

## Law: Boosting Compliance to Personnel Law

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### Faculty and Staff Disclosures

Jeannette Y. Wick, RPh, MBA, FASCP, has no financial relationships with ineligible companies to disclose.



Nothing—absolutely nothing—in this presentation should be construed as legal advice!

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## Working for a Living: Employment laws protect you

Whether you are a supervisor or an employee

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### Educational Objectives

*After completion of this activity, participants will be able to:*

- Differentiate critical state and federal personnel law
- Explain common personnel laws and issues with their implementation
- List pharmacy-related laws most likely to be violated
- Identify ways to improve adherence to laws

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## Boosting Knowledge

Differentiate critical state and federal personnel law

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### How do federal and state law compare?

- A. Most states use a model that mimics federal system
- B. State law trumps any federal law in explicit conflict
- C. The law that affords the fewest rights always prevails

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### Jurisdiction

- The U.S. Constitution codifies primary distinctions between areas of jurisdiction at a national level
  - Originally, the states were supposed to be a loose confederation of separate countries!
  - Each state promulgates its own laws; they vary widely
  - Most states use a model that mimics federal system, allowing counties, parishes, or municipalities to handle matters that are uniquely local
- Courts' jurisdiction is more complicated
  - State courts can hear matters of federal law, and federal courts can hear matters of state law under certain conditions
  - State courts often limit their jurisdiction based on dollar amount or claim type

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	Federal Law	State Law
<b>Definition</b>	The body of law created by the federal government	Law of each separate U.S. state, as passed by the state legislature and adjudicated by state courts <ul style="list-style-type: none"> <li>• Parallel, and sometimes in conflict with, federal law.</li> </ul>
<b>Constitutional power</b>	US Constitution provides for a federal government superior to state governments regarding enumerated powers	No state law can abolish or reduce the rights afforded by the US Constitution
<b>Presumption in Conflict</b>	Federal law trumps any state law in explicit conflict	State law subservient to federal law in case of explicit conflict
<b>Citizen Rights</b>	If state law affords more rights to residents, the state law is presumed to prevail.	If state law affords more rights than the federal law, the state law is presumed to prevail.
<b>Issues under jurisdiction</b>	Rules that apply throughout US, like immigration, bankruptcy, patents, and Social Security	Criminal, domestic, welfare, and real estate matters

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### Some Examples

Federal	State
Federal Fair Labor Standards Act sets the 2021 Minimum wage at \$7.25/hour	States and localities are permitted to set their own minimum wage rates, which will take precedence over the Federal minimum wage rate if they are higher
Marijuana, medical and recreational	Schedule I controlled substance with no legitimate medical use under federal law, but legal in many states
Same-sex marriage	on June 26, 2015, the Supreme Court of the United States legalized same-sex marriage in a decision that applies nationwide

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### Boosting Awareness

Explain common personnel laws and issues with their implementation

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### Common Personnel Issues

- Corrective action and discipline when the supervisor is not on site
- Corrective action and discipline when the supervisor is on site
- Allegations of discrimination or mistreatment
- OSHA violations

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### Risk (AKA Exposure)

- Certain deficits increase risk of violating a law:
  - Vague, unclear policies
  - Failure to incorporate legal obligations
  - No affirmative defense (e.g., the employer lacks a viable mechanism for employees to use when they have complaints)

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### Consequences


- Frustration, discord, animosity
  - Employee complains to friends and family
  - They say, "Hey, you need a \_\_\_\_\_!"
- Perception of disparate treatment
- Perception of favoritism
- Flaws in policies or their implementation
  - First step for attorney: look here
- Loss of affirmative defense

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What can an employer use as an **affirmative defense** if an employee files a discrimination complaint?

- **Affirmative Action** – fact OR set of facts that are not alleged by the plaintiff or prosecutor; upon being proven by the defendant, these facts can defeat/mitigate the legal consequences regardless of the defendant's conduct (lawful or unlawful)
- **FACTS MATTER!**
- Someone says they weren't given the promotion because they were gay/black/Jewish etc. Employer's defense (*hopefully honest*):
  - Person's performance was worse than that of other candidates
  - Clients complained about given person
  - Employee was late to work every day, or person isn't a team player, etc.

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### Discrimination

- Laws handled by the EEOC:
  - Title VII of the Civil Rights Act of 1964
  - The Equal Pay Act of 1963
  - The Age Discrimination in Employment Act of 1967
  - Title I and Title V of the Americans with Disabilities Act of 1990
  - Sections 501 and 505 of the Rehabilitation Act of 1973
  - Title II of the Genetic Information Nondiscrimination Act of 2008
  - The Civil Rights Act of 1991

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### Discrimination

- **State variations:**
  - DC → Matriculation, genetic information, reproductive health decisions
  - New Jersey → familial status
  - Kentucky → tobacco use
  - Wisconsin → lie detector test
- Connecticut: Race, color, religious creed, age, sex, gender identity or expression, marital status, national origin, ancestry, present or past history of mental disability, intellectual disability, learning disability or physical disability, including, but not limited to, blindness, sexual orientation (actual or perceived), civil union status, pregnancy, criminal conviction alone, medical marijuana\*

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### Typical Discrimination Cases

- 1 • Employee believes he or she has a case  
• Seeks management help verbally or in writing and has the burden of proof
- 2 • Management addresses case  
• May include direct supervisor or HR, sometimes includes mediation
- 3 Case is resolved locally, and it ends here  
Case is unresolved and moves to the legal arena
- 4 • The case moves to a formal process  
• May involve mediation or progress to arbitration or court

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An employee believes she has a discrimination case against her employer. She does her research and learns she is unlikely to win. What type of discrimination has she alleged?

- A. Retaliation
- B. Color
- C. Race

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### EEOC Cases

<b>Likely to be WON by Plaintiff</b>	<b>Likely to be LOST by Plaintiff</b>
<ul style="list-style-type: none"> <li>• Retaliation</li> <li>• Harassment*</li> <li>• Race*</li> </ul>	<ul style="list-style-type: none"> <li>• Age Discrimination</li> <li>• GINA</li> <li>• Equal Pay</li> <li>• Color</li> <li>• National Origin</li> </ul>

\*Majority of these cases are settled early

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## Boosting Workplace Cohesion

List pharmacy-related laws most likely to be violated

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### Occupational Safety and Health Administration (OSHA)

- OSHA enforces the Occupational Safety and Health Act of 1970
- The law requires that:
  - Employees be properly trained and informed about safety on the job
  - Employers effectively maintain a safe workplace
  - In pharmacy, emphasizes blood borne pathogens (personal protective equipment, sharps containers, etc.)
- States also regulate working conditions



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### Most Common Rx OSHA violations

<ul style="list-style-type: none"> <li>• Lack of Training Under the OSHA Bloodborne Pathogen Standard/Needlestick Safety and Prevention Act</li> <li>• Failing to Provide Material Safety Data Sheets</li> <li>• No Training On the Hazard Communication Standard</li> <li>• Respiratory Protection Standard Ladders (2,129 violations)</li> <li>• Control of Hazardous Energy (lockout/tagout)</li> </ul>	<ul style="list-style-type: none"> <li>• General Requirements – Machine Guarding</li> <li>• General Requirements – Electrical/wiring</li> <li>• General Requirements – Walking/Working Surfaces</li> <li>• Flammable and Combustible Liquids</li> <li>• General Requirements – Personal Protective Equipment</li> </ul>
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Insight – Top ten OSHA violations in the biotechnology and pharmaceutical industry - Affvigility Solutions

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OSHA

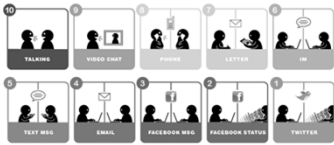
### OSHA “Issues” in Pharmacies

<ul style="list-style-type: none"> <li>• Exposure to hazardous drugs, chemicals</li> <li>• Exposure to bloodborne pathogens like Hepatitis B, Hepatitis C, and HIV</li> <li>• Exposure to corrosive materials</li> <li>• Wet surfaces that may cause falls</li> <li>• Latex allergy</li> </ul>	<ul style="list-style-type: none"> <li>• Employees working in these settings have all necessary personal protective equipment to prevent injury on the job</li> <li>• <b>Managers need to be sure employees have these things</b></li> <li>• OSHA’s “look back” period of 5 years for repeated violation changed in 2015. Prior to that time, it was only a 3-year period.</li> </ul>
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### Discrimination Complaints

- Poor communication is a primary cause
- Manager is
  - Unprepared, defensive, dismissive, or too busy
  - Makes promises, doesn't keep them
  - Talks too much
  - Too empathetic/sympathetic before gathering facts



10 Levels of Communication


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**OJA8** For those who are curious, you may want to mention that it changed in 2015 from only 3 years to 5 years

Osowiecki, Jennifer A., 10/29/2021

### The Consequences...

- Simple issues become inflamed
- Employee introduces external sources to the equation
- Employees receive bad or illegal response
- Complaints are mishandled, drag on
- Confusion
- Poor employee engagement
- Performance deficits



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### Illegal Interview Questions

1. Where were you born?
2. Are you going to want to take time off for religious holidays?
3. Do you plan on getting pregnant/having children?
4. When did you graduate from high school?
5. Do you have a disability?
6. Have you ever filed a workers' compensation claim?
7. How did you learn [foreign language]?
8. How do you identify?
9. Are you a U.S. citizen?
10. How much longer do you plan on working?
11. Where's your accent from?
12. Do you have children?
13. Do you need Sunday mornings off for church?
14. What's your background?
15. Have you been really sick in the last year?
16. How much do you make?

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### Salary History

State	Stance
Connecticut	<b>Effective January 1, 2019</b> , employers may not ask about an applicant's wage and salary history unless the applicant volunteers the information.
Massachusetts	<b>Effective July 2018</b> , MA became the first state to prohibit employers (public and private) from asking about applicants' salaries before offering them a job. Law signed on August 1, 2016.
New York	<b>Effective January 2017</b> , public employers prohibited from evaluating applicants based on prior wage history.  <b>Effective October 31, 2017</b> , public and private employers in <b>New York City</b> may not ask about an applicant's salary history during the hiring process.
New Jersey	<b>Effective February 1, 2018</b> , public employers are prohibited from asking job applicants for their compensation history or investigating the prior salaries of applicants.

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### Attracting Diverse Candidates

- Watch your wording
- Expand your search
- Use unbiased interview techniques
- Welcome diversity and encourage your employees to put aside bias and preconceived notions



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### Boosting Overall Protections

Identify ways to improve adherence to laws

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An employee wants her attorney to accompany her to every meeting with you. Is that OK?

- A. Yes
- B. No
- C. Maybe

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## The Key: Reduce Risk

- Know the law
- Know frequent causes of complaints and litigation
- Keep good records
- Ask, "What relief are you seeking?"

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## Types of Cases

### Types of Cases

- Harassment
- Discrimination
- Failure to hire/promote
- Compliance to wage and hour laws
- Failure to accommodate
- Wrongful termination

### Harassment

#### It is behaviour which is



Unwelcome  
Unsolicited  
Repeated  
Offensive  
Intimidating  
Humiliating  
Threatening

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## Monitor All Documentation

- The absence of records is an employer problem
- Establish periodic compliance audits
- Have and monitor a strong e-mail policy
- Retain records for 6.5 years after the employee's last day
- Don't award inflated reviews
- Document progressive discipline



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Alex Beagle, Esq., calls your office, indicating she represents one of your employees. She is "assertive," and asks you to fax or e-mail all of your records about this employee and this case including any personal notes?

- Send them promptly; you do not want to appear uncooperative
- Wait for a few days and send them; always make lawyers wait
- Do not send them; you need to do your homework first!

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## The Employee's Lawyer

- Employees are not entitled to have an attorney at every kind of meeting
- Make sure the attorney is an attorney, and that he or she really represents the employee
  - Ask for a signed release or letter confirming the representation or letter confirming the representation
- Remember: An employee's attorney has only the employee's version of events to start
- The attorney does not speak for the employee

But will you let them?

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## Supervision

- Not for the constitutionally weak
- Is not a reward for good performance at a lower level or to increase salary
- Will keep you awake at night if it's a bad fit



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### Be Prepared

- Employee will use**
  - Direct evidence
  - Circumstantial evidence
  - Compliance history
    - Employer has burden of proof
- Employer's defensive mechanism**
  - Use an interactive process
  - Document
    - Compliance records
    - Careful meeting notes
    - Witness verification
  - Allow complaints
  - Investigate with due diligence
  - Know state and local laws
- Employee's attorney will look for**
  - Smoking guns
  - Statistics
  - Lack of documentation
  - Lack of compliance

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### Strong Policies


- Hiring and promotion policies
  - Wage, hour and leave
  - Time and attendance
  - Hiring and promotion
  - Benefits
  - Leave policies
- Employee management
  - Performance evaluations
  - Tolerance
  - Acceptable manager behavior



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### Increase Adherence to Policies

- Disseminate policies and verify receipt of every policy and update
  - Multiple sites? Sometimes policy manuals differ
  - Having employees just sign is not enough
- Require employees to actually follow the policies



How should employers require employees to follow policies?

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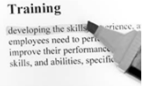
### Supervise

- Ensure consistency—all supervisors must apply rules consistently
  - Late is late
  - Lunch is lunch
  - Rude is rude
  - Opportunity is opportunity
  - Regardless of age, gender, disability status, or any other protected class or any other protected class
- Track time, attendance, and vacation (leave)

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### Training: Critical


- Types of Training**
  - Harassment
  - Discrimination
  - Dangerous equipment
  - Employee management
  - Policy and procedure
  - Supervision
    - Motivation
    - Consistency
    - Discretion
    - Progressive discipline
    - Retaliation
- Barriers**
  - Cost
  - Time
  - Employee resistance
  - Supervisor resistance
  - Sustaining periodic attention



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### Accountability

- All levels of the company must be accountable
  - Do the right thing, do it in a timely manner



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## Retaliation

- Easy to prove
- Retaliation claims occur when
  - Employee engaged in a protected activity (even if it was groundless)
  - Shortly after, the employer took adverse action
  - The action would dissuade an employee from complaining
  - About 37% of EEOC cases include concern retaliation

The High Cost of Getting Even



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## FMLA

- Hot topic: growing number of cases filed
- Difficult topic
- Use an interactive process
  - Communicate
  - Know your policies
  - Partner with HR
  - Be consistent



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## Family and Medical Leave Act (FMLA)

- What is it? FMLA provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires group health benefits to be maintained during the leave.
- Who enforces it? Department of Labor's Wage and Hour Division (WHD).
  - It is unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise, any right provided by the FMLA.
  - It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to the FMLA
  - WHD administers and enforces the FMLA; if you believe your rights have been violated you may file a complaint with the WHD or file a private lawsuit against your employer.

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## Documentation

- The actual documents
- The documents we wish we had
- The documents we wish never existed



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## Documentation: Key Terms

- Litigation hold: Once litigation begins, you must keep and protect all documents related to the case from the date of the event forward
  - **ALL E-mail is discoverable!**
    - It can be read, brought to trial, etc.
- **Note to Self:** A manager's desk calendar, diary
- Performance Evaluations (objective)
- Progressive Discipline

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## Going to Court

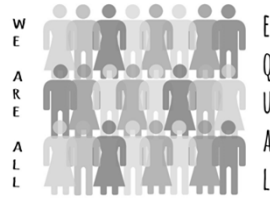
- Only 6% of discrimination lawsuits ever go to trial, only 1/3 of these find for the plaintiff
- Employers avoid taking an employment discrimination case to trial to
  - avoid the costs (time and money)
  - avoid negative publicity
  - remove unpredictable jury awards from the equation
- Plaintiffs accept most settlements



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## Conclusion

- The law is there to protect EVERYONE
- Supervisors and managers need training
- Consistency is key



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