

Wyoming

Labor Standards

A Division of the Wyoming
Department of Workforce Services

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Deputy Administrator

Programs Administered by Labor Standards

- Fair Employment
- Child Labor
- Wage & Hour
- Prevailing Wage
- Resident Contractor Certification
- Preference Act Requirements



Outreach Programs Offered by Labor Standards

- Provide training in all areas of enforcement
- Provide consulting services
- Sexual harassment
- Other forms of harassment
- Wage & Hour laws
- Help design effective policies
- Aid in interpreting recent legal developments and updates

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Discrimination



Workplace Discrimination

- Occurs when an Employer takes an **adverse employment action** against any employee or applicant
- Demotion
- Discipline
- Termination
- Failure to hire
- Failure to promote
- Constructive discharge
- Harassment
- Other terms & conditions of employment

Federal Statutes

- **Civil Rights Act of 1964 (Title VII):** prohibits employment discrimination on the basis of race, color, religion, national origin, and sex.
- **Age Discrimination in Employment Act (ADEA):** prohibits employment discrimination based on age.
- **Americans with Disabilities Act (ADA):** prohibits employment discrimination against people with disabilities.

Wyoming Fair Employment Practices Act of 1965

Prohibits employers from discriminating against applicants and employees based on:

- Race
- Sex
- Creed (religion)
- Color
- National origin/ancestry
- Age
- Disability
- Pregnancy
- Use of tobacco products



State and Federal Coverage



To obtain state coverage, the most recent discriminatory act must have occurred within six months of the time Charging Party has filed his/her claim.



Federal coverage requires the most recent discrimination to have taken place within 300 days of the time the claim is filed.

Sex

What's Covered?

- Gender (including sexual stereotypes)
- Sexual desire
- Aversion to a particular sex in the workplace

What's Not Covered?

- General horseplay
- Course or boorish language
- Differences in the ways men & women interact in the workplace
- Sexual orientation*

Religion/Creed

- Employers cannot give preference to one religion over another
- Must be firmly held religious belief
- Cannot just be political or social preference
- Employers required to make accommodation if does not create undue hardship
- Bona fide seniority system can take precedence
- Employees of private employers are allowed to display religious items in personal workspace

Disability

A physical or mental impairment that substantially limits a **major life activity**

Major Life Activities:

- Walking
- Sitting
- Seeing/Hearing
- Major Bodily Functions
 - AutoImmune Disease
 - Sexual Reproduction
- Includes Disabilities
 - Cancer
 - Depression
 - Epilepsy

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Hiring Employees



Avoid Violation

To avoid violating these statutes, an employer should make no pre-employment inquiry about an employee's race, color, religion, national origin, sex, age or disability or request information that is *likely to elicit* information about these areas:

- On application forms;
- In job interviews, or
- In background or reference checks.

The Interview

- All requests for information must be related to the job.
- Ask all applicants the same questions.
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant.
- Liability for discrimination exists, regardless of whether the information was unlawfully solicited or volunteered.

Title VII –Religion

Guidelines on religious discrimination prohibit pre-employment inquiries into an applicant's availability for work or the necessity to accommodate the individual for religious practices.

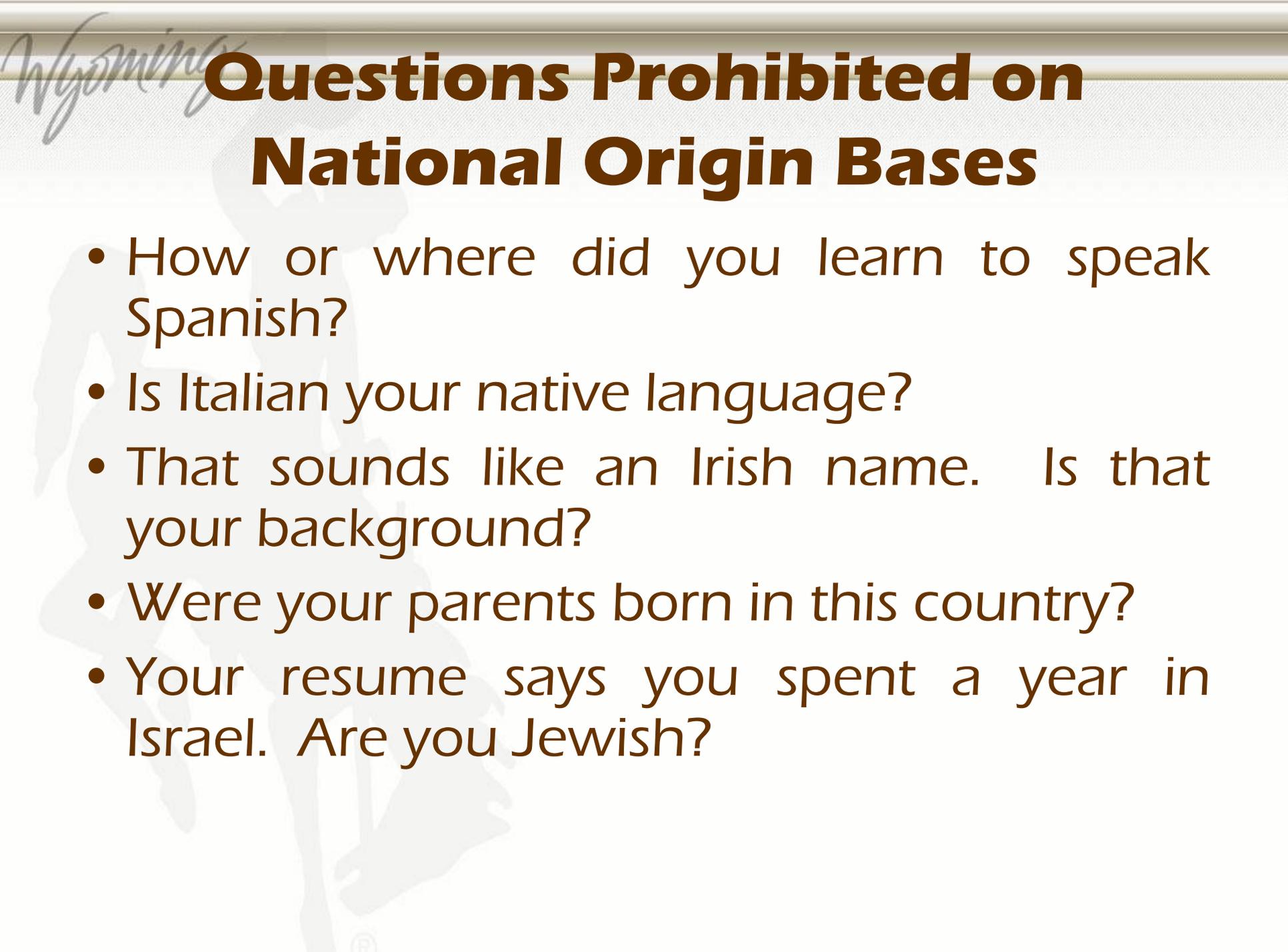
Questions Prohibited on Religious Basis

- “What is your religion?”
- “Can you work on Fridays, Saturdays or Sundays?”
- Comments regarding the religious affiliation of a school attended by the applicant.
- Comments on religious jewelry worn by an applicant.

Title VII – National Origin

Guidelines on national origin discrimination prohibit pre-employment inquiries into the follow areas:

- Citizenship
- Fluency in English
- Questions about an applicant's foreign training or education

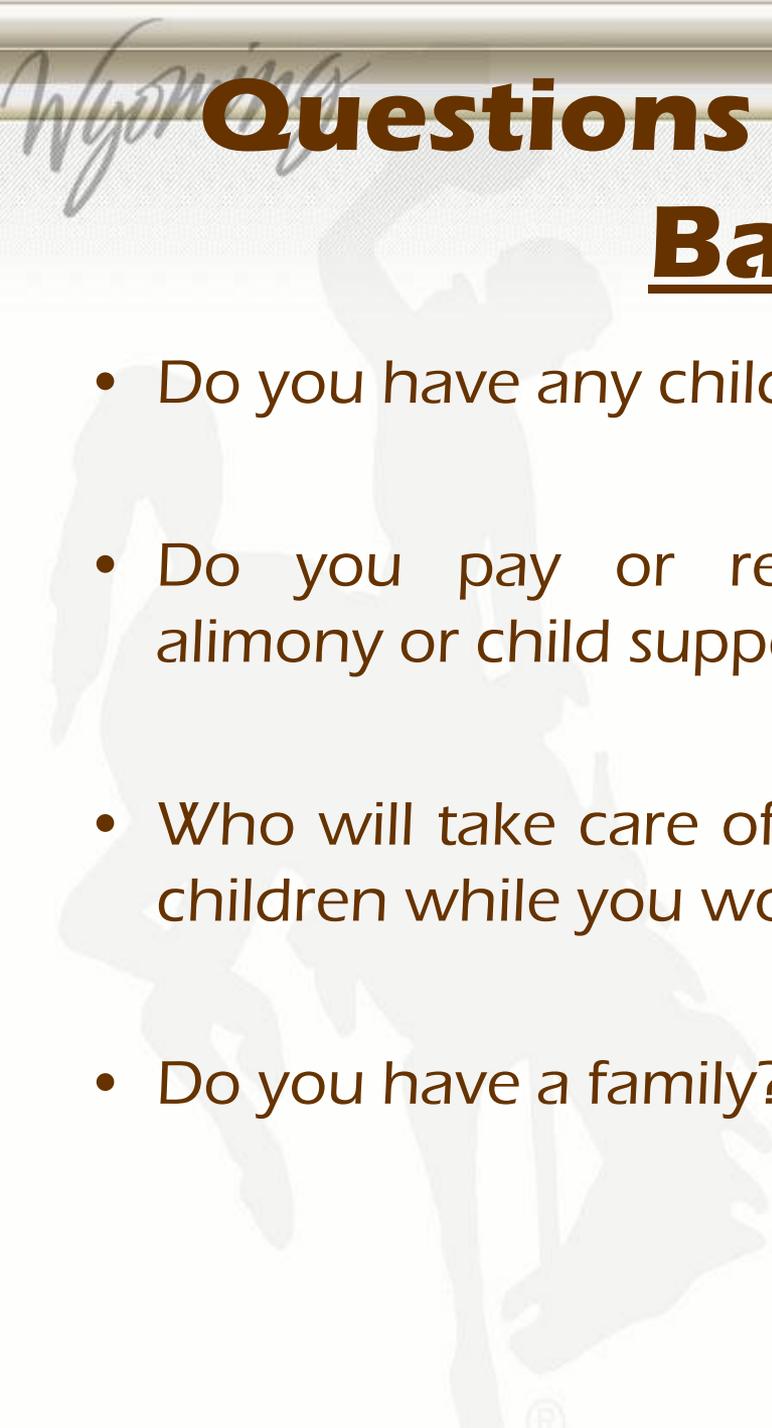
The background features a light beige color with a faint, large watermark of a cowboy on a horse in silhouette. In the top left corner, the word "Wyoming" is written in a cursive, script font.

Questions Prohibited on National Origin Bases

- How or where did you learn to speak Spanish?
- Is Italian your native language?
- That sounds like an Irish name. Is that your background?
- Were your parents born in this country?
- Your resume says you spent a year in Israel. Are you Jewish?

Title VII –Sex

- Asking an applicant's marital status may expose an employer to charges of sex discrimination.
- Guidelines on sex discrimination state that a hiring policy which forbids or restricts the employment of married women and does not apply to married men is sex discrimination prohibited by Title VII.



Questions Prohibited on the Basis of Sex

- Do you have any children?
- Do you pay or receive alimony or child support?
- Who will take care of your children while you work?
- Do you have a family?
- Are you gay?
- Are you living with someone?
- Will you leave this job if your husband is transferred?
- Will your husband move if we transfer you?

Title VII – Sex (Pregnancy)

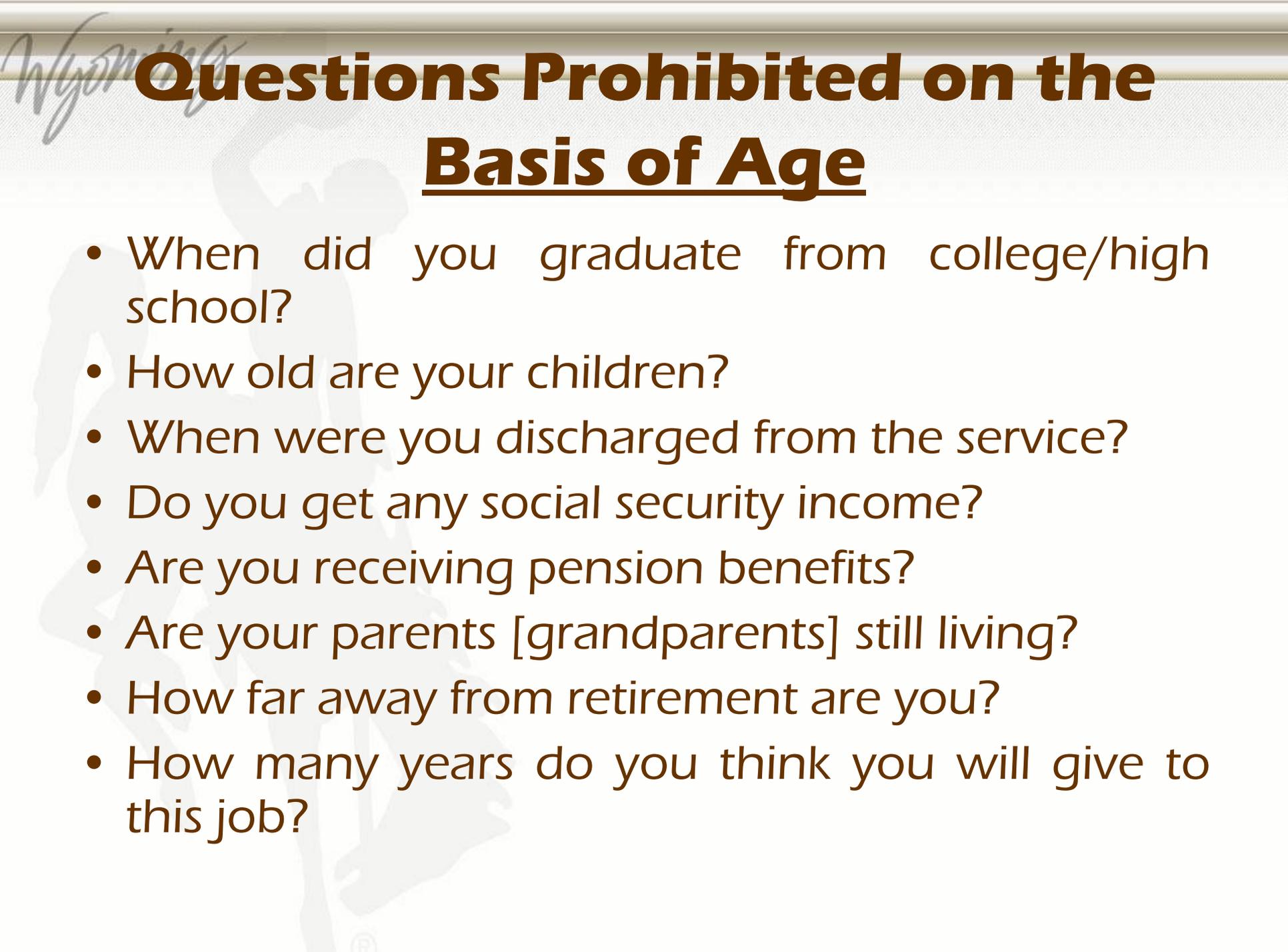
A written or unwritten employment policy or practice that excludes applicants or employees because of pregnancy, childbirth, or related medical conditions is a *prima facie* violation of Title VII.

Prohibited Questions on the Basis of Sex (Pregnancy)

- Do you have any children?
- Are you pregnant?
- Do you have or plan to have a family?
- Do you intend to become pregnant?
- Do you anticipate needing time off to have a baby?
- How much time would you expect to take off if you were to have a baby?
- What would you do if you were to become pregnant?
- Do you practice birth control?
- Have you ever had an abortion?
- Have you ever had or do you now have any female problems?
- Have you ever been pregnant?

ADEA - Age

- ADEA forbids discrimination based on age.
- Questions about age may deter older applicants or otherwise indicate discrimination based on age.
- Any question that is calculated to elicit information about a person's age should be avoided during interviews.

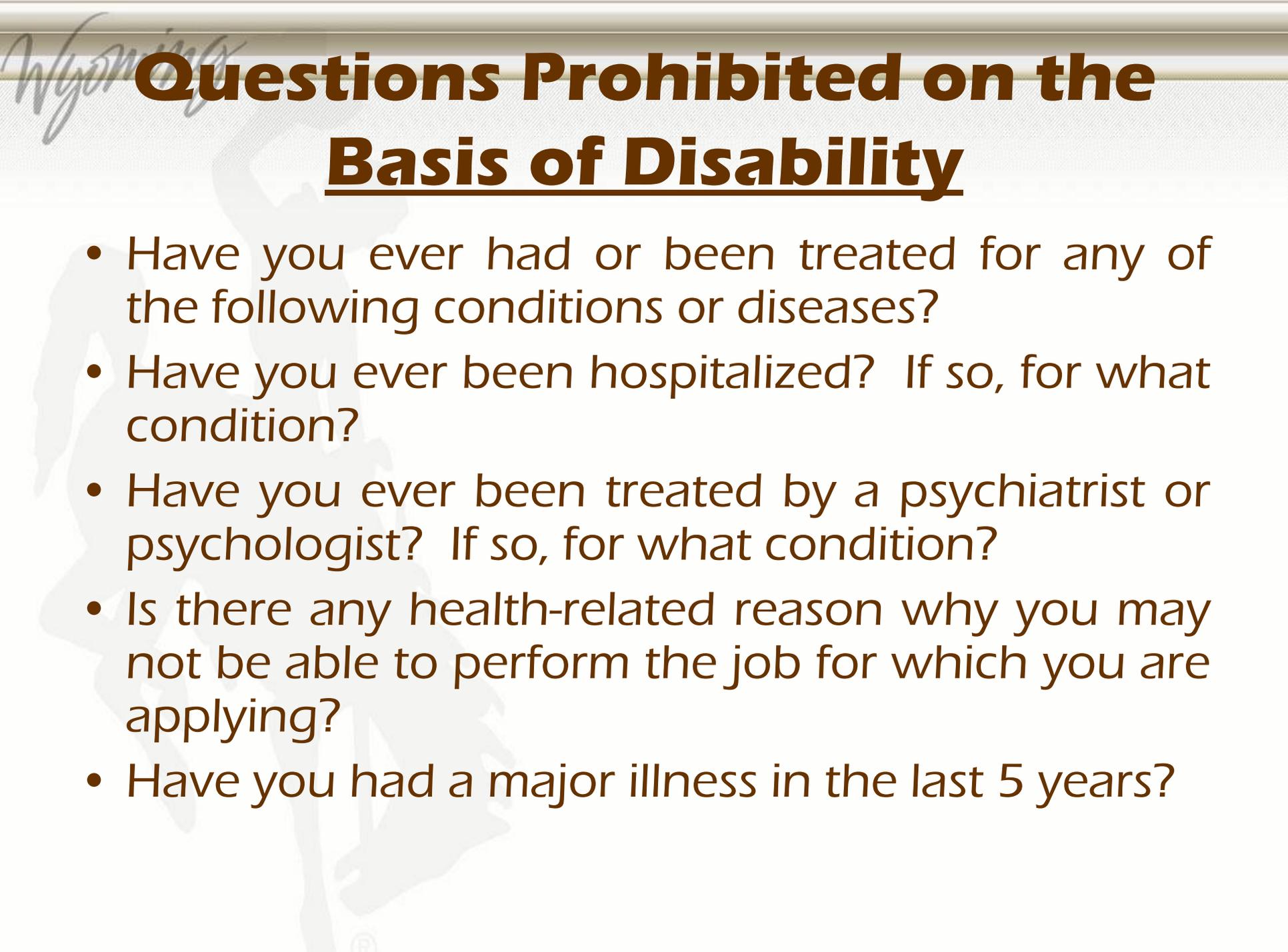
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Questions Prohibited on the Basis of Age

- When did you graduate from college/high school?
- How old are your children?
- When were you discharged from the service?
- Do you get any social security income?
- Are you receiving pension benefits?
- Are your parents [grandparents] still living?
- How far away from retirement are you?
- How many years do you think you will give to this job?

ADA – Disabilities

- A central focus of the ADA is to eliminate barriers to employment in the hiring process for individuals with disabilities.
- To accomplish that goal, the ADA establishes a two-stage hiring process that permits a limited inquiry into and use of medical information, but only **after a conditional offer of employment** has been extended.

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Questions Prohibited on the Basis of Disability

- Have you ever had or been treated for any of the following conditions or diseases?
- Have you ever been hospitalized? If so, for what condition?
- Have you ever been treated by a psychiatrist or psychologist? If so, for what condition?
- Is there any health-related reason why you may not be able to perform the job for which you are applying?
- Have you had a major illness in the last 5 years?

Prohibited Disability Questions Cont.

- How many days were you absent from work because of illness last year?
- Do you have any physical defects that preclude you from performing certain kinds of work? Are you taking any prescribed drugs?
- Have you ever been treated for drug abuse/addiction or alcoholism?
- Will/do you need reasonable accommodation to perform this job?
- Have you ever filed for workers' compensation insurance?

Permissible Questions Under the ADA

- If an individual has a *known* disability, “How will the job functions will be performed, with or without an accommodation.”
- “Did you have records of attendance with prior employers?”
- “Have you ever used illegal drugs?”
- An employer may give applicants tests to detect the illegal use of controlled substances.
- “Have you ever been arrested for driving under the influence of alcohol?”

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Disciplining or Terminating Employees



Pre-Termination Concerns

- Handbook
- Past Evaluations
- Disciplinary Actions
- Employee File Documents

Handbooks

- Spell out what the employer expects of its employees and what the employee can expect from the employer.
- Offer employer defense to certain claims:
 - Sexual harassment
 - FLSA, policy to record hours
- If policies are followed, employers can avoid disparate impact claims.
- Danger: Not following policies.

Document, Document, Document

- Employment at will rule: In Wyoming employees may be terminated “for a good reason, a bad reason or no reason at all.”
- In reality, every termination case, employer will be expected to explain the reason for termination.
- Jury’s view: “If it was important, it would have been written down.”

Review the File

- Prior to making a termination decision, review your file.
- Frequently, file reflects satisfactory performance.
- Maintaining accurate and up to date records of employee discipline and counseling will show that the employee was aware of the problem.
- Jurors expect employees to have an opportunity to correct the problem.

Termination Meeting

- Meet in private, with a witness present.
- Prepare a statement.
- Not required to give the employee a reason for termination.
- If a reason is given, offer only legitimate reasons.
- Decide in advance whether the employee will be asked to leave immediately or will be allowed to remain during a transition period:
 - Position, access to confidential information
 - Reason for termination
 - Ability to harm employers business.

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Harassment

Sexual Harassment

- Sexual harassment is any unwelcome sexual advance or conduct on the job that creates an intimidating, hostile or offensive working environment.
- Any conduct of a sexual nature that makes an employee uncomfortable has the potential to be sexual harassment.
 - Focus is on impact/effect, not on intent
- Unless the conduct is severe, a single comment or incident would not be sufficient to create a hostile work environment.

Types of Sexual Harassment

Quid Pro Quo (This for That)

- A supervisor implies to an employee that the employee must sleep with him or her to keep the job.
- An employee is denied a raise because he or she rejected advances from the manager.

Hostile Work Environment

- An environment at the work place which significantly and adversely affects and employee because of her/his sex.
- Unwelcome sexual advances or conduct.
- Includes taunts, touching, pictures, jokes or other harassing words or actions.

Examples of Hostile Work Environment

- A male employee brags to coworkers about his sex life.
- A computer screen saver shows pornographic pictures.
- An employee sends e-mails to coworkers that contain sexually explicit images, language or jokes and the coworkers are offended.
- A coworker constantly asks a female employee if she has a boyfriend or if she is available.
- A male employee tells his female coworkers what they wear is sexy or that he finds their clothing provocative.

Other Types of Harassment

- Calling someone disparaging names specific to their culture
- Making comments about stereotypes
- Making comments about a person's abilities considering their impairment
- Racial/National Origin Harassment
- Religious Harassment
- Disability-Based Harassment

What Should You Do?

- Tell the harasser to stop.
- Tell the harasser you find the behavior offensive.
- Mention sexual or other prohibited harassment if you feel it is appropriate.
- If you are uncomfortable confronting the harasser directly, you should go to your supervisor or other management employee to report the offensive behavior.

What Should You Do?

- If the unwelcome behavior does not stop, to go your supervisor.
- If your supervisor is the harasser, go to the manager or owner.
- Document the behavior, when it happened and the names of any witnesses.
- Document when and who the harassment was reported to and what you told the supervisor or manager.



Employer Responsibility

The employer should:

- Investigate the matter.
- Take action to end the harassment.
- Administer appropriate discipline to the harassing employee
- An employer is not required to take the action the employee thinks is appropriate.
- An employer is required to investigate allegations of harassment and take prompt, appropriate action to end the conduct

Employer Responsibility

- An employer must also investigate harassment they hear about from employees other than the victim, or any harassment a supervisor or manager observes directly.

Example:

- The manager notices one of the male employees swat a female coworker on the butt, or overhears comments about a coworker's speech impediment.
- The manager should take immediate action to assure this does not occur again.

Why Your Employer Cares

Costs to the employer

- Low morale
- Turnover
- Increased absenteeism
- Lost productivity
- Time spent providing state or federal investigators with information and in meetings
- Legal fees and court costs
- Possible payment of lost wages



Harassment in the Workplace

- No test to measure who or what type of person will harass or target people at work
- Focus on environmental risk factors to help mitigate and minimize potential for harassment
- A roadmap for employers to identify and engage in proactive measures to reduce harassment in the workplace

Risk Factors

- Homogenous workforces
- Nonconformist employee
- Cultural & language differences in workplace
- Coarsened social discourse outside work
- Workplace with young workers
- Workplace with “High Value” employees
- Significant power disparities
- Strong reliance on customer service and client satisfaction
- Monotonous or low-intensity tasks
- Isolated workspaces
- Cultures that tolerate or encourage alcohol consumption
- Decentralized workplaces

Reporting Harassment

- Workplace is HUGELY under-reported
 - 85% of people never file a formal charge
 - 70% of people never even complain to their supervisor
- Why? Fear!
 - Humiliation
 - Ostracism
 - Damage to Reputation
 - Damage to Career
 - Retaliation
 - Inaction
 - Blame
 - Disbelief

Fears of Retaliation

- 75% of employees who speak out against workplace mistreatment faced some form of retaliation
- So instead, Employees:
 - Endure the behavior
 - Avoid the harasser
 - Downplay the gravity of the situation
 - Seek support from family/friends
 - Leave their job

Preventing Harassment

- Training is key
- It starts at the top with a belief that all employees deserve to be respected
- Previous training focused on avoiding legal liability
- Focus instead should be recognition of diversity, identification of harassing behaviors and how to report them
- It's on us: Everyone is accountable

Wage & Hour



Fair Labor Standards Act (FLSA)

- Federal law passed by Congress in 1938
- Set first federal minimum wage at 25 cents
- Set hours of work
- Child labor restrictions

Minimum Wage

- Wyoming Statute § 27-4-202 provides:

Every employer shall pay to each of his or her employees wages at a rate of not less than five dollars and fifteen cents (\$5.15) per hour.

- Wyoming Statute § 27-4-507 provides:

It shall be unlawful for any employer to pay to any employee a lower wage, salary, or compensation than that provided for or agreed upon ...

Hours of Work

- FLSA sets basic hours of work at 40 hours per week
- Hours worked in excess of 40 in a workweek are considered overtime hours and need to be paid at time and one half of employee's regular rate of pay.
- Certain employees (executive, professional and administrative; law enforcement) may be exempt from overtime.

Hours of Work Continued

- Rest and meal periods—There is no statutory requirement, either state or federal, to provide employees rest or meal periods. The law only requires that rest periods of short duration (20 minutes or less) be paid. Meal periods of 30 minutes or more are not considered time worked unless the employee is not completely relieved of their duties.
- Rest and meal periods may be established by policy.

Child Labor

- Must be 14 to work (some exceptions for minors working for their parents)
- No work permits required
- Hours of work restrictions (primarily for 14 and 15 year olds outside of school hours)
- Driving restrictions
- No child under 18 may work in occupations deemed hazardous by Secretary of Labor.
(Currently list of 17 hazardous occupations)

Family and Medical Leave Act

The FMLA (Federal law):

- Protects employees who request or take leave
- Sets requirements for notice and certification of the need for leave
- Maintains health benefits during leave
- Restores an employee's job after leave

FMLA

Covered employers must grant eligible employees up to a total of 12 workweeks of unpaid leave during any 12 month period, for one or more of the following reasons:

- Birth and care of newborn child of employee
- Placement with the employee of son or daughter for adoption or foster care.
- To care for an immediate family member (spouse, child or parent) with a serious health condition.
- To take medical leave when the employee is unable to work because of a serious health condition.

Vacation Liability

Employer's liability for employees' earned vacation is governed by a 1963 Wyoming Attorneys' General Opinion:

1. There must be an agreement or contract between employer and employee which provides for vacation pay.
2. The agreement must specify some definite time element as to the period of employment which must be completed by employee before a right to vacation pay is earned.
3. Vacation pay must have been earned as provided in the agreement.

Vacation Liability

Recent statutory changes to the definition of “wages” allow an employer to avoid paying out earned, but unused vacation following an employee’s separation provided:

- The employer’s written policy specifically states vacation pay will not be paid out upon separation, and
- The employee acknowledges receiving the policy in writing.

Personnel Records

State Statutes require that every employer shall make, and keep for a period of not less than two (2) years on or about the premises where in any employee is employed, a record of the name, address and occupation of each of his employees, the rate of pay, and the amount paid each pay period to each such employee, the hours worked each day and each work week by such employee.

Miscellaneous Wage Requirements

- Employers must pay an employee all wages owed no later than the employer's usual practice on regularly schedule payroll dates.
- Claims for wages may be filed by any employee who no longer works for the employer from which she or he is claiming wages owed.
- Labor can go back 2 years in pursuing wages owed.
- Labor has no jurisdiction over independent contractor relationships.

Independent Contractor v. Employee

Employee

Any person who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

Independent Contractor

One who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to the control of his employer except as to the result of the work.

Considerations

The key consideration in distinguishing employee versus independent contractor is “employer’s right to control the means and manner of the work.”

- “When a worker is an independent contractor, the employer is typically interested only in the results of the work and does not direct the details of the how the work is performed”
- Having a written contract is relevant evidence, but not conclusive. Just because you do not have a contract does not necessarily mean an individual is an employee and vice versa.

Considerations Continued

- The method of payment,
 - Independent contractors generally set the price of their services and bills for services on a regular basis
 - The employer typically sets the employee's rate of pay and deducts taxes for income, social security, and medicare.
- The right to terminate the relationship without incurring liability,
- Furnishing of tools and equipment,
- The scope of the work,
- Control of the premises where the work is to be done.
- Does the worker devote all of his efforts to the position or does he also performs work for others?

Considerations continued

- Employer's also usually pay into worker's compensation and unemployment insurance
- Employees also can participate in benefit programs offered by the employer such as retirement, health insurance, vacation and sick leave.
- Remember no one factor guarantees an individual is an independent contractor. The assessment is done on a case by case basis!

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