



2024 LABOR & EMPLOYMENT LAW SEMINAR

On the Gridiron: Labor & Employment Laws at Play

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NOVEMBER 13, 2024



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NEW RULES ON THE FIELD OF PLAY EMPLOYMENT LAW UPDATES

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NOVEMBER 13, 2024



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NEW WORKPLACE RULES EXPECTED UNDER TRUMP 2.0

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CHANGES AT NLRB

- New Board leadership
- New standard for employer workplace rules
- Restrictions on decertification of unions lifted
- New rules on political and social causes on workplace uniforms
- Rescinding new rule on when employer is required to bargain with unions without employee vote
- Rollback of “quickie election” rule



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CHANGES AT NLRB

- Cease crackdown on stay-or-pay provisions
- Remove ban on non-compete agreements
- Stop making student-athletes employees
- Legislation to give employees a voluntary opportunity to negotiate their own terms
- PRO Act dead
- Joint employer status redefined



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OSHA ROLE REVERSAL

- Remove first time penalties for violations (ranging up to \$16,131)
- Rejection of government oversight
- Cutting of number of inspectors
- Reduction of mandates on protective measures
- Rescinding some recordkeeping requirements
- Remove “union walkaround” rule



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DEPARTMENT OF LABOR NEW RULES

- Court stay on new OT rule raising salary threshold to nearly \$59k on January 1
- Trump DOL will scrap or scale back new salary threshold
- Plan for new rule!



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DEPARTMENT OF LABOR NEW RULES

- Federal Minimum Wage Increase
- No taxes on tipped wages and overtime pay
- Reverse course on independent contractors being categorized as employees

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EEOC FOCUS CHANGED

- End of pay data collection
- Audit employment eligibility verification process (Form I-9)
- Deregulation of AI usage
- Lid placed on DEI efforts
- Opposition to designating in PWFA abortion as a medical condition employers are required to accommodate

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FEDERAL
AGENCY
UPDATES

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DEPARTMENT OF LABOR UPDATE

- On January 10, 2024, DOL released a new independent contractor rule.
- DOL will focus on six factors in determining whether a worker is an independent contractor or employee:
 - Opportunity for profit or loss depending on managerial skill;
 - Investments by the worker and the potential employer;
 - Degree of permanence of the work relationship;
 - Nature and degree of control;
 - Extent to which the work performed is an integral part of the potential employer's business; and
 - Skill and initiative.

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DEPARTMENT OF LABOR UPDATE


- On April 23, 2024, DOL released a final rule to increase the salary threshold for white collar exemptions:

Date	Salary Threshold
Before July 1, 2024	\$684 per week \$35,568 per year
July 1, 2024	\$844 per week \$43,888 per year
January 1, 2025	\$1,128 per week \$58,686 per year

- The Rule includes a new mechanism that automatically increase the salary threshold on July 1, 2027 and every three years thereafter.
- The Rule does not change the existing job duties tests for any exemption.

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DEPARTMENT OF LABOR UPDATE

- Field Assistant Bulletin No. 2024-1 ("FAB")
 - Artificial Intelligence and Automated Systems in the Workplace under the FLSA and Other Federal Labor Standards
 - FAB addressed three areas impacted by AI and other automated systems: (1) FLSA, (2) FMLA, and (3) Nursing Mothers.
 - FAB emphasizes that statutory protections apply as usual, regardless of the new tools and systems employers use.
 - Employers must "exercise responsible human oversight" when using AI and other automated systems.


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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

- Charge Statistics for Fiscal Year 2023
 - Retaliation** — 57% (46,047)
 - Disability** — 36% (29,160)
 - Race** — 34% (27,505)
 - Sex** — 31% (25,473)
 - Age** — 17.4% (14,144)
 - National Origin** — 8.6% (6,963)
 - Color** — 7.2% (5,819)
 - Religion** — 5.4% (4,341)
 - Pregnancy** — 3.7% (2,966)

EEOC Charge Receipts by State
FY 2023



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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

- Annual Performance Report for Fiscal Year 2023
 - Recovered \$665 million in monetary relief for victims of discrimination (nearly 30% increase over FY 2022)
 - Received more than 81,055 new discrimination charges (10% increase*)
 - Filed 143 lawsuits (50% increase over FY2022)
 - Nearly 500 new positions within EEOC – mostly investigators, investigative support assistants, mediators, and attorneys
- Draft Strategic Enforcement Plan for Fiscal Years 2024-2028
 - Establishes the EEOC's substantive area priorities
 - First Priority is "Eliminating Barriers in Recruitment and Hiring"
 - Another was preventing and remedying systemic harassment and protecting vulnerable workers

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

o Pregnant Worker Fairness Act Regulations

- Expansive definition of "pregnancy, childbirth, or related medical conditions"
- Expansive definition of "qualified" employee or applicant
 - Requires employers to consider eliminating one or more essential functions of a job for a temporary period
- Require employers to engage in the interactive process and expeditious response to an employee's request for reasonable accommodation
- Adopts 4 presumptively reasonable accommodations
- Restricts when employers may ask for documentation to support a request for reasonable accommodation and what information they may request

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION UPDATE

o Enforcement Guidance on Harassment in the Workplace

- First updated harassment guidance in 25 years
- Incorporates legal developments (e.g., *Bostock*) since last updated
- Includes updated examples aimed at addressing harassment in modern workplaces (e.g., virtual or hybrid work environments), newly recognized protected statuses, and crossed protected bases



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OSHA UPDATE

- o Emergency Response NPRM
- o Enhancing Coverage of Preventative Services under the Affordable Care Act
 - Hrg Nov 12th
- o Worker Walkaround Representative Designation Process – 04-01-24
- o Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings NPRM
 - Comment Period ends December 30, 2024
- o Top 10 List of Violations
- o Increased Penalties

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OSHA'S TOP 10 VIOLATIONS 2024

- Between October 1, 2023, and September 5, 2024:
- 1. Fall Protection—General Requirements: 6,307 violations
- 2. Hazard Communication: 2,888 violations
- 3. Ladders: 2,573 violations
- 4. Respiratory Protection: 2,470 violations
- 5. Lockout/Tagout: 2,443 violations
- 6. Powered Industrial Trucks: 2,248 violations
- 7. Fall Protection – Training Requirements: 2,050 violations
- 8. Scaffolding: 1,873 violations
- 9. Personal Protective and Lifesaving Equipment – Eye and Face Protection: 1,814 violations
- 10. Machine Guarding: 1,541 violations

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SUPREME COURT UPDATE

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MULDROW V. CITY OF ST. LOUIS, MISSOURI

**Issue**


- Whether discriminatory transfer decisions violate Title VII of the Civil Rights Act

**Holding**

- Yes, while Muldrow must demonstrate “some harm” to an identifiable term or condition of employment, this harm need not be significant or material.

**Importance**

- While the case was about transfers, it will have broad applicability in discrimination cases moving forward.
- We are likely to see claims brought over a broad range of workplace decisions that, prior to *Muldrow*, would have been considered to trivial to bring a discrimination claim.



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LOPER BRIGHT ENTERPRISES V. RAIMONDO

? **Issue**

- Whether courts should give deference to agencies' interpretation of laws that they enforce

Holding

- No, the Administrative Procedure Act requires courts to exercise their independent judgement in deciding whether an agency has acted within its statutory authority, and
- Courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.

! **Importance**

- The Court's decision empowers regulated entities to challenge agency decisions with reasoned arguments and allows courts to play a more active role in scrutinizing federal regulations.



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LINDKE V. FREED & O'CONNOR-RADCLIFF V. GARNIER

? **Issue**


- Do elected officials violate the First Amendment by deleting comments or blocking certain users?

Holding

- Yes, if the official (1) possessed actual authority to speak on the government's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts.

! **Important Takeaway**

- To determine whether an official was acting in an official capacity or as a private citizen on social media, factors to be considered include: (i) whether the account was designated as personal or official, (ii) whether individual posts expressly invoked the official's state authority, (iii) the immediate legal effect of the posts, and (iv) other contextual facts, such as the official's use of government staff to make posts.



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SOCIAL MEDIA AFTER LINDKE

- To keep a personal account from becoming a government or mixed-use account, consider the following:
 - Do not put your official position on your personal account.
 - Post a disclaimer on your personal account identifying the account purpose and that the opinions you express are your own.
 - Limit the account content to personal use.
 - Understand the privacy settings and use them to manage the account.
 - Have a plan to respond to government-related comments.
 - **DON'T** write posts on personal accounts that fit within the scope of your employment.
 - **DON'T** discuss your private accounts in public meetings or documents.
 - **DON'T** use government devices to maintain your private account or link to your private account from any official city account.



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2024-2025 SUPREME COURT CASES

- **Stanley v. City of Sanford, Fla.**
 - Question arising under the Americans with Disabilities Act
 - Stanley's suffered from Parkinson's disease, which forced her to retire after more than 20 years of service as a firefighter
 - Stanley filed lawsuit alleging that the City's benefits policy discriminated against disabled retirees



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2024-2025 SUPREME COURT CASES

- **E.M.D. Sales Inc. v. Carrera**
 - Question arising under the Fair Labor Standards Act (FLSA)
 - Employees classified as outside sales
 - Issue: Burden of Proof
 - Context: Primary Duty Examination



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2024-2025 SUPREME COURT CASES

- **Ames v. Ohio Dept. of Youth Services**
 - Question arising under Title VII of the Civil Rights Act of 1964
 - Ames alleges she was passed over for a promotion then demoted because of her heterosexuality
 - Filed lawsuit alleging sex discrimination against straight employees



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FEDERAL TRADE COMMISSION LITIGATION

- Non-Compete (Not so) Final Rule
- Ryan LLC v Federal Trade Commission
- Nation-wide Stay

• **Allowed:**

- Sale of business
- Franchisors/Franchisees
- Existing Senior Executive Agreements

• **Banned:**

- New Non-compete agreements
- Prohibits enforcement of all other non-competes

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STATE LAW UPDATES & TRENDS

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STATE LAW UPDATES & TRENDS

- Nebraska Minimum Wage Increase
 - January 1, 2025: \$13.50/hour
 - January 1, 2026: \$15.00/hour
 - Annual COL increases beginning 2027
- Colorado Minimum Wage Increase - 2025
 - Denver \$18.81
 - Boulder County (Unincorporated Areas) \$16.57
 - Edgewater \$16.52
 - If No higher local minimum: \$14.81




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NEBRASKA LAW UPDATES & TRENDS

- Nebraska Case Law
 - *Lancaster County v. Slezak*, 317 Neb. 157 (2024)
 - **Holding:** Appropriate remedy for delayed performance evaluations under a CBA is (1) performing the evaluation, and (2) granting a retroactive merit increase *only if* the evaluation reveals that the applicant would have qualified for a merit increase.
 - *Wright v. S.W. Airlines Co.*, 315 Neb. 911 (2024)
 - **Holding:** For purposes of unemployment benefits, misconduct related to voluntary social committees or other committees constitutes “work-related misconduct” if the harm affects other employees, even if such misconduct occurs off-duty and does not involve company resources.



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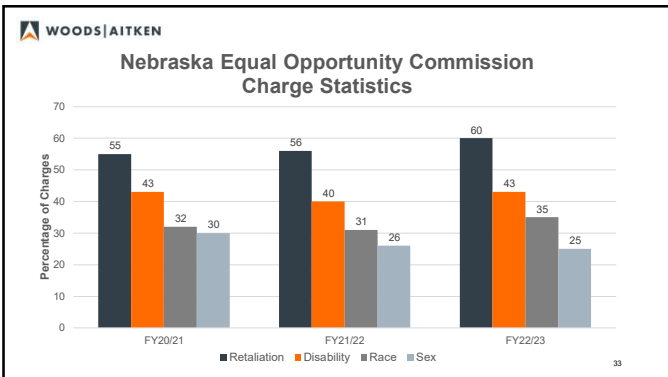
NEBRASKA LAW UPDATES & TRENDS

- Eighth Circuit Opinions
 - *Huber v. Westar Foods, Inc.*, 106 F.4th 725 (8th Cir. 2024)
 - **Holding:** Termination for violations of workplace policies or other misconduct must be sufficiently independent from any disability, otherwise the employer may not be able to rely upon the “honest belief” rule.
 - *Noon v. City of Platte Woods, Missouri*, 9 F.4th 759 (8th Cir. 2024)
 - **Holding:** First Amendment protections may apply to public employee whistleblowers even if the disclosure of alleged corruption is required by their job duties.



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WHAT'S THE 'END GAME' FOR LABOR & EMPLOYMENT?

- Federal Level:
 - Return to Trump's Pro-Employer Policy Positions
 - Reformation of Federal Agency Priorities
- State Level Across All States:
 - Expansion of Paid Leave Benefits
 - Evolving regulations for Cannabis/Medical Cannabis
 - Limitations on Non-Competes / Restrictive Covenants
 - Increased Efforts to Regulate AI-Based Systems
 - Pay Transparency
 - CROWN Acts



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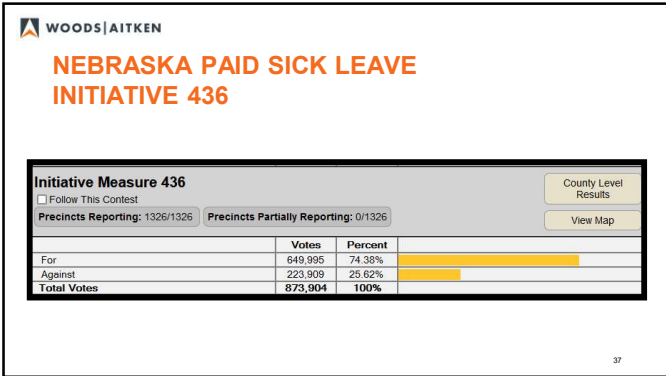
TWO-MINUTE DRILL – PREPARING FOR THE BALLOT INITIATIVES: MARIJUANA & PAID SICK LEAVE

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NEBRASKA PAID SICK LEAVE INITIATIVE 436

What is it?

- Enacts a statute to provide eligible employees the right to earn paid sick time for personal or family health needs
- Benefits depend on Employer Size
 - < 20 Employees: Accrue up to 40 hours of paid sick leave / year*
 - ≥ 20 employees: Accrue up to 56 hours of paid sick leave / year*
 - * Can accrue at a higher rate



Who's a covered employer?

Who's an employee?

Who's in an employee's family?

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NEBRASKA PAID SICK LEAVE

Employer: Any person or entity who employs at least one employee, but not...


- The United States; or
- The State of Nebraska, or its agencies, departments, or political subdivisions
- Counting Rules for Small Employer Status:
 - Counting to less than 20 requires counting full-time, part-time, and temporary employees
 - You have to have stayed below 20 employees in each of 20 or more calendar weeks in the current AND preceding calendar years

Employee: Someone permitted to work, but not...

- Individuals who work in Nebraska < 80 hours in a calendar year; or
- Someone subject to the Railroad Unemployment Insurance Act

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NEBRASKA PAID SICK LEAVE


Family Member: Many defined people, but also: “any other individual related by blood to the employee or whose close association with the employee is the equivalent of a family relationship.”

Defined Familial Relationships:

- Biological, adopted, foster, or step- children or legal wards
- Child to whom the employee stands *in loco parentis*
- Biological, adoptive, foster, or step- parent or legal guardian of employee or employee’s spouse
- A person who stood *in loco parentis* to employee or employee’s spouse when either was a minor child
- Legally married spouse
- Grandparent, grandchild, or sibling whether biological, foster, adoptive, or step- of employee or employee’s spouse

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NEBRASKA PAID SICK LEAVE

Accrual


- **Amount:** Employees earn 1 hour of paid sick leave for every 30 hours worked. (Employers can choose a faster accrual rate.)
- **Accrual Start Date:** Commencement of employment or October 1, 2025, whichever is later.
- **Process:** Accrue as earned or at the beginning of the year.

What about my exempt / non-overtime / salaried employees?

I don't even track their time.

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NEBRASKA PAID SICK LEAVE

Carryover: Two Options

- Accrued paid sick time carries over to the following year.
 - Small businesses (<20 employees) aren't required to permit use of more than 40 hours / year.
 - Other businesses (≥ 20 employees) aren't required to permit use of more than 56 hours / year.
- Pay out unused sick leave at end of year, and make the 40/56 hour sick leave allotment immediately at beginning of next year.

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NEBRASKA PAID SICK LEAVE

Use

- *Increments of Use:* One hour or the smallest increment the employer's payroll system uses.
- *Work Coverage:* An employer cannot require an employee to find a replacement worker to cover their hours as a condition of taking paid sick time.

Can I require employees to provide me notice of a need to use paid sick time?

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NEBRASKA PAID SICK LEAVE

Notice

- Written policy **must** be provided with reasonable procedures to provide notice.
- If you don't provide the employee a copy of the written policy, you can't deny paid sick time based on non-compliance.

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NEBRASKA PAID SICK LEAVE


Documentation

- If an employee uses paid sick time for more than three consecutive *workdays*, an employer can require "**reasonable documentation**" that the time was used for a covered purpose.
 - "Paid sick time ... shall be provided upon the oral request of an employee."
 - "When possible, the request shall include the expected duration of the absence."

Great. So at least I can still require a doctor's note...right?

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NEBRASKA PAID SICK LEAVE

Reasonable Documentation

- Documentation signed by a health professional; or
- If the employee/family member didn't get services of health professional or if documentation can't be obtained in reasonable time or without added expense, then "a written statement from the employee indicating that the employee is taking or took paid sick time for a qualifying purpose" is sufficient.



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NEBRASKA PAID SICK LEAVE

All this discussion of use, notice, and reasonable documentation...my employee is trying to tell me that he doesn't have to give me details about the health condition at issue. That can't be right...can it?

"Unless otherwise required by law, an employer cannot require disclosure of the details of an employee's or an employee's family member's health information as a condition of providing paid sick time."

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NEBRASKA PAID SICK LEAVE

Permitted Reasons for Leave

- An employee's:
 - Mental or physical illness, injury, or health condition;
 - Need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
 - Need for preventative medical care.

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NEBRASKA PAID SICK LEAVE

Permitted Reasons for Leave

- Care of a family member who:
 - Has a mental or physical illness, injury, or health condition;
 - Needs care for a medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition;
 - Needs care for preventative medical care; or
 - *In the case of a child*, needs to attend a meeting necessitated by the child's mental or physical illness, injury, or health condition, at a school or place where the child is receiving care.

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NEBRASKA PAID SICK LEAVE

Permitted Reasons for Leave

- Public Health Emergency (PHE) Related Reasons
 - Closure of the employee's place of business by order of a public official due to a PHE;
 - An employee's need to care for a child whose school or place of care has been closed by order of a public official due to a PHE; or
 - An employee's need to self-isolate or care for the employee or a family member when it has been determined by the health authorities having jurisdiction or by a health care professional that the employee's or family member's presence in the community may jeopardize the health of others because of exposure to a communicable disease, whether or not the employee or family member has actually contracted the communicable disease.

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NEBRASKA PAID SICK LEAVE

Employer Notice Requirements to Employees by Sept. 15, 2025:

- The notice must state that beginning October 1, 2025, employees are entitled to paid sick time; identify the amount of paid sick time; and state the terms of its use guaranteed under the Nebraska Healthy Families and Workplaces Act.
- Retaliatory action against employees who request or use paid sick time is prohibited.
- There's a right to file a suit or complaint if paid sick time is denied or retaliation occurs.
- Provide the contact information for the department where questions about rights and responsibilities under the act can be answered.
- Retaliation against employees who request or use paid sick time is prohibited.

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NEBRASKA PAID SICK LEAVE

Additional Notice Requirements:

- Regular Paycheck must include:
 - Amount of Paid Sick Time Available
 - Amount of Paid Sick Time Taken To-Date that Year
 - Amount of Pay Received as Paid Sick Time
- Poster at Each Establishment with Employees
- If No Physical Workplace or Employee is WFH, then Electronic Notice or Posting in Web-Based Platform is Required

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NEBRASKA PAID SICK LEAVE

Confidentiality

- Any health information an employer possesses regarding an employee or employee's family member must be:
 - Maintained on a separate form and in a separate file from other personnel information.
 - Treated as confidential medical records.
 - Not be disclosed except to the affected employee or with the express permission of the affected employee.

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NEBRASKA PAID SICK LEAVE

Miscellaneous

- Employers can "loan" sick leave in advance of accrual.
- The Leave is "Sticky"
 - Follows employee through divisions, entities, or locations so long as the employee remains employed by the same employer.
 - At employment separation, previously accrued, but unused sick leave must be reinstated if the employee is re-hired within 12 months by the same employer.

What happens when someone quits before they accrue the leave they took early?

I'm thinking about hiring someone for a second tour of duty. But, the other applicant is new and doesn't come in with 20+ hours of sick leave. I think I'll hire the new person. Issues?

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NEBRASKA PAID SICK LEAVE

○ Miscellaneous

- Be careful with neutrally-applied “point” systems.

“It shall be unlawful for an employer’s absence control policy to count paid sick time taken under the act as an absence that may lead to or result in a retaliatory personnel action or any other adverse action.”

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NEBRASKA PAID SICK LEAVE

○ Alternative to All of That

- Have a generalized PTO policy that meets or exceeds these requirements.
- Must be allowed to be used “for the same purposes and under the same conditions as paid sick time under the act.”

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NEBRASKA PAID SICK LEAVE

Administrative Penalties

- Monetary
 - First Violation: No more than \$500
 - Second + Violations: No more than \$5,000
- Short contest period (15 working days) if notified of citation or penalty
- Citations and names of violators will be available to public upon request
 - Violations being contested are excluded

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NEBRASKA PAID SICK LEAVE

Civil Penalties

- Private right of action for "legal and equitable relief."
- Attorney fees can be ordered to a plaintiff.
- Administrative citation is admissible as evidence unless the citation was contested and shall not be admitted until that contest is resolved.
- Four-year statute of limitations
(Context: 300-day SOL for discrimination/harassment suits)

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EMPLOYMENT CONSIDERATIONS

- **Review your leave policies.**
 - Even if the total amount of leave provided is greater than 40 or 56 hours, do the usage/notice/documentation policies comply?
 - Do you want to consider moving from PTO to a mix of vacation and sick leave?
- **Review your attendance policies.**
 - Ensure you're not penalizing anyone for use of sick time.

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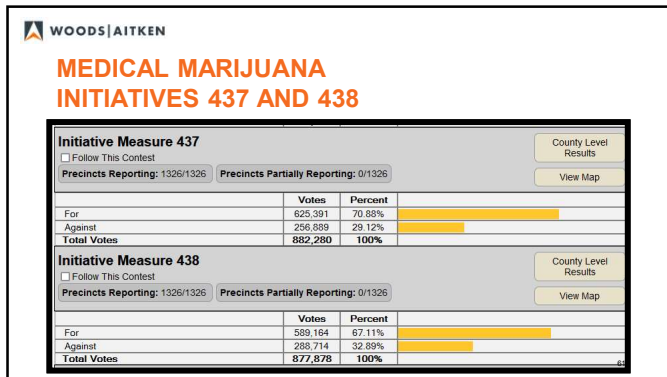
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EMPLOYMENT CONSIDERATIONS

- **Consider how you're going to track hours/use for sick leave.**
 - Exempt / Salaried Workers v. Hourly Workers
 - What is a sick leave hour v. vacation hour?
- **Retain sick leave attendance records for at least 4 years post-termination.**

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MEDICAL MARIJUANA INITIATIVES 437 AND 438

What are these initiatives, and why are there two?

Initiative 437: Nebraska Medical Cannabis Patient Protection Act

Initiative 438: Nebraska Medical Cannabis Regulation Act




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437: MEDICAL CANNABIS PATIENT PROTECTION ACT

It legalizes the use, possession, and acquisition of cannabis for medical purposes for qualified patients.

- **Qualified Patient:** Someone with a written recommendation from a health care practitioner, and in the case of someone < 18, written permission of parent or legal guardian.
- **Health Care Practitioner:** Can be a physician, osteopathic physician, physician's assistant, or nurse practitioner.
- **What drugs are covered?**
 - The allowable amount of cannabis is up to 5 ounces.
 - Cannabis includes marijuana, hashish, and concentrated cannabis.
 - It does not include hemp, certain parts of the plant, or cannabidiol (CBD) contained in a drug product approved by the federal FDA.

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437: MEDICAL CANNABIS PATIENT PROTECTION ACT**What constitutes written recommendation?**

- “[S]igned and dated declaration from a health care practitioner stating that, in the health care practitioner’s professional judgment, the potential benefits of cannabis outweigh the potential harms for the alleviation of a patient’s medical condition, its symptoms, or side effects of the condition’s treatment.”
- Valid for two years after the date of issuance or for a period of time specified by the health care practitioner on the written recommendation.

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438: MEDICAL CANNABIS REGULATION ACT

Regulates the possession, manufacture, distribution, delivery, and dispensing of cannabis for medical purposes by registered cannabis establishments in the state.

- **Keys to Note:**
 - The word “use” is not included in this statement.
 - There is no reference to users. Rather, this initiative is regulating the possession, manufacture, distribution, delivery, and dispensing of the drug.
- **Key Dates:**
 - **By July 1, 2025:** Commission must establish criteria to accept or deny applications for registrations
 - **By October 1, 2025:** Commission must begin granting/denying registrations to applicants

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INTERACTION OF 437 AND 438

- The use of medical marijuana does not seem to be tied in any way to the regulation of those entities that distribute/manufacture it.
- *But...how can someone legally obtain the drug without doing so from an authorized distributor?*

Can medical marijuana usage start before the regulations on distribution / manufacture?

- **Issues:** Transport across state lines.
Not yet legal to buy in Nebraska.



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EFFECTIVE DATES

- **Ballot measures take effect upon the Governor's proclamation of election results.**
 - Canvass is certified on the 4th Monday after the election (December 2, 2024)
 - Proclamation must be made within 10 days of the completion of the election results canvass. (December 12, 2024)
 - Neb. Rev. Stat. § 32-1037 and § 32-1414
- **Medical marijuana initiatives are facing legal challenges re: signature collection process.**
 - Trial in Lancaster County District Court finished November 4, 2024
 - Post-trial briefing through November 18, 2024
 - Appeals could follow

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EMPLOYMENT CONSIDERATIONS

- **Marijuana is still illegal at federal level and classified as a Schedule 1 Drug under federal law.**
 - Federal ADA would not protect state-authorized marijuana usage at this time.
- **Unlike other states:**
 - There's no express provision that would allow employers to prohibit marijuana usage among employees.
 - There's no express provision to the contrary, either.
 - **So:** Consider state anti-discrimination laws relating to disabilities.
 - We don't know how that issue will be decided.
 - States have decided both ways.

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EMPLOYMENT CONSIDERATIONS

- Review your drug testing policy and safety policies.
- Consider whether modifications are needed:
 - Consider safety sensitive positions vs. all other positions.
 - Talk to your drug testing facility.
 - Enforce standards consistently.
- Consider the impact on recruitment/retention of employees if you prohibit the use of medical marijuana.

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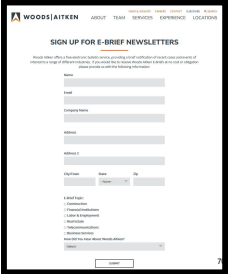


EMPLOYMENT CONSIDERATIONS

There's a lot we don't know yet!

Have you joined our E-Brief list?

<https://www.woodsaitken.com/sign-e-brief-newsletters>



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BREAK

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UNDER REVIEW


CRITICAL CONVERSATIONS IN THE WORKPLACE

PAMELA J. BOURNE
ASHLEY H. CONNELL


NOVEMBER 13, 2024



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UNDER REVIEW: MEET YOUR REFEREES



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MANAGEMENT PRINCIPLES



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CORE PRINCIPLES OF GOOD MANAGEMENT



Effective
Communication



Fairness



Consistency



Empathy & Support

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EFFECTIVE COMMUNICATION

- Effective communication is **clear** and **concise**.
- Strategies to improve communication skills:
 - Prepare ahead of time
 - Don't put off the conversation
 - Be mindful of nonverbal communication
 - Watch your tone
 - Practice active listening (clarify and verify)
 - Empathy

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HOW DO EMPLOYERS DEMONSTRATE FAIRNESS

1

Comply with
employment
laws

2

Follow own
policies and
practices

3

Provide
feedback
and evaluate
objectively

4


Be
consistent

5


Document
appropriately

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REASONABLE ACCOMMODATIONS & THE INTERACTIVE PROCESS




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REASONABLE ACCOMMODATIONS & THE INTERACTIVE PROCESS

Employers are required to provide reasonable accommodations to qualified employees or applicants due to disability; religious observance and practice; pregnancy, childbirth or related medical condition, unless the accommodation would impose an undue hardship.



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THE INTERACTIVE PROCESS

- ☐ To determine whether an accommodation request is reasonable, effective, and would not impose an undue hardship, employers are required to engage in the **interactive process**.
- ☐ However, employers create liability by failing to have these important conversations.

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FAILING TO ENGAGE IN THE INTERACTIVE PROCESS

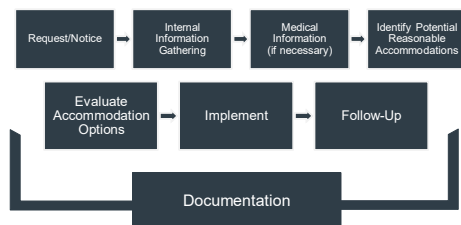
□ Why?

- Jumping to conclusions that an accommodation request is unreasonable or would impose undue hardship without supporting evidence
- For example, denying reasonable accommodation requests based on:
 - "That's going to cost too much money"
 - "We've never done that for anybody else"
 - "If I did that for you, I'd have to do that for everybody"

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THE INTERACTIVE PROCESS



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POTENTIAL REASONABLE ACCOMMODATIONS

□ Examples of Common Reasonable Accommodations

- | | |
|--------------------------------|---|
| • Using assistive technologies | • Change in equipment |
| • Change in schedule | • Change in work environment |
| • Change in break times | • Elimination or exchange of marginal job tasks |
| • Using job aids | • Re-assignment |
| • Change in work location | • Leave of absence |

- **Job Accommodation Network (JAN):** Free consultant service that helps employers make individualized accommodations

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NOT REASONABLE ACCOMMODATIONS

- Lowering performance or behavior standards/expectations
- Eliminating essential job duties or customizing a job to fit work restrictions
- Creating light duty or a new job
- Tolerating excessive attendance problems
- Accepting the impairment as an excuse for performance or behavior problems

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**ACCOMMODATING A
MENTAL HEALTH
IMPAIRMENT**

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PENALTY FLAG: THINGS TO AVOID

- Focusing on the diagnosis
- "I can't just change the rules for one person"
- Allows others to engage in the requested accommodation (inconsistency)
- Saying no to requested accommodation without presenting any alternatives

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ACCOMMODATING A MENTAL HEALTH IMPAIRMENT

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TAKEAWAYS

- **Power Phrase:** “What can I do to help you be successful here at work?”
- Ask questions to understand the limitations impact on essential job functions
- Be prepared to talk about alternatives
- Try accommodations to determine effectiveness or if it will impose undue hardship; requires follow up

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RELIGIOUS ACCOMMODATION

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RELIGIOUS ACCOMMODATION

- Anticipated increase in religious discrimination claims and accommodation requests
 - Supreme Court changed standard for “undue hardship” in religious accommodations
 - From “de minimis” to a “substantial increased costs in relation to the conduct of its particular business”
 - FY2023, the EEOC reported receiving double the religious discrimination charges filed in comparison to FY2021

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RELIGIOUS ACCOMMODATION

- Special considerations for religious accommodations (cont.)
 - Potential religious accommodation requests
 - Attire and grooming (e.g., long hair and beard, permitted to wear religious garments and jewelry, etc.)
 - Modified schedule (e.g., no work on Sunday/Saturday, holiday days of observation)
 - Leave to attend religious ritual or ceremony
 - Additional breaks or alternative break schedule
 - Abstaining from workplace requirements for religious purposes
 - Providing space for religious observation (e.g., space to pray)

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RELIGIOUS ACCOMMODATION

- Special considerations for religious accommodations (cont.)
 - Additional work for co-workers is not enough
 - Must demonstrate “substantial increased costs” to constitute undue hardship
 - If a requested accommodation poses an undue hardship, the employer must initiate consideration of other possible accommodations
 - Evolving area of the law, so work closely with legal counsel

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RELIGIOUS
ACCOMMODATION

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PENALTY FLAG: THINGS TO AVOID

- o Focusing on the sincerity of the religious belief and asking questions about the specific religion, rather than the interactive process
- o If I did that for you, I'd have to do that for everybody
- o It will create more work for co-workers and impact morale

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RELIGIOUS
ACCOMMODATION

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TAKEAWAYS

- **Power Phrase:** "Thank you for bringing this to my attention. I want to support you however we can. Can you help me understand what you need?"
- Ask for clarification to understand the limitation due to religious obligations
 - Do not challenge the sincerity of the belief
- Exchange ideas for potential accommodations
 - Do not have to accept an employee's preferred accommodation if other reasonable and effective accommodations are available

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PERFORMANCE COACHING & ADDRESSING CONDUCT CONCERNS

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PERFORMANCE COACHING

- Normalize performance coaching; communicate often
- Performance coaching should reflect overall performance – recognition of the good, identify areas to improve, and set goals/expectations
 - Studies show there is a correlation between engagement and the frequency with which employees receive recognition or praise for doing good work.
 - A failure to address deficiencies is interpreted by employees as "no news is good news." If you are silent, an employee will believe he/she is meeting expectations.
 - If you need to ultimately discipline/fire someone, he/she should not be hearing the reasons for the first time when disciplined/fired. It's a matter of fairness.

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PERFORMANCE COACHING

- Questions to ask:
 - How are you?
 - Do you have any updates from our last meeting?
 - What are you focusing on now?
 - How are you feeling about your workload?
 - How are you feeling in your role?
 - What can I do to support you?
 - Where do you see the team falling short?
 - Do you have any questions about [insert topic]?
 - Do you have any feedback for me?
 - Is this format working for you?

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PERFORMANCE COACHING

- Prompt feedback (within a week) on deficiencies
- Identify (with specifics) the deficiency by theme or violation of policy
- Reason why it's important for the deficiency to be addressed and consequence of reoccurrence
- Constructive (not destructive) – use respectful language
- Express optimism that employee “can do it”
- Ask employee for thoughts on proactive plan and commitment to improve
- Document the conversation (memo to file or memo to employee)

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PERFORMANCE COACHING

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PENALTY FLAG: THINGS TO AVOID

- Putting someone on a performance improvement plan without prior discussions
- Not coming prepared to discuss examples
- Only focusing on the negative
- Failing to offer support or guidance
- Tone of conversation (dismissive, belittling, not empathetic)

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PERFORMANCE COACHING

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TAKEAWAYS

- Normalize feedback with fair assessment of overall work performance
 - Recognizes positives and identify opportunities for growth
- Ask for employee's input
- Offer strategies to overcome performance challenges
- Set expectations moving forward
- Offer opportunity for employee to provide feedback or make request

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ADDRESSING
INAPPROPRIATE
WORKPLACE
CONDUCT

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TAKEAWAYS

- Promptly address conduct issues
- Identify workplace policy and how conduct does not align
- Explain importance and purpose behind policy and procedure
- **Power Phrase:** "Can I count on you to . . . ?"
- Stay consistent and stand firm on expectations

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SUICIDE
IDEATIONS

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PENALTY FLAG: THINGS TO AVOID

- Tone of conversation (dismissive, belittling, not empathetic)
- Isolating employee at home
- Failing to identify resources and support
- Threatening position

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SCENARIO

SUICIDE IDEATIONS

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TAKEAWAYS

- Tone of conversation (caring, supportive, empathic)
- Offering suggestions to deal with personal circumstances
- Identify support system outside of the office
 - **Power Phrase:** "Thank you for trusting me with this. ... Do you have someone that I can call for you? I don't want you to go home and be alone right now."
- Offering resources and support


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 **DISCHARGE**

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 **BEFORE YOU THINK ABOUT TERMINATION...**

- ☐ Did you properly investigate?
 - o In the case of misconduct, conduct a prompt, fair and impartial investigation.
 - o In the case of poor job performance, verify objective evaluations justifying discharge.
- ☐ Do you have documentation that matches the reasons justifying termination?
 - o Performance evaluations;
 - o Disciplinary action forms;
 - o Job descriptions;
 - o Prior communications regarding performance/behavior; and
 - o Handbooks, CBAs, SOPs, and other relevant documents.
- ☐ What kind of overall employment record does the employee have (e.g., salary increases, prior discipline, length of employment)?

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 **BEFORE YOU THINK ABOUT A TERMINATION...**

- ☐ Does this seem fair?
 - o Verify the employee knew what was expected and failed to meet those expectations.
 - o Was the employee afforded due process?
 - o Are there any extenuating circumstances?
 - o Are the standards and rules in question appropriate?
 - o Is the penalty reasonable?
- ☐ Is this consistent with how I have treated other similarly situated individuals for engaging in the same conduct/behavior?

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BEFORE YOU THINK ABOUT A TERMINATION...

- ☐ Were there any implied or actual commitments made concerning length of employment in written communications to the employee?
- ☐ Were any verbal representations made to the employee regarding job security?
- ☐ Have all applicable provisions of the employee handbook (or CBA or SOPs) been followed?
- ☐ Consider consulting with human resources and/or legal counsel if you believe an employee should be discharged.

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COMMUNICATION DURING DISCHARGE

1. Prepare: Use a carefully drafted script for what you want to say:
 - a. Identify the behavior or pattern giving rise to discharge.
 - b. Identify the grounds/themes for discharge.
 - c. Point to a specific policy violation, if possible.
2. Use professional and respectful language.
3. Do not debate the merits of your decision with the employee.
 - If necessary, tell employee that **“it serves no purpose to debate the issue; the decision has been made.”**
4. Make supervisory notes to file about your conversation with employee and what you said. Attach all supporting documentation.

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SCENARIO

TERMINATION

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PENALTY FLAG: THINGS TO AVOID

- Allowing emotion to control the tone of the conversation
- Not prepared? Provides vague reasons for termination and could not provide examples
- Dispute about if there were prior discussions, but no documentation to support
- Previous performance evaluation and compensation history is inconsistent with the decision

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SCENARIO

TERMINATION

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TAKEAWAYS

- Tone of conversation (respectful but firm)
- Previous conversations and documentation to support
- **Power Phrases:**
 - "After careful consideration, I've made the difficult decision to terminate your employment. We have previously discussed our concerns about your performance, so this should not come as a surprise to you. You have a number of abilities, but unfortunately, those skills don't align well with the needs for this position."

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AVOIDING THE PENALTIES – ASK AN ATTORNEY!

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NOVEMBER 13, 2024



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THANK YOU!

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