

The Inside Scoop:
The HR Professional's
Ultimate Checklist for
Reducing Legal Risks
Part II

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The Ultimate Checklist

PART I

- ✓ Independent Contractors
- ✓ Management Training
- ✓ Employee Handbook
- ✓ FLSA Exempt Status
- ✓ Gender Equity Pay Issues
- ✓ FMLA Administration

PART II

- ✓ Reasonable Accommodations Under the ADA
- ✓ Internal Investigations
- ✓ Terminations
- ✓ Union Avoidance
- ✓ State/Local Laws

Reasonable Accommodation Interactive Process



The Interactive Process

- "When a qualified individual with a disability requests a reasonable accommodation, the employer and employee should engage in flexible, interactive discussions to determine the appropriate accommodation." *Griffin v. United Parcel Service, Inc.* (5th Cir. 2011)
- Failure to engage in the interactive process is a *per se* or stand-alone violation of the ADA if it is shown the employer did not engage in the process at all or did so without a genuine effort to explore whether reasonable accommodations were available.
- Both the employer and the employee must participate in the interactive process in good faith.

Document the Interactive Process!

- The employer's requests for information from the employee must be clear and rationally related to the goal of exploring reasonable accommodations.
- Best practices mandate that employers completely document ***each and every step*** of the interactive process.
- Don't be afraid to ask for the employee's own reasonable accommodation ideas.
- Employers should document all of the accommodation ideas they explored (including both the employee's and the employer's ideas).
- Documenting by email is better than nothing, but consider a "working memo" or journal of the interactive process.

Use an ADA Questionnaire

- Employers often lack enough information about the employee's impairment to make informed decisions.
- The law allows employers to draft questionnaires for the employee's doctor to complete, asking:
 - Whether the employee can perform the essential functions of the job (enclose the job description).
 - A detailed description of the employee's restrictions.
 - How long the employee will be restricted.
- **Remember:** Give the questionnaire to the employee with written instructions on what to do with it and when you need it back from the employee or their doctor.

Interactive Process Checklist

- ✓ Do you have an internal reasonable accommodation process?
- ✓ Is the process documented?
- ✓ Do you have appropriate form letters to assist in the process?
- ✓ Have you determined if the employee has an ADA-covered disability?
- ✓ Have you asked for the employee's input in writing restrictions and accommodations?
- ✓ Have you asked for the health care provider's input in writing restrictions and accommodations?
- ✓ Have you asked for input from management about accommodations?
- ✓ Have you sought technical assistance?
- ✓ Have you analyzed all accommodations for effectiveness?
- ✓ Have you analyzed all accommodations for undue hardship?

Reasonable Accommodation Order

- Are effective reasonable accommodations available to assist the employee in performing the current position?
- If not, the employer must determine if there are vacant positions available which the employee can perform with or without reasonable accommodations? (**NOTE:** An employee cannot be required to compete for a vacancy as part of this process.)
- If not, the employer must determine whether leave time is a reasonable accommodation and, if so, for how long and will there be a job available upon return from leave that the employee can perform with or without reasonable accommodations?
- Do any of the accommodations pose an undue hardship?

Undue Hardship

- Employers are exempt from making accommodations if they can prove that doing so would cause the business "undue hardship."
- "Undue hardship" means significant difficulty or expense, and focuses on the resources and circumstances of the particular employer compared to the cost or difficulty of providing the accommodation at issue. 29 C.F.R. §1630.2(p)
- The focus is not only on the financial cost, but also whether the accommodation is unduly extensive, substantial or disruptive, or would fundamentally alter business operations.
- This question is **very** fact-specific and must be assessed on a case-by-case basis.

Internal Investigations



Investigation File Checklist

- ✓ Prepare a summary, notes or get a written statement of complainant's issues following meeting with complainant or receipt of written complaint.
- ✓ Letter/email to complainant acknowledging receipt of complaint, explaining next steps, setting out initial time line, advising no retaliation and how to raise concerns about retaliation.
- ✓ Meet with accused to advise of complaint and next steps.
- ✓ Letter/email to accused confirming meeting to advise of allegations, explaining next steps, setting out initial time line, outlining any interim actions being taken (such as complainant reporting to another supervisor), advising no retaliation and advising of consequences of retaliation.

Investigation File Checklist (Cont'd)

- ✓ Gather documents/tangible items.
- ✓ Investigation outline – who to interview, order, timing, general and specific questions, additional documents to compile, general information to give everyone interviewed about internal investigations, confidentiality, no retaliation, how to raise concerns about retaliation, who to contact for additional information or concerns.
- ✓ Conduct witness interviews and any follow-up interviews.
- ✓ Gather additional documents/tangible items.
- ✓ Make a determination.
- ✓ Write conclusion letter to complainant and accused.
- ✓ Follow-up with complainant and accused.

Terminations



The Involuntary Termination Decision Checklist

- ✓ Who is the decision-maker?
- ✓ Can the decision-maker articulate a reasonable business basis for the termination decision?
- ✓ Is the termination for a series of incidents (poor performance or behavior) or one serious incident that warrants termination?
- ✓ If a series of incidents, is there evidence of prior warnings, coaching or counseling and have all relevant company policies been followed for progressive discipline?
- ✓ How have similarly situated employees been treated in the past for doing the same thing?

The Involuntary Termination Decision Checklist (Cont'd)

- ✓ Are there any indicators of discrimination, harassment, retaliation or other inappropriate/unlawful behavior by management?
- ✓ Has an appropriate investigation been done to confirm relevant facts and collect pertinent documents/evidence to support termination?
- ✓ Is termination consistent with the Company's culture?
- ✓ Have all Company policies been followed?
- ✓ Is management prepared for any negative reaction from employees as a result of the termination decision?
- ✓ Is management prepared to make sure Company operations needs are covered immediately following the termination?

The Involuntary Termination Checklist

- ✓ Who will communicate the termination and how?
- ✓ Who will be present in the termination meeting?
- ✓ Where will the meeting take place?
- ✓ Are there security and/or safety concerns?
- ✓ Is management prepared for a variety of responses from the separated employee?
- ✓ How will the employee exit the building?
- ✓ How will the employee's personal belongings be collected and returned?
- ✓ How will all Company property be returned?

The Involuntary Termination Checklist

(Cont'd)

- ✓ Are there agreements with the employee that remain in effect following termination and how should they be emphasized?
- ✓ Is IT prepared to stop network access, security access, etc., during the termination meeting?
- ✓ Will a written separation notice or other written explanation of the reasons for termination be provided?
- ✓ How will benefits continuation, COBRA, 401k, final paycheck, accrued PTO and other separation issues be addressed with the departing employee?
- ✓ Will the company fight unemployment?
- ✓ Will a severance agreement be requested?

Union Avoidance

- Is your Company at risk?
- If so, have you had a union avoidance assessment done to gauge risk?
- Do your managers understand the Company's position on union avoidance and their role in carrying out Company goals?
- Have you done union avoidance practical and legal training for management?
- Is troublesome behavior by management addressed promptly to reduce union organizing risks?
- Are there opportunities for open communication between employees and management and are they utilized and effective?

Quirky State and Local Laws

- Additional protected classes for discrimination and harassment
- Different standards for accommodating pregnant employees
- Paid sick leave
- Wage theft protection and disclosure laws
- State and City family leave laws
- "Ban the Box" laws
- Payment of accrued vacation and time limits on final paychecks upon termination
- State immigration laws

AFFORDABLE CARE ACT UPDATE

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"Applicable Large Employer" Definition

- Only employers with 50 or more FTEs in the prior year are subject to Shared Responsibility rules in current year.
- To determine ALE status, count employees by month, in prior year. For each month add up the total number of FTEs and divide by 12. If less than 50, not an ALE. Solely for ALE status, determine FTEs as follows:
 1. Count each full-time employee (anyone regularly scheduled to work 30 or more hours per week) as 1.
 2. All other employees*, take total hours worked in a month and divide by 120.

*Special rule for “seasonal worker” (next slide).

ALE Status and Seasonal Workers

- A “seasonal worker” is anyone who is employed for not more than four months (or 120 days) during the prior calendar year. For example, retail workers employed exclusively during holiday seasons are seasonal workers.
- If an employer’s workforce exceeds 50 full-time employees for 120 days or fewer during a calendar year, and the employees in excess of 50 who were employed during that period of no more than 120 days were seasonal workers, the employer is not considered an applicable large employer.

This exception applies SOLELY for purposes of determining ALE status.

Shared Responsibility Rule Changes

- In 2016, the percentage of FTEs and ALE must offer coverage to or pay a penalty increases from 70% to 95%.
- In 2015, the first 80 full-time employees were excluded from counting toward the penalty; in 2016, only the first 30 will be excluded.

Don't forget that even if an employer meets the 95% test, if an FTE is NOT offered affordable coverage and enrolls in a subsidized exchange coverage, the employer will be subject to an excise (penalty) tax for that employee.

ACA Penalties Increase

- An ALE must offer coverage to at least 70% (for 2015) and 95% (for 2016 forward) of its full-time employees or be subject to the following excise taxes:
 - For 2015, this amount was \$2,080 (\$173.33/month) multiplied by the full-time employee count (minus the first 80 full-time employees).
 - For 2016, this amount is \$2,160 (\$180/month) multiplied by the full-time employee count (minus the first 30 full-time employees).

ACA Penalties Increase (cont'd)

- An ALE must offer full-time employees coverage that both provides minimum value and is affordable or be subject to a potential penalty tax, as follows:
 - For 2015, this amount was \$3,120 (\$260/month) multiplied by each full-time employee who enrolls through a public Exchange and qualifies for a tax subsidy.
 - For 2016, this amount is \$3,240 (\$270/month) multiplied by each full-time employee who enrolls through a public Exchange and qualifies for a tax subsidy.

Deadline for ACA Reporting

- Forms 1095-B and 1095-C: Deadline to furnish forms to Individuals:
 - Original due date: February 1, 2016
 - Extended due date: March 31, 2016
- Forms 1094-B and 1094-C: Deadline to file forms with IRS by paper:
 - Original due date: February 29, 2016
 - Extended due date: May 31, 2016
- Forms 1094-B and 1094-C: Deadline to file forms with IRS electronically (required for 250 or more returns)
 - Original due date: March 31, 2016
 - Extended due date: June 30, 2016

Reporting – Which Form to Use?

	Form 1095-C	Form 1095-B
Active employee offered and enrolled in self-insured coverage	X	N/A
Active employee offered and enrolled in fully-insured coverage	X (Part III blank)	X (from insurer)
Active FTE NOT offered coverage	X (Part III blank)	N/A
Active non-FTE either not offered coverage or offered coverage and not enrolled	N/A	N/A
Year of termination COBRA participant or retiree enrolled in self-insured coverage	X	N/A
Year of termination COBRA participant or retiree enrolled in fully-insured coverage	X (Part III blank)	X (from insurer)
Year 2 COBRA participant or retiree enrolled in self-insured coverage	N/A	X (from employer)
Year 2 COBRA participant or retiree enrolled in fully-insured coverage	N/A	X (from insurer)
Union employees for which employer contributes to multiemployer fund	X (Part II transition relief; Part III blank)	X (from Fund)

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This app contains Quick and Easy Guides to the primary labor and employment laws of the identified states. We've also provided a summary of primary federal laws.