



RECREATION LAW GROUP

Oh Yeah, This is Work: Employment Law Basics for Your Business

2023 Wilderness Risk Managers Conference

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About



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Disclaimer



I am an attorney licensed in New Mexico and Colorado.

This session is to provide legal information, not legal advice.



Who's in the room?

This is Work

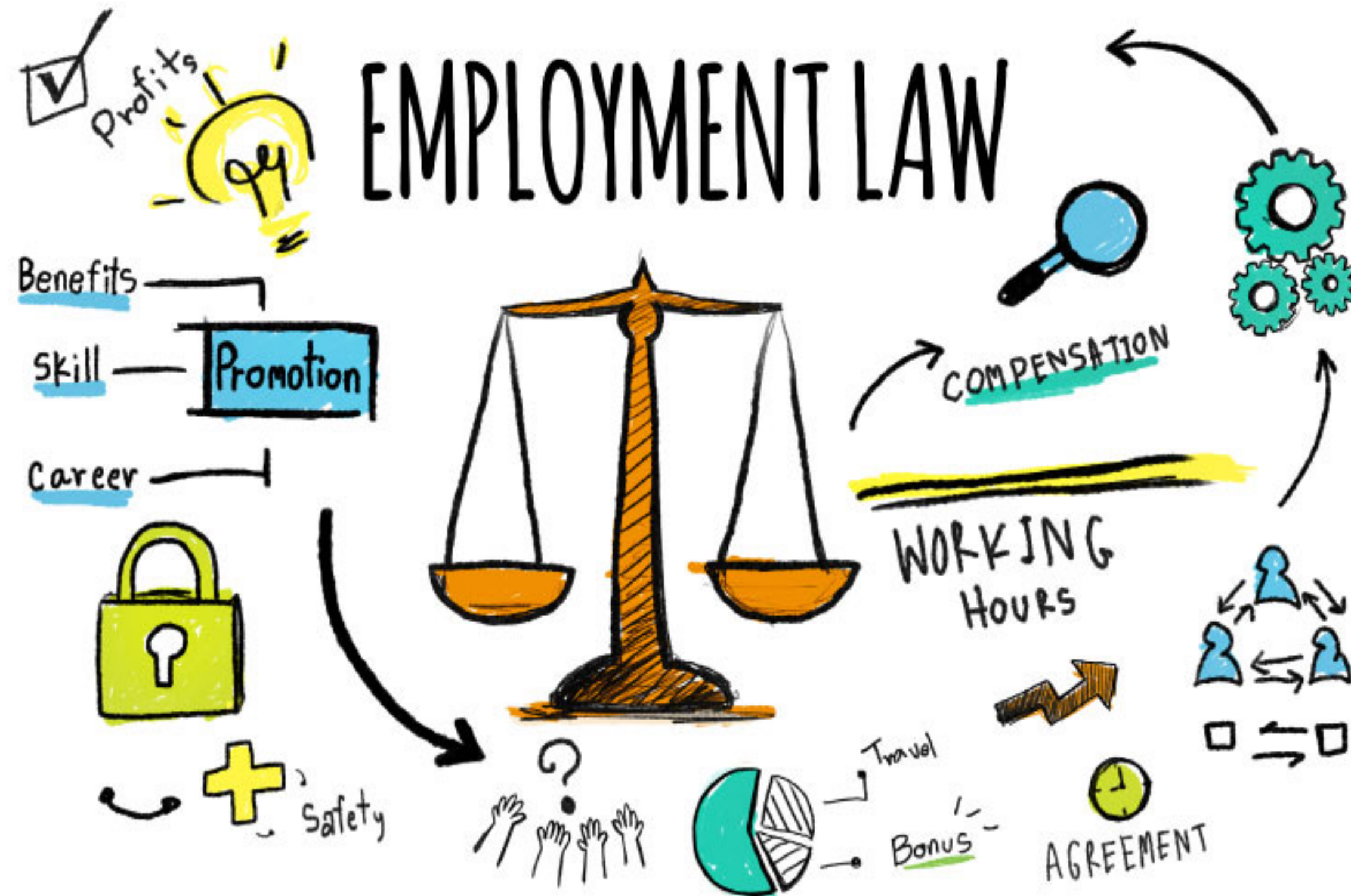
- Athletics coach.
- Camp counselor and director.
- Backpacking guide.
- School outdoor education leader (hiking, backpacking, climbing, rafting).
- Kayak instructor.
- Trekking guide.

This is Work (!)

1. I can't believe I get paid to do this!
2. What was I thinking?!

The risks of our work are not confined to the outdoors.

Session Overview



1. General principles of employment law.
2. Onboarding
3. Legally essential employment policies.
4. Important employment/workplace-related policies.

General Principles of Employment Law

- Protects both the employee and employer.
- Employment laws, requirements, and principles are not linear.
- State and Federal laws.
- All employees need to know your policies, practices, expectations.
- Important to develop relationship with an employment law attorney.

Onboarding

- The employment relationship: independent contractor vs. employee
- Application
- Essential Functions
- At-will Employment
- Employment Handbook
- Employee Training and Orientation

Independent Contractor vs. Employee

“Right-to-Control” basis and test – Fact based

- Designed to evaluate who controls how work is performed.
- Independent contractors control the manner and means by which contracted services, products, or results are achieved.
- The more control a company exercises over how, when, where, and by whom work is performed, the more likely the workers are employees, not independent contractors.

Independent Contractor vs. Employee

Many states have both statutory test and a **common law test** for determining whether a worker is an employee or an independent contractor:

Sample Statutory test (Wyoming):

“Independent contractor” means an individual who performs services for another individual or entity and:

- Is free from control or direction over the details of the performance of services by contract and by fact;
- Represents his services to the public as a self-employed individual or an independent contractor;
- May substitute another person to perform his services.

Wyo. Stat. Ann. § 27-14-102 (xxiii)

Independent Contractor vs. Employee

Sample common law test (Wyoming)

An express contract between the parties “is important evidence in defining the relationship, although it is not conclusive of the issue.”

- “Other factors which are important to the determination include:
 - the method of payment,
 - the right to terminate the relationship without incurring liability,
 - the furnishing of tools and equipment,
 - the scope of the work, and
 - the control of the premises where the work is to be done.
 - whether the worker devotes all of his efforts to the position or if he also performs work for others.”

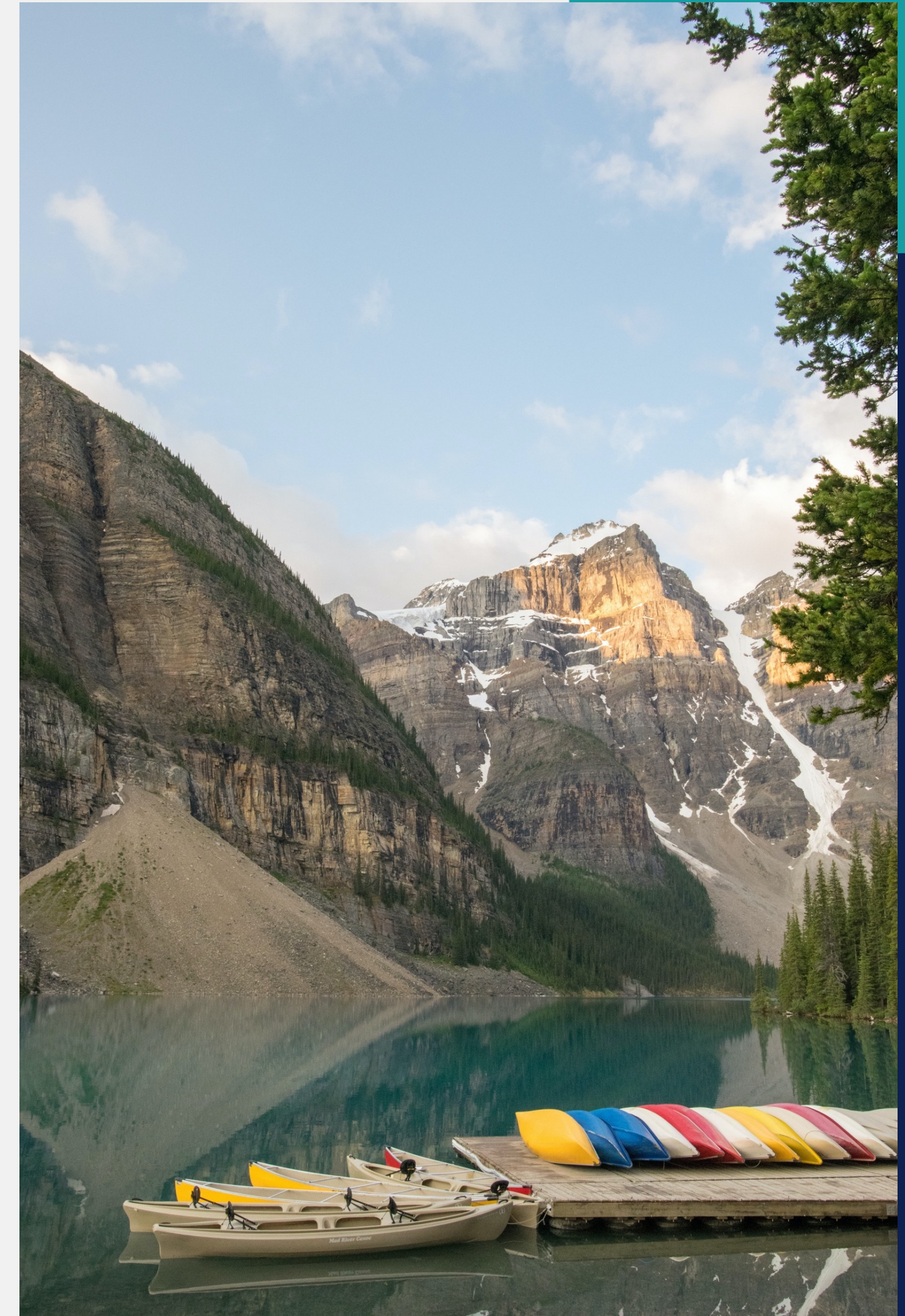
Circle C Res., Inc. v. Kobielski (In re Kobielski), 2014 WY 35, ¶ 12, 320 P.3d 213, 218.

Employment Application

Your application questions should be related to the job for which you are hiring.

- DOB?
- Ethnicity?
- SSN?
- US Citizen?
- Health?

Position Description and Essential Functions



Essential Functions

Title I of the ADA:

- Prohibits an employer from discriminating against a qualified individual on the basis of disability.
- ADA authorizes employers to identify and utilize essential functions of each job position for the purpose of identifying qualified individuals to perform the job.

Essential Functions are:

- “The fundamental job duties of the employment position the individual with a disability holds or desires. The term ‘essential functions’ does not include the marginal functions of the position.”



At-Will Employment

- What does “at-will” mean?
 - employment is for an indefinite period of time, and
 - employee or employer may terminate the employment, with or without notice, and at any time, for any *legal* reason.
- Caution re termination:
 - Though employment is at-will, your state may have requirements that you must follow regarding termination
 - Document everything.

Employment Handbook

- Your policies and procedures reflect applicable employment laws.
- Handbook houses
 - Written policies and procedures.
 - Company values, expectations
 - Employee rights and responsibilities
- Educate and train employees
- Delivery of handbook
 - Signature of understanding and receipt
- "Handbook does not alter the at-will nature of employment/does not serve as a contract."



Legally Essential Policies -- governing employment and compensation

- At-will Employment.
- Equal Employment Opportunity (EEO) Statement.
- Leave/Time off.
- Compensation and overtime.
- Workers compensation.
- Discrimination/Harassment in the Workplace or Work-Related Settings
 - Accommodations
 - Sexual Harassment

Sample EOE statement

Recreation Company provides equal employment opportunities to all employees and applicants for employment and prohibits discrimination and harassment of any type without regard to race, color, religion, age, sex, national origin, disability status, genetics, protected veteran status, sexual orientation, gender identity or expression, or any other characteristic protected by federal, state or local laws.

This policy applies to all terms and conditions of employment, including recruiting, hiring, placement, promotion, termination, layoff, recall, transfer, leaves of absence, compensation and training.

Fair Labor Standards Act (FLSA)

Establishes minimum wage, overtime pay, recordkeeping, and child labor standards affecting full-time and part-time workers in the private sector and in Federal, State, and local governments.

Fair Labor Standards Act (FLSA)

- Non-exempt employee
 - Must be paid at least the federal minimum wage as well as overtime as established by the law.
- The federal minimum wage is currently (2023) \$7.25 per hour for all hours an employee works.
- A non-exempt employee must be paid **overtime pay** for all hours worked over 40 hours in a workweek at not less than time-and-one-half the regular rate of pay.

Fair Labor Standards Act (FLSA)

Exempt employee –

- Employees who, by exemption, are not covered by the FLSA, as identified and defined by the law.
 - exempt from both minimum wage and overtime pay under the FLSA.
- An employee is exempt from the FLSA if an employee meets all of the factors listed under each exemption below.
 - Fact-based not based on title or labels

Discrimination and Harassment

Americans with Disabilities Act.

- Prohibits discrimination in the workplace based on disability.

Title VII of the Civil Rights Act of 1964

- Prohibits discrimination in the workplace based on any of the protected classes

Both apply to private employers with 15 or more employees

Protected classes

- Race, color, sex, religion, national origin
- Other laws protect against discrimination for other classes, e.g., age, disability

Important Employment/Workplace-Related Policies

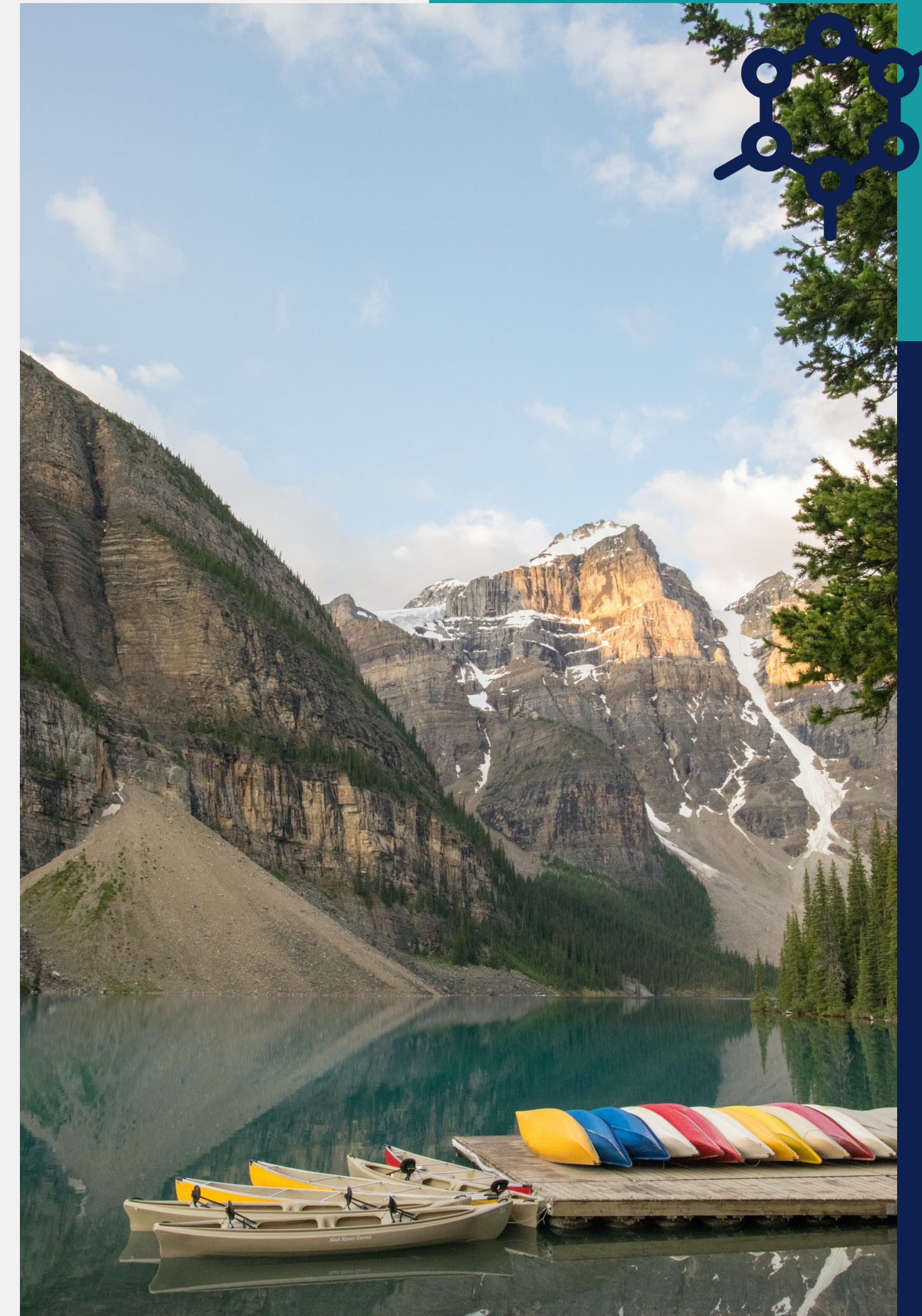
- Drug and alcohol use/possession on company time
 - Marijuana use – recreational, medical
 - Federal v. state law
 - Drug testing
- Computer and internet acceptable use policy
 - No expectation of privacy
- Social media acceptable use policy
 - Free speech v. company policies
 - Media inquiries

Important Employment/Workplace-Related Policies

- Firearms in workplace
- Expectations (e.g., work hours and punctuality, dress, grooming, compliance with the law, etc.)
- Working with minors
- Discipline (note: at-will)
- Workplace safety, violence, threats of violence
 - “see something say something”

Policies should be considered
promises.

Keep your promises!



ACTION STEPS

1. Review your policies and past implementation of them to ensure your business has the essential policies and address the requirements of state and federal law (i.e., are your policies adequate?).
2. Draft specific new policies or procedures.
3. Develop a relationship with an employment attorney.

Questions?

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