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Employment FAQ's

What is "employment at will?"

Texas is an employment at will state. In general, that means that an employer has the right to terminate an employee for a good, bad or no reason at all with very limited exceptions. The exceptions to the employment at will doctrine include the state and federal anti-discrimination statues, which provide protection in some instances to persons in certain categories, such as race, gender, or disability discrimination, or a refusal to commit an illegal act that would subject you to criminal penalties. An employer also might owe an employee additional rights if there is a written employment contract between the parties.

What constitutes sexual harassment?

Generally for sexual harassment the person being harassed must be a member of a protected class (based on sex); be subjected to unwelcome harassment in the form of sexual advances or requests for sexual favors; the harassment complained of must be based on sex, and there must be a tangible employment action or affect a condition of employment as a result of the employee's refusal to submit to a supervisor's sexual demand or employees submission to unwelcome advances was implied or expressed for a job benefit.

Some of the key factors important in determining whether sexual harassment has occurred include whether the sexual harassment was unwanted; whether it was based on gender; did it lead to an abusive work environment; what kind of sexually suggestive joke or vulgar language; and the frequency or severity of any conduct. The list does not include all factors but includes the prevailing factors. Whether punishment is impose would include if preventative measures were taken or there were remedial actions taken by the employer.

What is discrimination legally?

Discriminatory acts are the acts of the employer that violate the federal anti-discrimination acts. Employment discrimination laws are designed to prevent employers from discriminating based on race, sex, religion, national origin, physical disability, and age.

The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for enforcing the anti-discrimination laws.

Employers should keep in mind that the anti-discrimination laws are not all encompassing. There are loopholes in the laws that can be used for the benefit of the employer. One example is the bona fide occupational qualification (BFOQ). A bona fide occupational qualification is defined as any requirement which when viewed on the surface seems biased, but actually is reasonably necessary for the performance of the job.

Do the anti-discrimination acts provide protection against discrimination based on sexual orientation?

The discrimination acts are geared towards curtailing discrimination based on race, sex, religion, national origin, physical disability, and age. The discrimination acts provide no protection for sexual orientation under the law. Title VII has been consistently held not to apply to discrimination against homosexuals. Nevertheless, many states and municipalities have adopted sexual orientation anti-discrimination laws.

What is the difference between exempt and non-exempt employees?

The primary difference is that usually exempt employees are paid a salary and are not entitled to overtime and non-exempt employees must be paid for each hour that they work. However, there are some requirements and exceptions to this general rule governed by the Fair Labor Standards Act (FLSA). The exempt status is usually for executive, administrative, professional, computer, or outside-sales personnel. The salary cannot be less than $455

per week. The job title is not what determines the status. Instead, it is actual duties of the job which must comply with FLSA standards. It is often best to have legal counsel review the duties of the position to determine whether it is exempt or non-exempt from overtime and minimum wage requirements.

What is the difference between an independent contractor and an employee?

This is governed by the Fair Labor Standards Act. There are three different classifications of exempt employees including professional, executive, and administrative.

Independent contractors (ICs) are people who contract to perform services for others, but don't have the legal status of employees. Because many employment laws and tax rules that cover employees don't apply to ICs, businesses can save time, money, and headaches by hiring ICs instead of employees.

The IRS has laid out guidelines for determining whether a worker is an independent contractor or an exempt employee. This will determine whether the employer will have to pay the social security, Medicare, and unemployment taxes. Generally, control governs whether or not an employee will be considered an independent contractor or employee. The three different criteria to use is the amount of behavioral control, financial control, and the type of relationship between the worker and the employer. For behavior control, if the employer gets to direct the work of the worker, decide the hours, method of work, and provides training then these are indication that the worker is an employee. However, if the worker gets to decide his own hours with little or no direction then it is an indication that the worker is an independent contractor. Additionally, if the employer controls how the work is paid, places restrictions on who the worker may work for, or influences on whether the work will make a profit, then this will indicate an employer/employee relationship. Finally, the relationship such as whether there is a contract, benefits, or work related to the employer's primary functions would all be factors of and employer/employee relationship.

What are some of the benefits of hiring independent contractors?

Businesses can usually money by hiring ICs instead of employees when it comes to salaries and other compensation. Employers generally have to pay additional expenses for employees, including payroll taxes, insurance premiums, employee benefits, and more.

When businesses hire ICs instead of employees, an employer will also have reduced exposure to some types of lawsuits, such as alleging job discrimination or wrongful termination.

What are some of the disadvantages of hiring independent contractors?

Employers should be aware that misclassifying an employee as an independent contractor can lead to consequences that are economically devastating. A business must pay the IRS all the back taxes owed, with interest, plus a penality of 12% or 35% of the tax bill.

Audits by state agencies are even more common than the IRS audits. State audits frequently occur when workers classified as ICs apply for unemployment compensation after their services are terminated.

Another major disadvantage of hiring ICs is that they can sue the business for negligence if they are injured on the job. This is something employees normally cannot do because their work injuries are covered by workers' compensation insurance.

I have an employee with a disability, what do I have to do?

Even when an employer knows that its employee is disabled, the employer is not automatically required to find out whether the employee requires an accommodation. Instead, the burden is on the employee to make an initial request for an accommodation. The employee does not need to use the term accommodation, but needs only to inform the employer of the disability and that he or she needs some assistance in performing job duties. Once he or she has made the request, the employer is required to engage in an interactive process with the employee, to determine whether an accommodation is actually needed, and if so, what accommodation might be appropriate. Both parties have a responsibility to cooperate in finding a reasonable accommodation. For example, if the employee refuses to provide any medical evidence of his or her disability or specifically notify the employer of the essential job

functions that he or she is having difficulty performing, the employer cannot be held liable for failing to provide an appropriate accommodation. Likewise, the employer cannot make a single offer of an inadequate accommodation and, if the employee refuses it, decline to search for other alternatives.

An employer may also be required to make reasonable accommodations for a job applicant, if the accommodations are necessary for the applicant to participate in the application process. An applicant who believes that he or she may need an accommodation must, like an employee, inform the employer of the need for accommodation, and then work with the employer to find an effective accommodation, if one exists. An example might be moving a typing test to a room that the applicant can reach or allowing the applicant to bring adaptive equipment to the interview, such a special keyboards. An applicant with hearing or visual impairments may be accommodated by allowing an interpreter to accompany the applicant to the interview. An employer who responds to an applicant's request for accommodation by telling the applicant that he or she cannot participate in the interview process because he or she obviously cannot perform the job may be violating the law.

How may an employer monitor employees in the workplace?

In most states, citizens have a right to some privacy in their persons and affairs, and this right extends into the workplace to protect employees from over-intrusive monitoring by employers. For example, employees have a limited right, created by federal and state wiretapping laws, to privacy in their telephone conversations and voice mail messages. An employer who wishes to monitor telephone calls or voice mail messages must warn employees that it is doing so, and establish that the monitoring is undertaken in the ordinary course of business, such as to monitor performance or to coach employees. An employer may also monitor communications if it has reason to believe that an employee is using the telephone or voice mail to commit theft or somehow damage the company, but again, only if the employer warns the employee that it plans to monitor. An employer who monitors phone calls or voice mail messages for any reason must stop monitoring as soon as it determines that a call or message is private.

E-mail messages using the employer's network and Internet access from the employer's computer are generally not protected. Many employers monitor employee Internet use and e-mail messages. Monitoring is often done to ensure employees are not disseminating materials which would themselves violate employment laws (i.e., sexually explicit websites or racially harassing e-mails). Employees should assume their e-mail messages and Internet activities at work are not private.

Employers have monitored employees by placing video cameras around the workplace, as well. However, video surveillance of employees has been controversial. An employer who places a camera in the lunchroom or on a loading dock does not violate the law, but employers have been held liable for invasion of privacy, and sometimes for sexual harassment, after placing hidden cameras in bathrooms or in the ceilings of employees' offices.

When constitutes illegal harassment?

Contrary to popular belief, it is not illegal for a supervisor to harass an employee simply because he or she doesn't like the employee's work or doesn't like the employee as an individual. Harassment is illegal only if it is based on some protected characteristic of the employee, such as his or her age, race, national origin, sex, religion or disability.

In addition, harassment must be severe and pervasive in order to violate the law. Courts have held that the government cannot make American workplaces pristine, but may ensure only that they are not hostile and abusive to an employee because the employee is a member of a protected class. Therefore, isolated or occasional use of racial or ethnic slurs, or sporadic dirty jokes, while offensive, will not violate the law. On the other hand, one incident of harassment, if it is severe enough, may be enough to violate the law. An example might be a sexual assault or a beating by coworkers. Likewise, harassment which is continual or which pervades the work environment is actionable. Such behavior includes constant dirty jokes or comments, repeated unwelcome passes, anti-Semitic or racist comments, or a workplace decorated with pornographic posters.

Finally, the harassing behavior must be offensive to the reasonable person and to the employee. Behavior which offends a highly sensitive employee, but which would not offend a reasonable person in the same situation, would not violate the law. Likewise, behavior that might offend a reasonable person, but that clearly did not offend the employee, will not create a right for damages. Some courts define a reasonable person as an average employee in same the protected category as the employee, for example, a reasonable female employee or a reasonable Hispanic employee; other courts consider the reaction of a generic reasonable person. In determining whether the employee

was offended personally, a court or jury will consider whether the employee willingly participated in the conduct, and whether he or she used reasonably available avenues of complaint to protest the conduct.

What is considered working time under the wage and hour laws?

Any work that an employer suffers or permits an employee to perform is considered compensable time under the wage and hour laws. This means that if an employer knows that an employee has performed work, even if the employee was not specifically instructed to do so or if the work was done outside the employee's normal hours, the employee must be paid for time spent doing this work. The time will also be counted in determining whether the employee has worked forty hours in a week, and is thus entitled to overtime compensation. An employer may discipline an employee for performing unauthorized work, but the employer must also pay the employee for that work.

Many pre- and post-work activities have been specifically addressed by the regulations and court opinions construing the wage and hour laws. For example, commuting to and from work is generally not included in working time, nor is changing clothes or washing up at the work site. Performing other preparatory duties, such as assembling tools or receiving a work assignment may be considered hours worked, however. Short rest periods during the workday, such as fifteen-minute breaks, are hours worked. A meal period must generally be at least thirty minutes long in order to be excluded from hours worked.

For example, time when an employee is on call must be compensated if the employee must wait at the work site, even if the employee has no duties during that time. An employee who is free to go about his or her own pursuits, however, and merely leave a contact number and arrive when called need not be paid when he or she is not actually performing work. Likewise, an employee who has private sleeping quarters on the employer's premises, and who can sleep at least five hours uninterrupted, need not be paid for the time spent actually sleeping. The employee must be paid when he or she is interrupted for work, however, and if the employee's sleep is frequently interrupted, the employee must be paid for the entire time at the work site, even time spent sleeping.

Time spent on training or education is not considered hours worked as long as the employee's participation is completely voluntary, the employee attends outside of his or her regular working hours, and the employee performs no productive work during the class. Finally, time spent traveling for the employer is hours worked if the traveling is part of the employee's principal activities (for example, traveling between multiple work sites, or a day trip to an out-of-town location), although travel undertaken for an overnight trip is not compensable unless the travel is done during normal working hours, or the employee actually works as he or she is traveling.

BUSINESS LAW FAQ’s

What is a corporation?

What sets the corporation apart from all other types of businesses is that a corporation is an independent legal entity, separate from the people who own, control, and manage it. In other words, corporation and tax laws view the corporation as a legal "person," meaning that the corporation can enter into contracts, incur debts, and pay taxes apart from its owners. And there are other important characteristics that result from the corporation's separate existence: A corporation does not dissolve when its owners (shareholders) change or die, and the owners of a corporation are not personally responsible for the corporation's debts; this is called limited liability.

Who should form a corporation?

Because of the expense and formalities involved in setting up a corporation and issuing stock (shares in the corporation), you should form a corporation only if you have good reason to do so. If you merely want to limit your personal liability for business debts, forming a limited liability company (LLC) is probably smarter because LLCs are both less expensive to form and less complex to run.

When is it beneficial to form a corporation over a LLC?

Here are some situations in which incorporating your business instead of forming an LLC may make sense:

- Your business needs the ability to issue stock or stock options to attract key employees or outside investment capital.

- Your business is so profitable that you can save significant income tax dollars by keeping some profits in the corporation each year. This strategy is called "income splitting" because profits are essentially split between the individual owners and the corporation.

- You own a family business and you want to begin making gifts of ownership to your family as part of your financial or estate plan or to plan for the next generation of owners. With a corporation you can easily make gifts of shares in your company without necessarily giving up management control and, if it's done correctly, without paying gift tax.

- Others insist that you incorporate your business. For example, if you are an independent contractor, companies you want to work for may ask you to incorporate before they will sign contracts for your services. This is because if you form a corporation, the IRS is more likely to view you as an independent contractor than an employee -- a less-risky proposition for those who want to hire you.

Does running a corporation involve more paperwork than running other types of businesses?

Yes. Corporations must comply with statutory rules that unincorporated businesses such as limited liability companies (LLCs), partnerships, and sole proprietorships do not. For instance, corporations must observe corporate formalities such as holding and taking minutes of annual shareholder and director meetings and documenting important directors' decisions. Also, corporations must file and pay taxes on a separate corporate tax return and must set up a double-entry bookkeeping system to record business transactions, complete with daily journals and a general ledger.

What is a close corporation? What are the benefits of forming a close corporation?

A close corporation is any domestic for-profit corporation or professional corporation that states in its Articles of Incorporation or Certificate of Formation that "this corporation is a close corporation." The statement can be included in a corporation’s initial Articles of Incorporation or Certificate of Formation, or it can be added later by amendment.

Benefits of a close corporation are that they may be managed according to a shareholders' agreement instead of by a board of directors or bylaws. Frequently, shareholders in close corporations agree to limit the conditions under which shares may be transferred or sold, apportion profits and losses in a specific manner, or set terms and conditions for share ownership or management positions. For more information, please see Part Twelve of the Texas Business Corporation Act or BOC §§ 21.701 et seq.

What are the possible consequences of personal liability for business debts and obligations?

Personal liability can devastate the accumulated wealth of a lifetime of work. This form of liability opens the individual to claims for a wide range of business obligations. Most people realize that personal liability may extend to business losses, but other obligations may also reach individuals, including: damage awards in lawsuits; tax deficiencies and penalties; and back wages and benefit payments.

Example: Wendy operates a trucking company as a sole proprietor. One of her drivers causes an accident that kills several people. If the company's insurance and assets are inadequate to cover the damages awarded in the wrongful death suit, the plaintiffs may enforce the judgment against Wendy's personal assets.

How can limited liability help?

Limited liability offered by incorporation shelters business owners from personal liability. Certain types of insurance can also help cover business owners, directors, and officers. However, if an owner or director performs certain personal acts, behaves illegally, or fails to uphold statutory requirements for corporate status, he or she may face personal liability despite the corporate shelter.

What are the differences between C and S corporations?

The Internal Revenue Code allows for two different levels of corporate tax treatment. Subchapters C and S of the code define the rules for applying corporate taxes.

Subchapter C corporations include most large, publicly-held businesses. These corporations face double taxation on their profits if they pay dividends: C corporations file their own tax returns and pay taxes on profits before paying dividends to shareholders, which are subsequently taxed on the shareholders' individual returns.

Subchapter S corporations meet certain requirements that allow the business to insulate shareholders from corporate debts but avoid the double taxation imposed by subchapter C. To receive subchapter S treatment, corporations:

- Must be domestic;
- Must not be affiliated with a larger corporate group;
- Must have no more than one hundred shareholders;
- Must have only one class of stock;
- Must not have any corporate or partnership shareholders; and
- Must not have any nonresident alien shareholders.

Additionally, after a business is incorporated, all shareholders must agree to subchapter S treatment prior to electing that option with the Internal Revenue Service. The limitations imposed by the subchapter may affect the transferability and marketability of corporate shares.

What types of legal procedures should corporations maintain?

Once incorporators establish a new business, the directors must ensure that it retains its legal status. Depending on the business form, certain legal formalities must be followed for this purpose. Once incorporated, an ongoing business's obligations include:

- Obtaining federal and state tax identification numbers for the business and filing needed tax returns annually;
- Issuing shares of stock as mandated by the articles of incorporation and federal securities law;
- Establishing and maintaining corporate books and records, including accounting ledgers, shareholder records, and corporate minutes;
- Calling and conducting an initial meeting of the board of directors or shareholders, as required in the articles of incorporation;
- Holding future meetings at least as often as required by applicable business laws;
- Conforming all decisions and internal procedures set forth by the articles of incorporation;
- Recording all actions and decisions of the board of directors in the corporate minutes; and
- Maintaining annual registration with the state government as required by law.

Additionally, some businesses must comply with licensing requirements or professional standards to preserve their status. These businesses may need to maintain further records or use special procedures or equipment based on rules for their specific industries.

In many situations, a failure to abide by corporate obligations can result in personal liability for directors, officers, or shareholders for business obligations and debts. Because of these harsh consequences and because the

specific legal requirements vary depending on the business's location and form, businesses should seek professional legal advice.

What is "piercing the corporate veil?"

Sometimes, courts will allow plaintiffs to receive compensation from corporate officers, directors, or shareholders for damages rather than limiting recovery to corporate resources. This procedure avoids the usual corporate immunity for organizational wrongdoing, and may be imposed in a variety of situations. The specific criteria for piercing the corporate veil vary somewhat from state to state and may include the following:

- If a business is indistinguishable from its owners in practical terms, courts will not allow owners to benefit from limited liability.

- If a corporation is formed for fraudulent purposes, courts will allow recourse to the owners.

- If a business fails to follow corporate formalities in areas such as record-keeping and decision-making procedures, a court may impose liability on the individuals controlling the business.

The potential for personal liability encourages businesses to observe legal requirements and to avoid damage to third parties.

How much franchise tax must a corporation or limited liability company pay?

For information on franchise taxes, contact the Texas Comptroller of Public Accounts at (800) 252-5555, (800) 252-1381, tax.help@cpa.state.tx.us, or www.cpa.state.tx.us.

Do shareholders of closely held corporations have any legal responsibilities to each other?

Corporate law imposes a *fiduciary duty* on business directors that requires them to act in the best interests of the company's shareholders. For closely held corporations where shareholders work together and may act as directors, there may be a fiduciary responsibility between shareholders in some instances.

The traditional legal view holds that shareholders have no special responsibilities to one another. In closely held businesses, however, majority shareholders can potentially greatly damage the interests of small shareholders. Since most investors do not want to buy closely held shares, minority shareholders have few options when their interests are compromised. In response, some states and courts have recognized fiduciary duties among shareholders of closely held businesses.

These duties depend on the state and the particular circumstances of the case. Some state court holdings require that majority shareholders exercise the utmost good faith and loyalty to minority shareholders of close corporations.

Example: Jane is a minority shareholder in her grandfather's company. Her grandfather, the majority shareholder, takes dividends himself but refuses to pay her dividends because he believes she will use the money unwisely. Jane's grandfather's actions violate his fiduciary duties to Jane as a shareholder.

Some states do not establish a fiduciary duty, but offer special rights to minority shareholders. In some cases, minority shareholders of close corporations can compel the company to dissolve. Other laws authorize special voting trust rules or other options to boost the power of the minority shareholder.

What is a shareholder voting agreement?

Shareholders may choose to *pool* their votes for a particular goal. Voting agreements may specify that the involved shareholders will vote their shares together or cooperatively. Courts usually uphold shareholder voting agreements as long as they relate to issues upon which shareholders can vote.

Example: Connie and Val enter into a shareholder agreement that they will never vote for another shareholder, Arlene, for a seat on the board of directors. They also agree that if they are outvoted, they will try to convince the company to pay Arlene less than the other directors. The first part of the agreement is valid because it relates to an issue on which Connie and Val can vote. The second portion cannot be enforced as a shareholder voting agreement because Arlene's pay is within the discretion of the board of directors and will not come up for shareholder vote.

Voting pools may specify exactly how the participating shares should be voted, or they may allow for negotiation and agreement for each individual issue. Many voting pools include an alternative dispute resolution procedure for reaching agreement on such issues.

Some states require that voting pools follow specific guidelines to be valid. These laws may limit the length of a shareholder agreement, or may require that the shareholders deposit a copy of the agreement with the corporation. If a party to a valid voting agreement violates the agreement, the other parties may sue the uncooperative party. Courts may require that the dissenting shareholder vote according to the agreement, or they may disqualify violating votes.

Can closely held businesses be bought and sold?

Individuals and other businesses can acquire closely held businesses as long as the current shareholders are willing to sell. Since many closely held businesses involve family relationships, emotional events including divorce, estrangement, or death may precipitate the business sale. Needless to say, these circumstances may complicate any business transaction.

Problems with selling closely held businesses?

One difficulty in purchasing or selling a closely held business involves valuation. Since shares in closely held businesses are not commonly traded, parties may find it nearly impossible to agree on a fair price for the business. Financial professionals and lawyers can assist the parties in valuing the business and reaching an amicable agreement for its transfer.

Can Interests in closely held businesses be transferred?

Some transfers cause no complications whatsoever. For sole proprietorships, the buyer purchases the company's assets and takes over operations. Partnerships and limited liability companies do not transfer as easily. If a partner or limited liability company owner sells his or her interest, the buyer cannot participate in the business without the remaining owners' consent. Essentially, the buyer succeeds to the seller's profits and losses in the business unless the other parties agree to allow him or her to participate in management of the business. Corporate ownership interests cause the fewest problems because corporate shareholders may sell their entire interests.

Experienced competition may destroy the value of the purchased business. Purchasers of closely held businesses should consider having the sellers sign non-compete agreements. These agreements prevent sellers from using their expertise and market knowledge to compete against the purchaser in his or her new venture. Courts generally uphold these agreements so long as they do not extend too far geographically or chronologically.