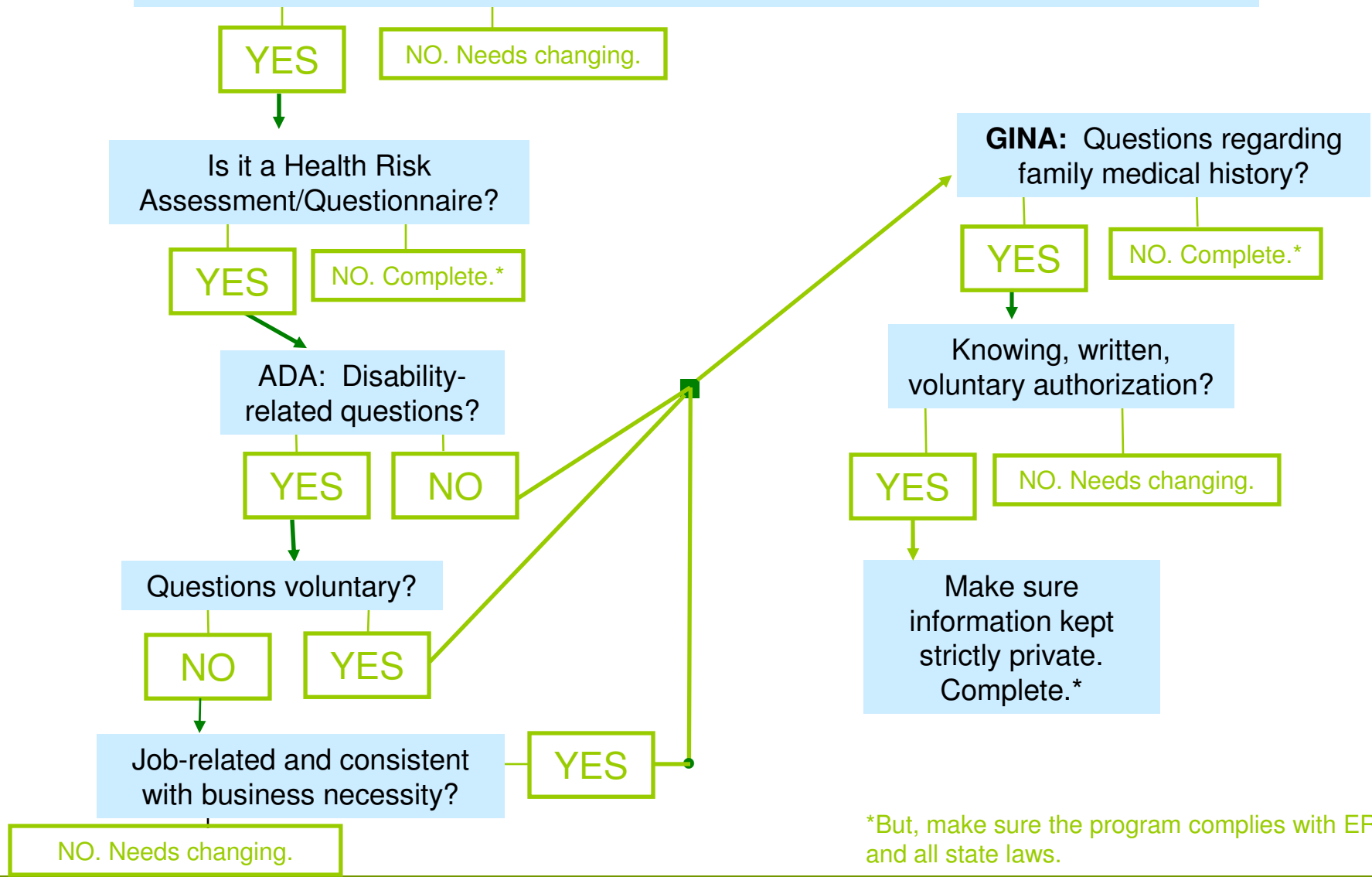
Must meet 5 HIPAA regulations:

1. Incentive may not exceed 20% of employee premium (or 30% for new plans)
2. Must be designed to promote health / prevent disease
3. Chance to earn reward once/year
4. Available to all
5. Alternatives for those physically unable to participate

ADA, ADEA, Title VII: Wellness program available to all with reasonable accommodation for disabled employees?

Refer to next page.

Continued from previous page ... Wellness program available to all with reasonable accommodation for disabled employees? (ADA, ADEA, Title VII)



*But, make sure the program complies with ERISA, and all state laws.

Preparing for Trial: Ensuring Your Company Can Successfully Defend Itself Under the MHRA

Randy Thompson
Laura Staley

The Missouri Human Rights Act (MHRA):

- Prohibited discrimination is “any unfair treatment based on race, color, religion, national origin, ancestry, sex, age as it relates to employment, disability, or familial status as it relates to housing.”

MHRA cont.

- Right to jury trial
- Contributing factor
- Summary judgment less likely
- Individual liability

Recent Verdicts

- *Ingraham v. UBS Financial Services* (May 2011)
 - Jackson County Circuit Court
 - Employee of 22 years claimed her discharge was retaliation for sexual harassment complaint
 - **\$600,000** in actual damages
 - **\$10,000,000** in punitive damages

Recent Verdicts cont.

- *Griffin v. City of Kansas City* (Jan. 2011)
 - Jackson County Circuit Court
 - Two city employees awarded \$2.6M for (race and age) discrimination and retaliation
 - **\$863,100** in actual damages
 - **\$1,800,000** in punitive damages

Recent Verdicts cont.

- *Hill v. City of St. Louis* (Sept. 2010)
 - St. Louis City Circuit Court
 - Two city employees claiming race discrimination/retaliation were awarded:
 - **\$150,000** in actual damages
 - **\$700,000** in punitive damages
 - Court reduced punitive damages awards to \$75,000 each

Recent Verdicts cont.

- *Jester v. DITEQ* (August 2010)
 - Jackson County Circuit Court
 - Plaintiff awarded \$414,847 for gender discrimination and retaliation
 - **\$100,000** in actual damages
 - **\$314,847** in punitive damages

Recent Verdicts cont.

- *Kessler v. Monarch Fire Protection District* (July 2010)
 - St. Louis County Circuit Court
 - Two employees awarded **\$400,000** (\$200,000 each) for gender discrimination and retaliation
 - No punitive damages

Recent Verdicts cont.

- *Hervey v. Missouri Department of Corrections* (April 2010)
 - Jackson County Circuit Court
 - Parole officer awarded \$2.6M for disability discrimination
 - **\$127,056** for actual damages
 - **\$2,500,000** for punitive damages

Recent Verdicts cont.

- *McCrainey v. Kansas City Missouri School District* (Jan. 2011)
 - Jackson County Circuit Court
 - Retaliation for harassment complaint
 - Superintendant of schools individually liable
 - **\$266,000** against district
 - **\$96,000** against superintendant

Recent Verdicts cont.

- *Holmes v. Zobrist* (March 2010)
 - Jackson County Circuit Court
 - Former police officer claimed race discrimination and other non-MHRA claims
 - **\$250,000** actual damages for discrimination
 - **\$250,000** punitive damages for discrimination
 - **\$3,500,000** for whistle-blowing retaliation
 - **\$2,500,000** for breach of contract

Process and Timing

- Administrative Phase
 - Charge of discrimination
 - Position statement
 - Right to sue
- Filing Lawsuit
 - Statute of Limitations (2 years)
- Litigation
 - Could be 2+ years before trial

Minimize Damages/Awards

- Failure to mitigate defense
- Plaintiff's prior employment records
- Plaintiff's medical history

Practical Considerations

- How Do Courts Make Decisions?
 - Motivating vs. Contributing factor
 - Summary judgment more difficult in state court
 - Will legislature have enough votes to override the veto to House Bill 205?

What Wins and Loses Cases?

- The Fairness Factor
 - Was the employer right?
 - Was it fair?
 - Does it make sense?
 - Could you have done something else?
 - Were similarly situated employees treated better or worse?

What Wins and Loses Cases?

- Venue
 - State court vs. Federal court
 - Big city vs. Smaller city
 - What will the jury look like?

What Wins and Loses Cases?

- Jurors
 - Fairness overrides facts
 - Company often presumed unfair
 - Humanize the unfair issues
 - Jurors see themselves as actual or future victims

What Wins and Loses Cases?

- Witnesses
 - Decision-makers must testify
 - Non-manager witnesses are helpful
 - Do not be unlikable

What Wins and Loses Cases?

- Evidence
 - Visual
 - Documentary
 - Testimony

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Consistency in Enforcement of Policies
 - Look at employees in similar positions
 - How was the policy communicated
 - Prior corrective actions of the decision maker
 - Does the discipline appear “fair” under the circumstances?

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Take All Complaints Seriously and Investigate Thoroughly
 - Meet with complainant quickly
 - Interview any witnesses/co-workers identified or in the vicinity who might see/know something
 - Interview target
 - Follow-up with complainant in some fashion at conclusion (and during investigation if appropriate)
 - Document investigation steps and outcome

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Ensure Retaliation Does Not Occur
 - Follow-up with complainant/witnesses routinely
 - Document (e.g. on calendar, e-mail, memo to file) substance of the encounter
 - Consider transfer/reassignment (as long as not punitive)

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Document Preservation
 - Send legal hold notice when you learn of the claim, e.g., demand letter, charge of discrimination

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Conduct Investigation Early
 - Interviews (consider sworn statements)
 - E-mail searches
 - Gathering of documents

Best Practices for Avoiding Multi-Million Dollar Verdicts

- Consider Use of Expert on Job Market in Appropriate Cases

Best Practices for Avoiding Multi-Million Dollar Verdicts

Earlier Trial Dates

- Witnesses available
- Memories are fresh
- Costs/fees contained

Later Trial Dates

- Typically less emotion
- Possibility that plaintiff has obtained other employment or established failure to mitigate