SECTION II HUMAN RESOURCE MANAGEMENT

Managing people is one of the key responsibilities of laboratory managers. The ability to understand and follow human resource guidelines and regulations, as well as to perform job analyses, write job descriptions, and manage work groups, is critical to this end. Laboratory managers must also participate in performance evaluation and professional development issues with their employees. An introduction to the basic aspects of education and training also assists laboratory managers to achieve good human resource skills.

Section II consists of four chapters based on human resource issues. Because of the overlap of select terms and concepts in each of the topics covered, discussions of them occur in multiple chapters, where appropriate.

Section II Contents:

CHAPTER 5

Human Resource Guidelines and Regulations

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Chapter Outline

Objectives

Following successful completion of this chapter, the learner will be able to:

1. List and define at least two key legal issues and at least one proactive measure an employer may take in the area of recruitment.
2. List and define at least two key legal issues and at least one proactive measure an employer may take in the area of compensation.
3. List and define at least two key legal issues and at least one proactive measure an employer may take in the area of leave benefits.
4. List and define at least two key legal issues and at least one proactive measure an employer may take in the area of employee/labor relations.
5. List and define at least two key legal issues and at least one proactive measure an employer may take in the area of termination.
6. Accurately describe the minimum legal duty imposed on an employer for each of these areas.
7. Compare and contrast various approaches to managing conflicts in each of the areas covered in this chapter.

Key Terms

Affirmative Action
Age Discrimination in Employment Act (ADEA)
Americans with Disabilities Act (ADA)
Bona Fide Occupational Qualifications (BFOQ)
Equal Employment Opportunity Commission (EEOC)
Equal Pay Act (EPA)
Fair Labor Standards Act of 1938 (FLSA)
Family and Medical Leave Act of 1993 (FMLA)
Title VII of the Civil Rights Act of 1964
Unlawful Harassment

Introduction

Human resource management (HRM) is an element critical to the successful operation of any department in any industry. Managers, directors, and supervisors who are not familiar with the basic elements of HRM serve as a potential liability for their own organization, rather than an asset, and are likely to find themselves embroiled in costly litigation. This chapter is intended to provide an overview of the fundamental concepts of HRM in five basic areas: recruitment, compensation, leave benefits, employee relations, and termination. Case studies and subsequent discussions are incorporated into this chapter as appropriate to illustrate key points. It is not intended to serve as nor constitute legal advice. Managers should always contact their human resources practitioner, or legal counsel, before making any decision that may adversely affect any employment relationship. Other chapters in Section II of this text will provide readers with more detailed information about these and other areas involved in HRM. This chapter is intended to fa-

miliarize those responsible for the supervisory duties within a department or laboratory with the issues that are most frequently problematic to employers.

RECRUITMENT

Success in any business requires success in competition. Thus, every company within various industries strives to recruit and retain the most highly qualified personnel. Companies are constantly challenged to create new and better services, programs, and benefits with which to entice the most qualified candidates to work for their organization. In the excitement of that competitive spirit, however, many managers have not been provided the opportunity to learn the basics of the recruitment process. What questions may properly be asked in an employment interview? What information should be divulged when answering a call for an employment reference? If a candidate for employment discloses the existence of a disability or need for a religious accommodation, how should you respond? Understanding the basic requirements of the recruitment process is key to creating a high quality, stable workforce.

Table 5–1 lists federal laws that most frequently affect the employment relationship, the number of employees an organization must employ before each law is applicable, and some websites of the federal agencies that regulate the particular statute.

Affirmative Action

Executive Order 11246 (Order), entitled "Equal Employment Opportunity," was issued by President Lyndon Johnson on September 24, 1965. This order, generally known as ***Affirmative Action,*** prohibits federal contractors, subcontractors, and federally assisted construction contractors and subcontractors (contractors), who conduct more than $10,000 in government business in 1 year from discriminating in employment decisions on the basis of race, color, religion, sex, or national origin. Certain government contractors or first-tier subcontractors with 50 or more employees and $50,000 or more in government contracts are required to develop and maintain a written affirmative action plan (AAP). In November 2000, the Office of Federal Contract Compliance Program, of the Department of Labor, published a rule that clarified that, except in limited circumstances, the contractor must maintain a separate plan for each of its establishments. Contrary to popular belief, affirmative action is not a quota system or a system that gives preference to certain candidates. Affirmative action does require an employer to measure and assess three areas that may be envisioned as concentric circles (Figure 5–1).

For example, an employer is not required to hire a member of a minority group or a female when a more qualified candidate is available. Affirmative action is a commitment by the employer to proactively reach out into various employment pools and continue to seek the most qualified candidate but from a variety of sources, rather than from the same sources the employer has always used such as the local newspaper or community or local colleges and universities.

TABLE 5–1. Federal Laws That Most Frequently Affect the Employment Relationship

Federal Law	Covered Employers	Website *(where applicable)*
Americans with Disabilities Act (ADA), 1990	Employers with 25 or more employees	*http://www.eeoc.gov/policy/ada.html*
Age Discrimination in Employment Act (ADEA), 1967	Employers with 20 or more employees	*http://www.eeoc.gov/policy/adea.html*
Civil Rights Act of 1991	Employers with 15 or more employees	*http://www.eeoc.gov/policy/cra91.html*
Drug Free Workplace Act, 1988	Organizations with federal contracts of $100,000 or more and all individual, federal contractors and grantees	*http://www.dol.gov/elaws/drugfree.htm*
Equal Pay Act, 1963	same as FLSA	*http://www.eeoc.gov/policy/epa.html*
Executive Order 11246 (Equal Employment Opportunity)	certain federal contractors and subcontractors	*http://www.dol.gov/dol/esa/public/regs/compliance/ofccp/fs11246.htm*
Fair Credit Reporting Act	All	*http://www.ftc.gov/os/statutes/fcrajump.htm*
Fair Labor Standards Act (FLSA)	Almost all	*http://www.dol.gov/esa/whd/flsa/*
Family and Medical Leave Act (FMLA)	Employers with 50 or more employees	*http://www.dol.gov/esa/whd/fmla/*
Immigration Reform and Control Act of 1990 (IRCA)	All	*http://www.dol.gov/esa/regs/compliance/ofccp/ca_irca.htm*
Occupational Safety and Health Act (OSHA)	Employers with 2 or more employees (exclusive of self-employed)	*http://www.osha.gov/*
Title VII, Civil Rights Act of 1964	Employers with 15 or more employees	*http://www.eeoc.gov/policy/*
Uniformed Services Employment and Re-employment Rights Act (USERRA), 1994	All	*http://www.dol.gov/elaws/vets/userra.asp/*

The outermost circle represents the applicant pool, that is, the pool of all qualified candidates in the employer's geographic labor market. This information is available through federal, state, and local departments of labor. The second circle represents the pool of candidates who actually apply for employment with any particular company. Employers obligated to maintain an affirmative action plan must track all applications received, including the race and gender of applicants

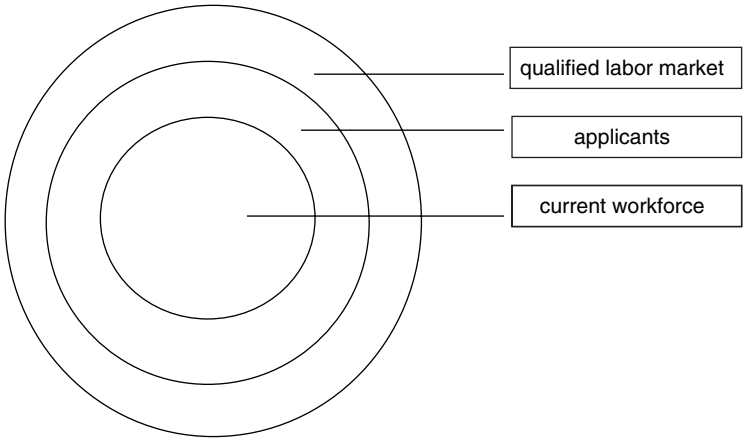

FIGURE 5–1 Three areas of assessment required by Affirmative Action.

and the position(s) for which they have applied. Currently this information must be tracked for all applicants, as the employer defines an applicant. In March 2004, a number of federal agencies published proposed regulations that would limit or clarify the definition of an E-applicant, that is one who applies for employment through electronic means such as the internet. The third circle represents the employees who are employed by the company. This data should be tracked through an internal human resources information system (HRIS). If any of the numbers in these three groups are statistically disparate from the general labor market, the employer should audit the company's outreach, recruitment, and hiring practices to ensure those practices are not having an adverse impact on women, minorities, persons with disabilities, or protected veterans.

Many employers maintain voluntary affirmative action plans or programs, even though they are not required to do so under the Order. Affirmative action programs have faced many legal challenges in the last decade. It is currently recommended that voluntary affirmative action programs or plans be implemented only to remedy a history of past discrimination. Programs or plans used as a proactive measure to enhance diversity within an organization have come under legal scrutiny in the last several years.

Position Descriptions

The recruitment process should begin with the writing of the job description. The best job description lists the **essential functions** of the job, defined as those that are most important and/or performed with the greatest frequency of all required tasks within a job. The job description should also include a listing of the requirements with regard to education and experience. Although an employer may want or prefer candidates with a college degree for a particular position, it is important to list only those factors that are ***bona fide occupational qualifications (BFOQ).*** An employer may limit employment in a particular job to persons of a particular sex, religion, or national origin if the employer can show that sex, religion, or

national origin is an actual qualification for performing the job. For example, although a clinical laboratory scientist may need a specialized degree or training to conduct certain laboratory tests, it is likely that comparable education, although helpful, is not required for a person to successfully perform the duties of a laboratory assistant. A sample job description is provided in Table 5–2.

After the job description is completed, the employer will need to attach an appropriate pay or salary range to that job. It is generally the duty of the human resources department to conduct market surveys and ensure their compensation structure is both internally equitable as well as market competitive. Maintaining internal equity requires comparing the current wages paid to each person currently employed within a particular job classification with regard to a number of factors such as each incumbent's level of education, years of experience in the field, and years of experience in the job with that employer. Hiring a new candidate at a rate of pay higher than current incumbents with comparable education and experience in the field may require an upward wage adjustment for every other worker in that job classification. If this is done, it can be very costly to the employer and must be weighed against the return on the investment of bringing in that one new candidate. If the candidate is hired at the higher rate, and no adjustment is made, the likely result is not just a reduction in employee morale and resentment toward the new worker but potential claims of wage discrimination. Additional information on and samples of job/position descriptions are located in Chapter 6.

Equal Pay Act

The ***Equal Pay Act (EPA),*** which is part of the Fair Labor Standards Act of 1938 and is administered and enforced by the EEOC, prohibits wage discrimination between men and women in the same establishment who are performing similar work under similar working conditions. For example, imagine that a healthcare clinic has just opened a new cancer research center. The market is competitive in this area, and the clinic finds that it cannot hire a highly qualified clinical laboratory scientist for less than $25.00 per hour. Several candidates apply and a male is selected and paid the appropriate rate. In the Department of Histology, however, a female scientist is paid only $20.00 an hour. The work the two scientists perform is similar as are their working conditions. In this case, while there is clearly a difference between the wage being paid to the male and female scientists, it most likely would not be a violation of the EPA, as the higher rate is (1) driven by the market demand based on the area of research and (2) would be paid to any incumbent in the cancer research laboratory, male or female. If, however, market data did not support that the higher rate was required or competitive in the area of cancer research, or if it was discovered that female scientists in the new cancer research center were paid less than $25.00 per hour, the employer may be found guilty of wage discrimination and violation of the EPA. It is also important to remember that wage discrimination is blind to gender. A male employee may bring charges of wage discrimination just as well as a female. A male scientist working in a predominantly female work environment should not receive a lower wage than his female counterparts just because he is more easily recruited.

TABLE 5–2. Sample Job Description

Position Title: Laboratory Technician
Job Group: Laboratory-Technical Pay Grade: ___ Position #___

Summary of Duties
Following routine protocols under the close supervision of a faculty investigator or a senior technician, performs laboratory tests utilizing requisite laboratory equipment and instruments, making minor adjustments as required. Typically works with biohazardous and/or radioactive materials. Responsible for laboratory maintenance, preparing solutions and media, and ordering supplies. May be responsible for care of laboratory animals.

Essential Job Functions
- Performs laboratory tests and/or experiments that may include various assays, specialized techniques such as electrophoresis and basic tissue culture, following established procedures or protocols.
- Operates requisite laboratory equipment and instruments, records data, maintains and makes minor adjustments to equipment.
- Uses universal safety precautions to protect self and co-workers from biohazardous materials, including blood-borne pathogens.
- Complies with biohazard/radiation safety standards through proper handling of potentially hazardous chemical and biological agents and/or radiation sources in the workplace.
- Completes annual university biohazard/universal precaution/radiation safety training, as appropriate.
- Prepares sterile media such as agar in plates, jars, or test tubes for use in growing bacterial cultures.
- Prepares solutions, reagents, and stains following standard laboratory formulas and procedures.
- Uses sterile techniques to avoid contaminating laboratory experiments.
- Prepares, cleans, sterilizes, and maintains laboratory equipment, glassware, and instruments used in research experiments.
- Monitors inventory levels, orders materials and supplies in accordance with established policies and procedures, counts orders on receipt.

Scope of Responsibility
Knows the informal policies, procedures, and practices necessary to conduct the normal function of a specific section, unit, or work area. Is aware of the role of the position and its potential impact on the working unit.

Decision Making
Carries out duties and responsibilities with limited supervision. Makes decisions and establishes work priorities on essentially procedure-oriented operations.

Authority
Does not direct the activities of staff or a function.

Communication
Exchanges routine information in an appropriate manner requiring good oral and written communication skills.

(*continued*)

TABLE 5–2. Sample Job Description *(continued)*

Education
Associate degree in medical laboratory science or a laboratory science from an accredited institution.

Experience
Gained through college level classwork in the sciences or summer employment. Biological science coursework or experience in a biological laboratory is preferred.

Certification
MLT(ASCP) or CLT(NCA) or equivalent.

Physical Requirements
- Work produced is subject to precise measures of quantity and quality
- Work environment may include areas of unpleasant extremes of cold or heat
- Biohazardous conditions such as the risk of radiation exposure, fumes or airborne particles, and/or toxic or caustic chemicals may be present in this work environment, which mandates attention to safety considerations
- Near vision to see objects clearly within 20 inches
- Sharp focus to adjust vision when doing close work that changes in distance from eyes
- Full spectrum vision to identify and distinguish color
- Finger dexterity required to manipulate objects with fingers rather than with whole hand(s) or arm(s), for example, using a keyboard
- Handling by seizing, holding, grasping, turning or otherwise working with the hand or hands, but without finger dexterity
- Sitting in a normal seated position for extended periods
- Occasionally lifting, carrying objects weighing 10 lb or less
- Occasionally pushing, pulling objects weighing 30 lb or less
- Ability to move about

This description is a general statement of required major duties and responsibilities performed on a regular and continuous basis. It does not exclude other duties as assigned.

Interviewing

One of the greatest pitfalls in recruitment is interviewing. Although human resource professionals are usually trained in current employment practices, including how to develop interviewing questionnaires and templates and what questions are not appropriate to ask, front line supervisors and managers often do not receive this training. As a result, and with no bad intent, they may ask questions that are at best offensive and at worst unlawful. Table 5–3 lists questions that should be avoided during the interview process and removed from job applications. Keep in mind that many states and local jurisdictions provide legal protections for members of certain classes that go beyond those provided by federal law, such as marital status or sexual orientation.

The Americans with Disabilities Act is covered in more detail later, but it is worth noting here that an employer has a duty to provide a reasonable accommodation for a job applicant as well as employees. For example, some companies

TABLE 5–3. Questions to Avoid During the Interview Process

What is your date of birth?
When did you graduate from high school?
Are you married?
How many days did you miss from work last year?
Are you currently taking any prescription medication?
Do you currently have or have you any history of a disability?
What is your country of national origin?
Are you a U.S. citizen?
Have you ever been arrested?
Have you ever filed a claim for workers' compensation?

have a rule that all applications for employment are to be completed in the human resources department. An employer may have to grant an exception to that rule as a reasonable accommodation for a candidate with a visual impairment who arrives in the human resource office and asks to take the application home to use a reading device to complete the application. Learners are encouraged to read Chapters 6 and 7 for more information on conducting job analyses and interviews, as well as related issues of evaluating an employee's performance of assigned duties and responsibilities.

COMPENSATION

The ***Fair Labor Standards Act of 1938 (FLSA)*** is the federal law that defines the minimum wage, overtime, and other requirements related to how certain employees are to be paid. The term *nonexempt* refers to employees who are to be paid for every hour in which the employee performs work for, or is under the control of, the employer. With few exceptions, the FLSA also requires that nonexempt employees receive wages at the rate of 1.5 times the employee's regular rate of pay for any hours worked beyond 40 hours in 1 work week. Note that there are limited exceptions for companies in some industries, such as health care, that have established an 80-hour work week. These situations should be evaluated on a case-by-case basis as well as in conjunction with state laws that may impose greater requirements. This law can be quite complex and its interpretation convoluted, but if a supervisor follows a few basic rules, complications should be easily avoided.

Some employees are exempt from the provisions of the FLSA and are, thus, termed, "exempt" employees. Generally, these employees are classified as executive, administrative, or professional. A number of parameters must be used in determining whether any particular job should be classified as exempt or nonexempt. Because these exemptions are narrowly defined, employers should carefully check the exact terms and conditions for classification and work in conjunction with the company's human resources department and compensation experts to ensure proper classification. Improperly classifying a nonexempt

employee as exempt, as well as any other violation of the FLSA, can have serious financial consequences as a result of fines or penalties imposed by the Department of Labor. These fines may be imposed against an individual supervisor as well as the company, in amounts up to $10,000, in addition to civil money penalties plus damages for back pay, liquidated damages, and more.

Many companies have rules that overtime must be approved in advance of being worked. What if the employee is very dedicated to the job and chooses to come in early, performs work, and tells the supervisor that the company need not pay the employee for this extra time because the employee understands that permission was not granted in advance? Does the employer have to pay the employee for the extra time worked? What if an employee continues to work through his or her lunch period to catch up on some work? Does the employer have to pay the employee for what would otherwise be an unpaid lunch period? The answer is yes in both cases. Even if the work is performed without the permission or knowledge of the employer, the employee is still due appropriate compensation. The employer may, however, limit the compensation that is due under the FLSA by granting the nonexempt employee some time off later in the same work week to avoid incurring hours worked in excess of 40 in that work week.

Employers may also fail to properly pay nonexempt employees when an employee is on the employer's premises during his or her scheduled shift but not performing work.

Case Study: Three Scenarios Involving Compensation

An employee in Laboratory A is scheduled to work from 8:00 AM to 4:30 PM, with one break for lunch from 12:00 to 1:00 PM. The employee accurately records her arrival at work at 8:00 AM. The employee then walks to the company's cafe, gets breakfast, and returns 15 minutes later and begins working. Is the employer obligated to pay the employee for the period covered from 8:00 AM to 8:15 AM?

An employee arrives to work at 8:00 AM and is scheduled to conduct blood specimen testing. The equipment, however, is not working and cannot be repaired until at least 9:30 AM. In the interim, the supervisor instructs the employee to stay in the department until the repair specialist arrives. While waiting, the employee does some studying for a course he is taking at the local, community college. Is the employer obligated to pay the employee for the time the employee studies?

An employee drives into the employer's parking lot at 7:58 AM. He is scheduled to work from 8:00 AM to 4:30 PM. To avoid recording a late time of arrival for work, the employee parks his car outside the door, walks into his department, and records an 8:00 AM arrival time and then leaves to park his car, returning to the department at 8:10 AM. Is the employer obligated to pay for the period from 8:00 AM to 8:10 AM?

The intent of the FLSA, as drafted more than 65 years ago, was to provide compensation for an employee who performs work or remains under the employer's control. Thus, in the first and third scenarios the answer is No. The employer is obligated to compensate employees only for the time they performed

work in the laboratory, not for the time spent eating breakfast or parking the car. Keep an eye out for the common practice of nonexempt employees who eat lunch at their desk while working. If a nonexempt employee is not relieved of his or her duties during a scheduled, unpaid meal period, then the employer owes that employee compensation for the time worked, even if while simultaneously eating lunch. In the second scenario, even though no work was performed, the reason for the work stopping was beyond the employee's control. In addition, he remained under the control of the employer until the equipment was repaired. As a result, the employer may be obligated to pay that employee for that idle time. A proactive manager will find other work an employee may perform during down time.

Another common practice in which many employers engage is the granting of compensatory time off from work for nonexempt employees in lieu of overtime wages. At this time, the FLSA generally prohibits private (nongovernmental) employers from granting nonexempt employees compensatory time off from work. For example, imagine that you have a research grant due this Friday. You need your laboratory assistant to work some overtime to help get some last minute administrative details put together. When you convey this news to the employee, he says that would be fine because he would also like to take off early one day next week to take care of some personal business. If you and the employee both agree to this arrangement, can you grant the employee the compensatory time off from work next week in exchange for the additional hours worked this week? The answer is, No. To do so would be a violation of the FLSA. Note that legislation has been proposed for a number of years to permit this type of voluntary arrangement if the employer and employee both agree. As of this writing, those efforts have been unsuccessful.

Compensatory time off from work is also a strategy that employers use with exempt employees with the intent of enhancing the flexibility of work schedules. The new federal regulations that became effective in August 2004 expressly permit the additional payment so long as the exempt employee is still paid the required minimum salary on a salary basis.

Leave Benefits

While the overall administrative oversight of leave benefits (e.g., sick leave, vacation, personal, military) is generally regulated by the human resources department, problems most frequently arise at the departmental level when a request for some form of leave is initially denied or misapplied by a manager or supervisor. For the purpose of this discussion, the leave benefits covered are presented under two categories: Family and Medical Leave Act and Military and Other Leave.

Family and Medical Leave Act

The ***Family and Medical Leave Act of 1993 (FMLA)*** provides eligible employees with up to 12 weeks of leave (paid or unpaid) for the employee's own serious health condition, for the care of an immediate family member who has a serious

health condition (spouse, child, parent), and for the care of the employee's child following birth or adoption. The FMLA is applicable to any employer in the private sector who is engaged in commerce or in any industry or activity affecting commerce, and who has 50 or more employees each working day during at least 20 calendar weeks or more in the current or preceding calendar year. In addition, all public agencies (state and local government) and local education agencies (schools) are covered. These employers do not need to meet the 50 employee requirement. The FMLA guarantees the employee the right to return to the same or comparable position he had when the leave commenced, upon his or her return to work. A comparable position is one that provides the employee with the same wages, hours, and conditions of employment as the position originally held.

An eligible employee is one who has worked for the employer for at least 12 months (not necessarily consecutively) and at least 1,250 hours in the last 12 months. The employee must work at a worksite with at least 50 employees employed within 75 miles of that site. Although there is more than one definition of what conditions constitute a serious health condition, and they are quite detailed, the general definitions are those conditions that require inpatient care or continuing treatment by a health care provider. The nuances of administrating leave under the FMLA are very broad and easily warrant a chapter unto themselves. Here, we cover those areas of the FMLA that most often result in misinterpretation or misapplication.

Case Study: Leave Benefits

An employee calls in on Monday and tells you that he will be absent that day. On Tuesday, the employee calls in again and tells you that he is very sick and will be out for at least three more days, if not the entire week. The following Monday, you have not heard back from the employee so you call him at home. He says that he saw a physician on Friday afternoon and has been conditionally diagnosed with pneumonia, is scheduled for diagnostic testing, and will be out at least until the test results come back at the end of the week. The following Monday, following a two-week absence, the employee returns to work. What should you do? What portion of the absence, if any, may be applied to FMLA?

The U.S. Department of Labor administers the FMLA and has published interpretive guidelines that require an employer to give an employee notice that an absence is being counted towards FML within at least two business days of learning that the employee may have a qualifying event under the Act. In this case, the employer learned this on the first Tuesday, the employee's second day of absence from work. What happens if the employer knew that the leave may have qualified under FMLA, failed to give the employee proper notice, and the employee has returned to work? The leave may be designated retroactively but some penalty may apply, so held the U.S. Supreme Court in March 2002.

It is also important to note that while the FMLA provides employees the right to unpaid leave, the employer is permitted to run paid leave benefits, such as sick leave, vacation pay, workers' compensation and other benefits concurrently with FML. This is a sound business practice to prevent employees from taking up to 12 weeks of unpaid leave and returning to work with full, paid leave banks.

Military and Other Leave

Employers have certain duties to provide some limited benefits and protections to employees who take time off from work to perform a variety of social obligations, such as those required for military service, including weekend reservists units. Separate federal laws cover nearly all employers, including federal contractors. The law provides employees and candidates with certain rights to be free from discrimination based on their military obligations, including a conditional right to return to the same or a comparable position when they return from military service, as granted under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Employers should also become familiar with the laws in their state and local jurisdictions. Many provide further protections for employees taking leave to vote, respond to a subpoena for jury duty, or to serve as a witness at a trial. For example, Maryland law requires employers to grant employees at least two consecutive hours off from work while the polls are open to vote on election day.

Employee Relations

The arena of employment legislation and litigation is replete with challenges to employers' practices relating to a myriad of issues under the law. Federal, state, and local administrative agencies such as the ***Equal Employment Opportunity Commission (EEOC)*** and its counterparts are continually challenged to meet the demands of burgeoning case loads alleging discrimination in employment based on a person's membership in a legally protected class. Although the 1990s brought the enactment of several pieces of federal legislation imposing additional duties on employers, Title VII remains the most commonly cited law under which persons file charges with the EEOC. During fiscal year 2004, Title VII charges accounted for the greatest precentage of charges received by the EEOC, as compared to any other single statute.

Title VII of the Civil Rights Act of 1964

The ***Title VII of the Civil Rights Act of 1964,*** prohibits discrimination based on race, color, creed, religion, national origin, and sex. Keep in mind that a plaintiff may file a claim of discrimination alleging discrimination under more than one federal statute as well as more than one protected class. The burden of proof in such cases rests first with the person bringing the charge to show that (1) he belongs to a protected class; (2) he was qualified for a job; (3) though qualified,

some adverse employment action was taken against him (fired, not hired, demoted, etc.); and (4) thereafter the employer continued to seek applicants with the plaintiff's qualifications. If the plaintiff is able to establish each of these threshold elements, the burden then shifts to the employer to show a legitimate, nondiscriminatory reason for taking the adverse employment action. If the employer can do so, then the plaintiff is afforded one more opportunity to show that the reason given by the employer is a pretext and not the real reason for the decision. On June 12, 2000, the Supreme Court held that a plaintiff was not required to provide any evidence that the real reason for the adverse action was based on some unlawful, discriminatory intent, but only that the reason given by the employer was not true. The Court held that so long as the plaintiff was able to rebut the reason the employer gave as pretextual, then it may be appropriate for a jury to infer that the employer's motive was unlawful discrimination.

Case Study: Employee Relations—Civil Rights

A private laboratory has contracts with several companies to conduct "for cause" testing of employees whom the employer suspects have reported to work under the influence of drugs or alcohol. To ensure the donor does not tamper with the urine sample, employees must be monitored when giving a sample. The laboratory has a technician who currently conducts these tests. They have run into a problem, however. The clinical laboratory technician is male. Although employees sent for testing are permitted to give a urine specimen behind a curtain, many female employees refuse to do so with the male laboratory technician in the room. On these occasions, the laboratory has to call a female laboratory technician from another area to oversee the specimen collection process.

Would the laboratory be able to lawfully advertise for only female applicants for this position to monitor female donors? The answer is "Yes." When the work being performed may be reasonably perceived as private or personal in nature (security guards conducting searches of persons, video monitors in department store dressing rooms), then gender may be considered a BFOQ. It is important to note, however, that the courts have held that race may never be used as a BFOQ.

Unlawful Harassment

No issue under Title VII has received more attention over the last decade than issues related to unlawful harassment. From 1986 to 1993, the Supreme Court heard two landmark cases that laid the foundation for sexual harassment litigation under Title VII. From March 1998 to May 1998, however, the Court heard three cases (plus two under another federal statute) that further refined the definition and liability standards for unlawful harassment. The EEOC then followed suit and published new guidelines in June 1999 stating that ***unlawful harassment*** includes behaviors "based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers

should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful harassment."

Both the definition and liability standards for employers have changed a great deal. It is important that managers and supervisors understand the new duties and responsibilities that have been imposed on employers as a result of these decisions.

The Supreme Court has declared that the distinction between the former classifications of quid pro quo sexual harassment and hostile environment claims is of "limited utility." In cases in which an employee alleges some tangible economic harm (e.g., lost job, demotion, reduction of overtime or compensation), the employer may be held liable or strictly liable, meaning the employer will have no opportunity to put forward a defense. Only in the case of an allegation of harassment with no tangible economic harm may the employer be permitted to put forward an affirmative defense. That affirmative defense is basically a three-prong defense that requires the employer to show: (1) that the employer took reasonable care to prevent the harassment from occurring, (2) that the employer took reasonable care to promptly correct the harassment, and (3) the employee unreasonably failed to pursue these preventive or corrective measures or otherwise avoid harm. If the employer can meet all three elements, the company may escape liability for a claim of unlawful harassment. As a result, it is imperative that employers provide and document thorough training for managers and employees on unlawful harassment prevention, multiple resources for reporting complaints, and respond promptly to any questions, concerns, or complaints related to unlawful harassment.

In addition, the demographic landscape of harassment claims has changed quite dramatically after 9/11. In the year following the 9/11 attacks, the percentage increase in the number of claims of religious discrimination and harassment that were filed with the U.S. Equal Employment Opportunity Commission (EEOC) were more than double the preceding year. From 2000 to 2001, claims increased about 9.7%; from 2001–2002 the same claims increased at a rate of nearly 21%. They became so prevalent the EEOC named them "Post-9/11" and/or "Backlash" cases. Thus, employers are wise to follow the EEOC's guidance and develop policies and training programs that prohibit all forms of unlawful harassment, not just sexual.

Age Discrimination in Employment Act

The ***Age Discrimination in Employment Act (ADEA),*** passed in 1967, prohibits discrimination against any person 40 years old or older. Clinical laboratory managers and supervisors should also note that courts have held that even if both persons are 40 years old or older (a candidate not hired and the candidate hired, for example) the employer may still be guilty of age discrimination by not hiring the older worker. For example, if there are two applicants for a position, one is 42 years old and the other is 52, the 52-year-old candidate may have a prima facie case of age discrimination if she can present some evidence that the employer did not hire her because she was older than the other candidate, even though the other candidate was also over 40 years old.

It is important to check with your human resources department or legal counsel, as many states also have laws that prohibit discrimination against persons of any age, including those less than 40 years old.

Americans with Disabilities Act (ADA)

Case Study #1: Employee Relations—ADA

A clinical laboratory has a vacancy for a medical transcriptionist. The job requires candidates to be able to type at least 60 words per minute with an error rate of no more than 5%. Candidate A has more than 10 years in medical transcription, types 65 words per minute with a 2% error rate. She also has a very strong work record; however, she has been diagnosed with strong indications of carpel tunnel syndrome in her right wrist. To limit the tingling sensation and pain she occasionally experiences, she wears a wrist brace that extends over the lower portion of her hand on both sides and is visible even when she wears long sleeves. Candidate A applies in person for the job. She completes the application and takes a typing test. Impressed with her application, resume, and score on the typing test, the recruiter offers to immediately interview Candidate A for the position. One week later, Candidate A calls the employer to determine her status for employment. The recruiter tells her that, although she was highly qualified for the position, another candidate, whose qualifications were equally impressive, was selected. Candidate A has now filed a charge of discrimination with the EEOC alleging discrimination based on both perceived and present disability. Assuming Candidate A did have qualifications equal to those of the person hired for the job, did the employer discriminate against Candidate A based on a real or perceived disability?

The ***Americans with Disabilities Act (ADA)*** was passed in 1990 and prohibits discrimination based on a number of classifications of disabilities: a person who presently has a disability, has a past history of a disability, is perceived to have a disability, or associates with a person who has a disability. The Act defines a disability as any physical or mental impairment that substantially limits a major life activity. Major life activities are defined as, among other things, walking, talking, maintaining active employment, and conducting daily hygiene. The Act requires an employer to provide a qualified candidate or employee with a **reasonable accommodation.** A qualified candidate or employee is one who can perform the essential functions of the job with or without a reasonable accommodation. The employer does not, however, have to provide the candidate or employee with the best accommodation or one preferred by the candidate or employee.

Case Study #2: Employee Relations—ADA

A laboratory's busiest day is Monday. An employee tells his supervisor that he is currently undergoing medical treatment for a serious health condition. The treatment includes dialysis, which can only be conducted on Mondays and will require him to be

absent from work for the entire day. The employee is asking to have his job reduced to a part-time position, Tuesday through Friday, at least until the treatment is completed. At this time, his doctor projects the treatments will continue for at least 12 weeks. The supervisor knows that he cannot properly run the laboratory with one fewer person every Monday. Laboratory testing and results will be delayed, affecting patient care. The supervisor also knows there is a vacant position in Laboratory B that can accommodate the employee's request. Transferring the employee to Laboratory B would enable the supervisor to hire at least a temporary, full-time replacement.

Can the supervisor transfer the employee to work in Laboratory B part-time and hire a full-time replacement, at least temporarily? The answer is most likely, "Yes." The scenario actually involves the potential application of two federal laws. If the employee is eligible for Family and Medical Leave (FML), that law permits an employer to at least temporarily transfer an employee to another, comparable position, while taking intermittent FML. Under the ADA, the employer would also be providing the employee with a reasonable accommodation, assuming the condition qualifies as a disability under the ADA, although not the accommodation preferred by the employee. Note, however, if the employee requested a transfer to Laboratory B as a reasonable accommodation for a disability, the employer may be required to grant the request, even if a more qualified candidate is available for the job. In addition, keep in mind that if using the remedial device, such as medication, results in some other condition that substantially limit a major life activity, such as an inability to stay awake at work, then the employee may fall back under the purview and protection of the ADA.

In 1998, the Supreme Court of the United States answered another critical question. Is a person with a disability (high blood pressure or poor eyesight) who is no longer substantially limited in a major life activity when he uses a remedial device (medication or contact lenses), still covered under the ADA? The Supreme Court held that such persons were not intended to be and were not covered by the Act. Thus, if a candidate or employee is able to use a remedial device or measure so that he is no longer substantially limited in a major life activity, then that person is not covered by the ADA. Keep in mind that this would likely *not* include an amputee, for example, who wears a prosthetic leg so that he can walk and ambulate. Even with the prosthetic leg, he may still not be able to engage in some major life activities that many of us take for granted, such as running, jumping, walking or standing for extended periods. In addition, keep in mind that if using the remedial device, such as medication, results in some other condition that substantially limit a major life activity, such as an inability to stay awake at work, then the employee may fall back under the purview and protection of the ADA.

TERMINATION

A common basis of the employment relationships is the **at-will employment doctrine.** This doctrine maintains that the employment relationship is terminable at the will of either party. An employee may leave his or her job, at any time, for any

reason. Likewise, an employer may terminate the employment relationship at any time for any reason, including no reason. The limitation is that an employer may not terminate the employment relationship for an unlawful (discriminatory) reason.

Often, however, employers limit this relationship either intentionally through the use of written employment contracts or, unintentionally, through the creation of employment policies, practices, or statements inadvertently made during the interview process which are later construed to create an employment contract.

All policies, procedures, and handbooks should be reviewed and approved by your human resources department and general counsel before being published and distributed to employees or candidates for employment.

When it comes to terminating the employment relationship, a myriad of claims can arise including invasion of privacy, breach of contract, wrongful discharge, and more. Here are five tips to follow. Each tip addresses one of five elements, often referred to as the elements of **just cause.** Although they are not generally required absent a collective bargaining (union) agreement or other written contract, they serve as a reasonable foundation by which to assess the thoroughness of your reasons for discharging any employee.

1. Forewarning: Can you show that the employee in question has received some notice, either through instruction, coaching, a policy manual, or training, regarding the standard or expectation that he has failed to meet? Is this an assumption on your part, or do you have documentation to show that the employee received such notice?
2. Proper investigation: Have you spoken to all parties you can reasonably be expected to have knowledge regarding the information that has led to your decision to discharge? Most important, have you spoken to the employee to get his or her side of the story? Even if you believe there is no reasonable explanation the employee could provide, it is still imperative to give the employee that opportunity to present his or her case.
3. Evidence: Can you show that the information on which you are basing your decision to terminate is factual and not just perception or hearsay? Are there records to support your findings? If there are no tangible records, are there witnesses who are willing to give either a verbal or written statement supporting your decision? Are these witnesses credible?
4. Lack of discrimination: An employer should determine whether any single decision to discharge is consistent with comparable scenarios and past practice. If another employee engaged in the same wrongful conduct in another department and was *not* discharged, the employer should be able to justify why discharge may be appropriate in one department and not another. For example, lateness or absenteeism may be a much more serious offense in a critical care unit, owing to the potential, negative impact to patient care than it would in the office of volunteer services or gift shop.
5. Penalty meets the offense: Better known as the punishment fits the crime, it is important to assess whether the employee's behavior is salvageable and might be corrected with a lesser penalty. Discharge is often perceived by

arbitrators and courts as economic capital punishment and a measure of last resort. If it is reasonable that the employee might modify his or her behavior with a disciplinary suspension, consider that in lieu of discharge. Very serious or repeated infractions, however, deserve concomitant sanctions.

Managers should also become familiar with the basics of labor law and employees' rights under the National Labor Relations Act. One example was recently illustrated by a decision of the National Labor Relations Board in July 2000, which held that if a manager or supervisor interviews an employee as part of an investigation that may lead to disciplinary action of the employee being interviewed and the employee states that he or she does not want to meet with the management without a representative, the manager must grant the employee's request before continuing with the interview.

SUMMARY

The employment relationship can be as rewarding as it is fraught with pitfalls for liability. It has been the goal of this chapter to provide clinical laboratory managers and supervisors with some of the basics of the employment relationship so they may proactively identify issues in the workplace that have the potential to disrupt business operations and begin generating alternatives for avoiding a problem, rather than trying to negotiate the settlement of a problem after it has arisen.

The best manager and administrator need not be an expert in any of these areas but will be familiar with the basic concepts. They are then able to serve as a resource to the organization in seeking more information and asking questions before making any decision that affects any employee in the organization.

SUGGESTED PROBLEM-BASED LEARNING ACTIVITIES

Chapter 5: Human Resource Guidelines and Regulations

Instructions: Use Internet resources, books, articles, colleagues, etc., to present solutions to the problems listed below. There is no one correct solution to any problem.

Note to Instructor: Students in class may be divided into groups and given the problem-based learning activity to discuss and solve. Once the group has reached a consensus as to a solution, the group may present it to the other students in the class. This activity will provide all students with information regarding solutions to the problem.

Problem #1

Suppose your department has shown a 25% turnover rate. As manager you must develop a plan to encourage employee retention. In your plan, identify factors associated with excessive turnover.

Problem #2
Identify and define motivational techniques used in your institution to foster effective team interaction.

Problem #3
Suppose you are a laboratory manager and have an employee who is habitually late to work. Develop an action plan to remedy this behavior.

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Internet Resources

Department of Labor: Small Business Handbook
http://www.dol.gov/osbp/sbrefa/ main.htm

Equal Employment Opportunity Commission: Charge Statistics FY 1992 Through FY 2004
http://www.eeoc.gov/stats/charges.html.

Equal Employment Opportunity Commission: Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors
http://www.eeoc.gov/ policy/docs/harassment.html

Equal Employment Opportunity Commission: Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, October 2002
http://www.eeoc.gov/policy/docs/accommodation .html

HR Tools
http://www.hrtools.com