

# CHAPTER 8

## LEGALLY MANAGING EMPLOYEES

### 8.1 EMPLOYMENT RELATIONSHIPS

- Offer Letter
- Employee Manual

### 8.2 WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT

- Preventing Discrimination
- Managing Diversity
- Sexual Harassment
- Employer Liability
- Zero Tolerance
- Investigating a Complaint
- Resolving a Complaint
- Third-Party Harassment
- Liability Insurance

### 8.3 FAMILY AND MEDICAL LEAVE ACT

### 8.4 COMPENSATION

- Minimum Wage and Overtime
- Tipped Employees
- Tip Pooling
- Taxes and Credits

### 8.5 MANAGING EMPLOYEE PERFORMANCE

- Evaluation
- Discipline
- Termination
- In-House Dispute Resolution

**8.6 UNEMPLOYMENT CLAIMS**

Criteria for Granting or Denying Benefits  
Claims and Appeals

**8.7 EMPLOYMENT RECORDS AND RETENTION**

Department of Labor (DOL) Records  
Immigration-Related Records  
Records Required by the ADEA

**8.8 EMPLOYMENT POSTERS****8.9 WORKPLACE SURVEILLANCE**

**T**HE VOICE CAUGHT Trisha Sangus's ear as she rounded the basement stairwell and arrived at the hotel's security department offices.

"So these two guys' car breaks down . . . outside a farmhouse way in the country, see, and they go up to the door . . ."

Jon Ray, director of security, was the first one of the group of four men to see Trisha, the hotel's general manager. Jon was a retired policeman and one of the hotel's best department heads. He had done a lot to improve the safety and security of the hotel's physical assets since his arrival three years ago. Trisha knew that all of the guests were safer because of his innovative security efforts.

"Hello Ms. Sangus," Jon called out as the other three men glanced her way. Eric, the security guard who had been speaking, stopped and was now busily attempting to brush an imaginary piece of lint off his shirt. Tom, one of his coworkers, began talking somewhat loudly about the big ballgame that had been played the night before.

"Hello Tom, Eric, Leon," said Trisha as the three security staff members began to drift away from the group.

"Hi, Ms. Sangus," they replied, and then they were gone.

"Busy morning?" Trisha asked.

"The usual," Mr. Ray replied a bit offhandedly. Then, as he looked at Trisha, he stated, "Just the guys being guys. I'm sure in housekeeping the same kinds of stories are being told by their staff. You know, you can't dictate to employees what kind of

jokes they like. As you know, most of my guys are ex-cops. They've seen and heard it all."

"I suppose that's true," replied Trisha slowly. "Jon, the story Eric was about to tell, do you think I would find it funny?"

"Well," Mr. Ray replied cautiously, "how can anyone be sure what amuses a person today? In my department, these guys probably would find the joke funny. Certainly not offensive. But they know better than to tell an off-color story around a lady."

"Interesting," thought Trisha as she returned to her office. She agreed with Jon. She didn't think any of his security staff would find a "farmer's daughter" joke offensive. She was also sure that none of the men would tell such a joke in the presence of a female staff person. And there had never been a complaint filed against anyone in Jon's department. On further reflection, however, Trisha realized that she, and the hotel, faced a serious problem. She picked up the telephone to call Jon.

"Jon," she began, "I'm concerned about employee safety in the hotel. As director of security, and a member of the management team, you should be concerned, too. I need you up here immediately."

"I'll come up as soon as I finish the morning report," Mr. Ray replied.

"No, Jon, not later, now!" she said firmly, as she hung up the telephone.

"I wonder what happened," thought Mr. Ray, as he hurried to Trisha's office. Whatever it was, it must have been big!

## IN THIS CHAPTER, YOU WILL LEARN:

1. To differentiate between an employment agreement and an employee manual.
2. To establish a nondiscriminatory work environment.
3. To implement a procedure designed to eliminate sexual harassment and minimize the risk of penalties resulting from charges of unlawful harassment.
4. To legally manage the complex areas of employee leave, compensation, and performance.
5. To respond appropriately to unemployment claims.
6. To summarize and list the employment records that must be maintained to meet legal requirements.

## 8.1 EMPLOYMENT RELATIONSHIPS

After you have legally selected an employee for your organization, it is a good practice to clarify the conditions of the employment agreement with that employee.

All employers and employees have employment agreements with each other. The agreement can be as simple as an hourly wage rate for an hour's work and at-will employment for both parties. An agreement is in place even if there is nothing in writing or if work conditions have not been discussed in detail. *Employment agreements* may be individual, covering only one employee or, as discussed in the last chapter, they may involve groups of employees. Generally, employment agreements in the hospitality industry are established verbally, or with an offer letter.

### LEGALESE

#### Employment agreement:

The terms of the employment relationship between an employer and employee that specifies the rights and obligations of each party to the agreement.

### Offer Letter

Offer letters, when properly composed, can help prevent legal difficulties caused by employee or employer misunderstandings. As their name implies, offer letters detail the offer made by the employer to the employee. Some employers believe offer letters should be used only for managerial positions, but to avoid difficulties, all employees should have signed offer letters in their personnel files. Components of a sound offer letter include:

- Position offered
- Compensation included
- Benefits included (if any)
- Evaluation period and compensation review schedule
- Start date
- Location of employment
- Special conditions of the offer (e.g., at-will relationship)
- Reference to the *employee manual* as an additional source of information regarding employer policies that govern the workplace
- Signature lines for both employer and employee

Consider the case of Antonio Molina. Antonio applies for the position of maintenance foreman at a country club. He is selected for the job and is given an offer letter by the club's general manager. In the letter, a special condition of employment is that Antonio must submit to, and pass, a mandatory drug test. Though Antonio can sign the letter when it is received, his employment is not finalized until he passes the drug test.

Additional rules that Antonio will be expected to follow, or benefits that he may enjoy while on the job, will be contained in the employee manual.

### LEGALESE

#### Employee manual:

A document written to detail the policies, benefits, and employment practices of an employer.

## Employee Manual

In most cases, the offer letter will not detail all of the policies and procedures to which the employer and employee agree. These are typically contained in the employee manual. The manual may be as simple as a few pages or as extensive as several hundred pages. In either case, an important point to remember is that employee manuals are often referenced by the courts to help define the terms of the employment agreement if a dispute arises. The topics covered by an employee manual will vary from one organization to another. However, some common topic areas include:

### General Policies

- Probationary periods
- Performance reviews
- Disciplinary process
- Termination
- Attendance
- Drug and alcohol testing
- Uniforms
- Lockers
- Personal telephone calls
- Appearance and grooming

### Compensation

- Pay periods
- Payroll deductions
- Tip-reporting requirements
- Timekeeping procedures
- Overtime pay policies
- Meal periods
- Schedule posting
- Call-in pay
- Sick pay
- Vacation pay

### Benefits

- Health insurance
- Dental insurance
- Disability insurance
- Vacation accrual
- Paid holidays
- Jury duty
- Funeral leave
- Retirement programs
- Duty meals
- Leaves of absence
- Transfers
- Educational reimbursement plans

### Special Areas

- Policies against harassment
- Grievance and complaint procedures

- Family medical leave information
- Dispute resolution
- Safety rules
- Security rules
- Emergency preparedness

Employee manuals should be kept up to date, and it should be clearly established that it is the employer, not the employee, who retains the right to revise the employee manual.

Many companies issue employee manuals with a signature page, where employees must verify that they have indeed read the manual. This is a good idea, as it gives proof that employees were given the opportunity to familiarize themselves with the employers' policies and procedures. It is also a good idea to use wording similar to the following on a signature page. The wording should be emphasized in a type size larger than the type surrounding it.

*The employer reserves the right to modify, alter, or eliminate any and all of the policies and procedures contained in this manual at any time.*

An additional precaution taken by many employers is the practice of giving a written test covering the content of the employee manual before the employee begins work. The employee's test results are kept on file.

To clarify for employees that their status is "at-will," each page of the employee manual should contain the following wording at the bottom center of each page: "This is not an employment contract." A more formal statement should be placed at the beginning of the manual, such as:

*This manual is not a contract, expressed or implied, guaranteeing employment for any specific duration. Although [the company] hopes that your employment relationship with us will be long term, either you or the company may terminate this relationship at any time, with or without cause or notice.*

The employee manual must be very carefully drafted to avoid altering the at-will employment doctrine. The document should be carefully reviewed by an employment attorney each and every time it is revised.

## **8.2 WORKPLACE DISCRIMINATION AND SEXUAL HARASSMENT**

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As noted in the last chapter, various laws prohibit discrimination on the basis of an individual's race, religion, gender, national origin, disability, age (over 40), and in some states and communities, sexual orientation.

Although the federal government has taken the lead in outlawing discrimination in employment practices, many states, and even some towns and cities, also have antidiscrimination laws, which must be followed. In general, the state laws duplicate practices that are outlawed under federal law, such as discrimination based on race, color, national origin, and so on. It is important for a hospitality manager to know the provisions of a state civil rights law for several reasons.

Many state discrimination laws add other categories to the list of prohibited behavior, which are not covered under federal law, such as discrimination on the basis of marital status, arrest record, or sexual orientation. Also, while federal civil rights laws apply to businesses engaged in interstate commerce (which includes most restaurants and hotels), many state laws extend to other types of businesses, such as bars, taverns, stores, and "places of public accommodation." State discrimination laws are enforced by state civil rights agencies, which can assess severe penalties to businesses found in violation of the law. These penalties could include fines, prison terms, or both.

Some companies may also expand the protections that their workers receive under the law. As you saw in Chapter 1, "Prevention Philosophy," Hyatt's policy on conduct and ethics clearly states that its employees will not be discriminated against on the basis of their sexual preference. Since Hyatt Hotels are operated in many states and communities

where the law does not prohibit Hyatt from discriminating on the basis of one's sexual preference, Hyatt has voluntarily broadened the protections for its workforce.

These prohibitions of discrimination in the employment area apply when selecting employees for a given job, as well as after they have been hired. With such a wide diversity of employees in the hospitality industry, it is not surprising that a variety of attitudes about work, family, and fellow employees will also exist. Managers cannot dictate conformity in all areas of their employees' value systems. However, as a manager, you are required to prevent discrimination by your staff, coworkers, and even third parties, such as guests and suppliers.

## Preventing Discrimination

Workplace discrimination is enforced by the Equal Employment Opportunity Commission (EEOC). Applicants and employees can bring claims of discrimination to the EEOC and/or their state's counterpart to the EEOC (e.g., the Texas Commission on Human Rights), which will investigate the charges and issue a determination of whether they believe discrimination has occurred. It is important to keep in mind that if a discrimination charge is filed, the EEOC has the authority to examine all policies and practices in a business for violations, not just the circumstances surrounding a particular incident. If there is sufficient evidence of discrimination, the EEOC will first work with employers to correct any problems and try to voluntarily settle a case before it reaches the courts.

If a settlement cannot be worked out, the EEOC may file a lawsuit on behalf of the claimant or issue the claimant a right-to-sue letter. If the EEOC does not determine that unlawful discrimination occurred, then the claimant may accept that finding or privately pursue a lawsuit against the employer.

Penalties for violating Title VII of the Civil Rights Act can be severe. Plaintiffs have the right to recover back wages, future wages, the value of lost fringe benefits, other compensatory damages, attorneys' fees, as well as injunctive relief such as reinstatement of their job and the restoration of their seniority. In addition, federal fines for violating Title VII can be up to \$50,000 (for businesses with fewer than 100 employees) to \$300,000 (for corporations with 500 employees or more).

As we have stressed repeatedly, the best way to avoid litigation is by preventing incidents before they occur. Where discrimination is concerned, this involves making sure that your company's policies, and your own actions as a manager, do not adversely impact members of a protected class.

Some of the more common areas of potential conflict in the hospitality industry concern matters of appearance and language. For example, employers are permitted to require their employees to wear uniforms or adhere to certain common grooming standards (such as restrictions on hair length or wearing jewelry); provided that all employees are subject to these requirements and that the policies are established for a necessary business reason. Although the courts have not outlawed the establishment of "English-only" rules in business, lawsuits have occurred when such companies discriminate against people who have pronounced accents or who do not speak English fluently, especially in job positions where speaking English would not be considered a bona fide occupational qualification.

## Managing Diversity

Beyond preventing acts of overt discrimination, managers have a legal obligation to establish a work environment that is accepting of all people. The failure to establish such an environment is recognized by the courts to be a form of discrimination. Racial slurs, ethnic jokes, and other practices that might be offensive to an employee should not be tolerated.

As a manager, your ability to effectively work with people from diverse backgrounds will significantly affect your success. According to Gene M. Montegudo, former manager of diversity for Hyatt Hotels International, "It is no longer possible to

achieve success in the hospitality industry, either in the United States or abroad, unless you can effectively manage people in a cultural environment vastly different from your own.” Recognition of the differences among individuals is the first step toward effectively managing these differences. This can be confusing in a society that increasingly equates equality with correctness. The truth is that people are different in many cultural aspects; however, it is also true that “we do not have to be twins to be brothers.” In other words, just because we are equal under the law does not mean that we are the same.

One of the great myths of management today is that, because workers are equal under the law, all workers must be treated exactly the same. This is simply wrong. The effective manager treats people equitably, not uniformly. If one worker enjoys showing pictures of her grandchildren to a unit manager, it is okay for that manager to show an interest in them. If another worker prefers privacy, it is equally acceptable for the manager not to ask that employee about his or her grandchildren. Is this more complicated than treating both workers exactly the same? Of course it is. And it may be considered confusing by some. The key to remember here, however, is that the unit manager, by recognizing the real differences between the two employees, and acting on those differences accordingly, is treating them both equitably. That is, they are both being treated with respect for their own system of cultural values.

As you consider the diversity issue in greater detail, you will realize that the recognition of cultural differences is not a form of racism at all, but, rather, the first step toward harmony. The true racist is not the person who notices real cultural differences, but, rather, the person who ignores them. The culturally unaware foodservice manager who does not recognize, for example, the uniqueness and importance of the Asian worker’s culture, denigrates that culture in much the same way as the individual who is openly critical of it. In the hospitality industry, the management of cultural diversity and the inclusion of all people in all aspects of the business will remain an important fact of operational and legal life.

## Sexual Harassment

By their very nature, hospitality organizations are vulnerable to allegations of sexual harassment. Because this is true, it has become increasingly important that managers be informed about the attitudes and conduct that fall under the classification of sexual harassment. Currently, federal and state law recognizes two types of sexual harassment:

- *Quid pro quo* sexual harassment, in which the perpetrator asks for sexual favors in exchange for workplace benefits from a subordinate, or punishes the subordinate for rejecting the offer.
- Hostile environment harassment, in which the perpetrator, through language or conduct, creates an intimidating or hostile working environment for individuals of a particular gender. In a subtler way, this also occurs when “freezing out” tactics are used against employees or when employees are shunned or relegated to an outer office or desk with little or nothing to do, thus inhibiting all communication.

Title VII of the federal Civil Rights Act, as amended in 1972, prohibits sexual harassment in the workplace. The penalties for violating sexual harassment laws are the same as those for other types of civil rights violations. Claimants can recover lost wages, benefits, and attorneys’ fees, and can be reinstated in their jobs. Many states have also adopted laws to protect employees from sexual harassment, which may carry additional fines or penalties.

## Employer Liability

Behavior that once may have been tolerated in the workplace is no longer acceptable. The result has been an explosion of sexual harassment claims, pitting employee against supervisor, employee against another employee, women against men, and men against women, and even same-sex complaints.

### LEGALESE

**Quid pro quo:** Latin term for “giving one thing in return or exchange for another.”

**LEGALESE**

**Vicarious liability:** A party's responsibility for the acts of another that result in an injury, harm, or damage. (See also *respondet superior*.)

In an important decision for employers, on June 26, 1998, the United States Supreme Court, in the case of *Faragher v. City of Boca Raton*, ruled on the circumstances under which an employer may be held liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e, for the acts of a supervisory employee whose sexual harassment of subordinates created a hostile work environment amounting to employment discrimination.

The court held that an “employer is subject to *vicarious liability* to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.” In this case, the court found that “uninvited and offensive touching,” “lewd remarks,” or “speaking of women in offensive terms” was enough to create a hostile employment environment.

The court then determined that if this type of harassment occurs by a supervisor, the employer may avoid liability by raising an affirmative defense, if the following necessary elements are met:

- The employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior.
- The plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The court also held that if a supervisor's harassment ultimately results in a tangible employment action, such as an employee's termination, demotion, or reassignment, the employer is not entitled to claim the affirmative defense just described, and the employer will be held strictly liable for any acts of sexual harassment by its supervisors.

The result of this ruling is that the main, and oftentimes only, legal defense for supervisors to allegations of sexual harassment is to demonstrate a history of preventive and corrective measures. Therefore, it is crucial that every hospitality employer have, at a minimum, an employee manual that outlines the company's sexual harassment policy. This policy should be reviewed by an attorney to determine if it is legally sufficient.

## Zero Tolerance

In order to guard against the liability that results from charges of discrimination or harassment, and to ensure a high-quality workplace for all employees, hospitality organizations should institute a policy of zero (no) tolerance of objectionable behavior. Listed here are some of the measures that companies institute to create a zero tolerance environment:

- Clear policies that prohibit sexual harassment in the workplace
- Workshops to train supervisors and staff how to recognize potentially volatile situations and how to minimize potentially unpleasant consequences
- Provisions and avenues for seeking and receiving relief from offensive and unwanted behavior
- Written procedures for reporting incidents and for investigating and bringing grievances to closure

Of course, employers should not develop a zero tolerance policy toward harassment merely to avoid lawsuits. However, by creating a clear policy statement that includes severe penalties for violation, companies can demonstrate a good-faith effort to promote a safe, fair, work environment. An effective sexual harassment policy should include the following:

- A statement that the organization advocates and supports unequivocally a zero tolerance standard when it comes to sexual harassment.

- A definition of the terms and behaviors discussed in the statement.
- A description of acceptable and unacceptable behaviors; that is, no sexually suggestive photographs, jokes, vulgar language, or the like.
- An explanation of the reasons for the existing policy.
- A discussion of the consequences for unacceptable behavior. You should probably list sexual harassment as a punishable offense in all company handbooks and manuals. Types of disciplinary action available to the company should be stated as consequences for sexual harassment or hostile environment offenses.
- Specific identification of the complaint procedures to be followed by an employee.
- Several avenues for relief or ways to bring a complaint or concern(s) to the attention of management. If all grievances must be cleared through the supervisor and he or she is the culprit, you have not helped.
- Identification, by name, of the employer representative to whom complaints should be reported. This should be to someone who is not in an employee's chain of command. With the current state of the law, it is preferable to direct complaints to the personnel or human resources manager, with an alternative reporting procedure for employees in that department.
- A clear statement that all complaints and investigations will be treated with confidence. All investigative materials should be maintained in separate files with very limited and restricted access.
- A clear statement that the employer prohibits all forms of harassment and that any complaints by employees of other forms of harassment based on any protected category will be addressed under the antiharassment policy.

Although a policy statement is a good beginning, it will not be effective unless it is adopted by managers and communicated to all employees. Most companies reprint their policy on sexual harassment in their employee manual. Other companies have taken additional steps: posting the policy in common areas, such as in lunchrooms and on bulletin boards, and discussing the policy at new employee orientations and other personnel meetings.

A training program is one of the most effective ways an employer can foster a safe working environment and ensure compliance with the law. All employees should participate in a sexual harassment training program, initially during orientation and thereafter on a regular basis. Some of the most effective training techniques include role-playing exercises, group and panel discussions, videos, behavior modeling, and sensitivity training. It is also important that employees become fully familiar with the avenues for seeking relief, should they ever feel uncomfortable because of someone else's behavior. Employees with any kind of supervisory responsibility should be trained to identify circumstances that could be perceived as harassment, and understand both the company's policy and their role in preventing unwelcome behavior and responding seriously to any complaints.

While training is important, it is even more important to evaluate the effects of training. This can be done by administering tests to employees before and after they participate in a training program, keeping the results, and documenting the number of harassment complaints received as well as taking care to note whether the number of complaints has gone up or down. If the feedback shows that a training program is ineffective, change the program. If the feedback shows that an individual was unable to learn the demonstrated skills or follow company guidelines, then either retrain or terminate the employee; otherwise, you may risk a negligent retention claim, because

based on the feedback you received, you should have known that this employee would violate company standards or regulations. A jury might conclude that termination of the employee would have prevented the incident that prompted the lawsuit.

Oposing attorneys will not walk away from a case just because you have a policy in place and state that training has occurred. They will want to see that training did in fact occur, what kind of training it was, and whether or not the training was effective. In order to win a lawsuit that accuses you of ineffective training, you must be able to document a training “trail” and be able to show those materials to a jury. Keep records of every seminar and workshop that is conducted, and note the people who attended. If you used supporting materials such as videos or handouts, keep copies of them. If you solicited feedback after the workshop in the form of test results or employee evaluations, keep them on file. Why? Because, unfortunately, it is rarely the truth that wins lawsuits; it is usually the evidence that prevails.

## » ANALYZE THE SITUATION 8.1

JOSEPH HARPER WAS A cook at the HillsTop resort hotel. He was 61 years old, and had been employed by the resort for over 25 years. Sandra Shana was the new human resource director for the facility. As part of her duties, Ms. Shana conducted the hotel’s sexual harassment training program for all new employees, as well as management. The training sessions used up-to-date material provided by the resort’s national trade association, and Sandra worked hard to evaluate the effectiveness of the training for both employees and management.

Mr. Harper attended three training sessions in the space of five years. When he was approached by Ms. Shana to schedule another training session he stated, “I don’t know why I have to go through this again. It’s nonsense and a waste of time. I have gone three times, and it’s dumber each time I attend!” Mr. Harper had been heard to make similar comments each time he attended the training sessions, and once even challenged the trainers about the “political correctness” of the training. In addition, he had been heard making similar comments in the employee breakroom while other employees were in the room. No staff member of the resort had ever formally accused Mr. Harper of sexual harassment, however. The HillsTop resort stated in its employee manual that it is an “at-will” employer.

1. As the human resource director, would you recommend either the discipline or termination of Mr. Harper based on his comments?
2. If the resort, and Mr. Harper specifically, were named in a guest-initiated lawsuit alleging harassment, and found liable, would you recommend disciplinary action against the human resource director or the resort’s general manager for failing to act?
3. Does Mr. Harper have the right to openly express his opinion about the resort’s harassment training while at work?

## Investigating a Complaint

Unfortunately, even the most thorough prevention effort will not preclude all offensive behaviors. You must, therefore, have a procedure in place to deal with these incidents. This procedure must be strictly followed. Employees must be confident that they can come forward with their concerns without fear of ridicule, retaliation, or job loss.

When a complaint is lodged, or when inappropriate activity is brought to the attention of management, the employer should act immediately. At the time of the complaint, the employer should obtain the claimant's permission to start an investigation. Written consent forms, such as the one displayed in Figure 8.1 are recommended. Note that the form asks for permission to disclose the information to third parties, if necessary, so that a thorough investigation can be conducted.

Often, the circumstances surrounding a claim of sexual harassment are very personal. There are occasions when an employee launches a complaint, then later changes his or her mind or asks if the investigation can be conducted under certain conditions. As a manager, you need to be sensitive to an employee's emotions, but you must not allow them to interfere with a company's established investigation policies. Employees have the right to withdraw a complaint, but if they do so, you should have them sign a form, such as the one shown in Figure 8.2, stating that they no longer wish to pursue the matter and that they are comfortable having no further action taken.

In some situations, it may be necessary to pursue action, in spite of the employee's refusal to continue. For example, the facts brought to management's attention might be so serious that a company would need to consider taking some sort of immediate remedial action, such as the suspension or termination of the alleged harasser.

**Investigation Consent Form**

**I. Name:** \_\_\_\_\_

**II. Position and Title:** \_\_\_\_\_

**III. Facts of Situation (attach as many pages as necessary):**

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**IV. I hereby request that the company investigate the facts set forth above. I also authorize the company to disclose as much of the facts set forth above as necessary to pursue the investigation. I also understand and acknowledge that the company shall use due diligence in keeping this matter as confidential as possible. I recognize, however, that in the course of the investigation the information may need to become public to do a thorough investigation.**

Signature \_\_\_\_\_ Date \_\_\_\_\_

Employee

**Figure 8.1** Investigation consent form.

**Request for No Further Action**

I. Name: \_\_\_\_\_

II. Position and Title: \_\_\_\_\_

On the \_\_\_\_ day of \_\_\_\_\_ 200\_\_, I previously completed a consent form which, among other things, requested that the company investigate certain facts stated by me, a copy of which is attached to this document. I have now decided that it would not be in my best interest to pursue this matter, and am comfortable with my environment in the workplace, as it presently exists. I have been made aware that in the event that I become uncomfortable, I can seek the assistance and support of the company at any time, and have been encouraged to do so. At this time, however, I am requesting that at least for my benefit, no further action be taken in this regard, and I fully understand that an investigation for my benefit shall not take place. I do understand, however, that the company, after having been made aware of these circumstances, may elect to pursue an investigation on its own behalf and for the benefit of other employees.

Signature \_\_\_\_\_ Date \_\_\_\_\_

Employee

**Figure 8.2** Request for no further action.

Failure to do so could subject the company to liability for keeping the individual if he or she acts inappropriately again and management could not intervene. It is important to remember that just because an employee does not agree to formally complain or to follow through on a complaint, the employer is not relieved from the responsibility of providing a safe working environment.

If the complainant takes the position that the mere presence of the alleged harasser causes anxiety and distress, do not as an interim measure transfer that employee to another job or position. Suggest a couple of days off with pay while you investigate the complaint. A transfer tends to undermine the confidence of the victim, particularly after being told that there would be no retaliation for bringing the concern to the attention of management.

If you choose to undertake an investigation, be sure to do so thoroughly. An ineffective investigation could subject you to legal liability just as if no such investigation took place. When conducting an investigation, employers should exercise discretion in selecting the employees who will be interviewed. It is advisable to confine the investigation to the circle of the alleged victim's immediate coworkers who witnessed the incident, or who were privy to the claimant's situation and confidence. The objective is to garner as much information as possible in order to conduct an even-handed and fair investigation. The questions contained in Figure 8.3 are a few that you might want to consider asking those who are not directly involved in an allegation. Interviewers should be tactful and alert to the interviewees' attitude, and be cognizant of their relationship with the victim as well as the alleged harasser. Witnesses should be reminded of the sensitive nature of the investigation and of the importance of maintaining confidentiality. Always conduct the interviews in private. The results should be discussed with the accused in a nonthreatening manner. To maintain the integrity of the process, individuals identified by the accused who might be able to disprove the allegations should be contacted and interviewed.

1. Have you noticed any behavior that makes people uncomfortable in the workplace?
2. Did it involve sexual or ethnic matters? Would you mind sharing with me who was involved?
3. What is the general atmosphere of the work environment?
4. Do you consider any employees or supervisors to be chronic complainers?
5. Do you think some people are treated differently from others for reasons that are not job-related?
6. Do you feel as if any employees receive the benefit of favoritism for reasons other than job performance?
7. Have you noticed any personality conflicts?
8. Will you let me know if you think of anything else?

**Figure 8.3** Possible questions for interviewees not directly involved.

*Adapted from Jossen Jared, Investigating Sexual Harassment. In Litigating the Sexual Harassment Case, the American Bar Association, 1994.*

At all times, the investigation should be carefully and accurately documented. Conversations and interviews with witnesses should be recorded in writing, and whenever possible, signed statements should be obtained. A record of the decision made after the investigation should also be on file. References to the claim should not, however, appear in a personnel file; unless the offender has been issued a disciplinary action after a thorough investigation. A separate investigation file should be kept, and that file should be retained for as long as the statute of limitations on sexual harassment claims specifies. (That period can be as long as two years from the date an incident has occurred.)

## Resolving a Complaint

In order to avoid liability, an employer must offer evidence that a complaint of sexual harassment was investigated thoroughly, and that the employer undertook prompt remedial action to end the harassing conduct. The Equal Employment Opportunity Commission (EEOC) recognizes effective remedial action to include the following steps:

1. Prompt and thorough investigation of complaints
2. Immediate corrective action that effectively ends the harassment
3. Provision of a remedy to complainants for such harassment (e.g., restoring lost wages and benefits)
4. Preventive measures against future recurrences

Should the results of an investigation remain inconclusive, or if, after an investigation, no corrective or preventative actions are taken, then the victim has the right to file a lawsuit against the employer. However, if an employer punishes an accused harasser without having conclusive evidence to back up a claim, then the alleged harasser has the right to file a defamation lawsuit, or an invasion of privacy action against the employer. If the results of an investigation prove inconclusive, then the best actions to take are to: advise the alleged harasser that the investigation was inconclusive, inform all employees of the organization's zero tolerance policy of sexual harassment, spell out the consequences for failure to abide by that policy, and conduct sensitivity training programs. If there is a resolution to the investigation, have the complainant sign a resolution form, if possible, such as the one shown in Figure 8.4.

<b>Resolution of Complaint</b>	
I. Name: _____	
II. Position and Title: _____	
<p>III. On the ____ day of _____, 200 __, I previously completed a form, which alleged facts regarding the environment in the workplace, a copy of which is attached to this document. I have been made aware of the results of the investigation by the company, as well as its proposed resolution of this matter, which I understand to be as follows:</p>	
<p>(i). The alleged harasser shall undergo sensitivity training.</p>	
<p>(ii). The alleged harasser shall be suspended without pay for five (5) days beginning on the ____ day of _____ and ending on the ____ day of ____, 200__.</p>	
<p>(iii). It is agreed by both parties that the alleged harasser shall return to work at the time stated above, but only after having undergone the sensitivity training.</p>	
<p>I am satisfied with the resolution as set forth above, and understand fully that in the event the matter is not completely resolved by the foregoing actions, I have been encouraged to bring my concerns to the company for immediate attention.</p>	
Signature _____	Date _____
Employee	

**Figure 8.4** Resolution of complaint form.

## Third-Party Harassment

Third-party sexual harassment occurs when someone outside the workforce harasses an employee or is harassed by an employee. Some examples might be a supplier harassing an employee, a guest harassing an employee, or an employee harassing a guest. In the case of *EEOC v. Sage Realty Corporation*, a federal court in New York held the real estate company responsible when one of its employees violated federal law by terminating a female lobby attendant who refused to wear a uniform that she considered too revealing. She felt that wearing the uniform had caused her to be the victim of lewd comments and sexual propositions from customers and the general public.

In the hospitality industry, where the interaction between guests and employees is a critical component of the business, the risks of third-party harassment are especially great. The adage “the customer is always right” does not extend to harassment. The law clearly states that employees do not have to tolerate, nor should they be subjected to, offensive behavior. This means that employers have a responsibility to protect their employees from third-party harassment.

This is especially troublesome when one considers that managers have limited control over guests, and that it is a natural desire to want to hold on to the customers’ business and goodwill. From a legal and practical perspective, however, employees should know that they have the right to speak up when they are subject to unwelcome behavior, and managers should act quickly and reasonably to resolve any situations that do occur.

## Liability Insurance

It is important to remember that zero tolerance does not necessarily mean zero claims of harassment. Incidents will occur. Because this is true, employers, especially in the hospitality industry, should purchase liability insurance that includes coverage for illegal acts of discrimination, including internal and third-party sexual harassment. This coverage is not provided in ordinary liability insurance policies; it must be specifically requested. The insurance should cover the liability for acts of the employer, acts of the employees, and any damages that may not be covered by workers' compensation policies.

### 8.3 FAMILY AND MEDICAL LEAVE ACT

A highly significant piece of federal legislation that greatly impacts employee management in the hospitality industry is the Family and Medical Leave Act of 1993 (FMLA), and its amendments. The U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division, administers and enforces the FMLA. The FMLA entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave each year for specified family and medical reasons. The FMLA applies to all government workers and private sector employers that employ 50 or more employees within a 75-mile radius. It is important to note that the 50 employees need not all work at the same location. For example, a multiunit operator whose total workforce equals or exceeds 50 employees within a 75-mile radius is covered by the act.

To be eligible for FMLA benefits, an employee must have worked for the employer for a total of at least 12 months and have worked at least 1,250 hours over the previous 12 months. A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave for:

- The birth of a child, and to care for the newborn child within one year from birth
- The placement with the employee of a child for adoption or foster care, and to care for the newly placed child within one year of placement
- To care for the employee's spouse, child, or parent who has a serious health condition
- A serious health condition that makes the employee unable to perform the essential functions of his or her job
- Any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty"

Spouses who work for the same employer are jointly entitled to a combined total of 12 workweeks of family leave for the birth or placement of a child for adoption or foster care, and to care for a parent (not a parent-in-law) who has a serious health condition.

Alternatively, the FMLA allows for military caregiver leave, which entitles the employee to 26 workweeks of leave within a single 12-month period for the purpose of caring for a covered servicemember with a serious injury, if that covered servicemember is the spouse, son, daughter, parent, or next of kin to the employee.

Under some circumstances, employees may take FMLA leave intermittently—which means taking leaves in blocks of time or reducing their normal weekly or daily work schedule. FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member or because the employee is seriously ill and unable to work.

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave, if the insurance was provided before the leave was taken, and on the same terms as if the employee had continued to work. In most cases, the employee is required to pay his or her share of health insurance premiums while on leave.

Upon return from FMLA leave, an employee must be restored to his or her original job or an equivalent one. An equivalent job need not consist of exactly the same hours but must include the same pay and level of responsibility. Some exceptions are made under the law, especially for salaried or “key” staff personnel.

Employees seeking to use FMLA leave may be required to provide:

- Thirty-day advance notice of the need to take FMLA leave, when the need is foreseeable
- Medical certifications supporting the need for leave due to a serious health condition
- Second or third medical opinions, if requested by and paid for by the employer
- Periodic reports during FMLA leave regarding the employee’s status and intent to return to work

Covered employers must post a notice approved by the secretary of labor explaining rights and responsibilities under the FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to \$100 for each separate offense. Also, employers must inform employees of their rights under the FMLA. This information can be included in an employee manual, when one exists. In some cases, provisions for leaves of absence are also part of a labor union’s collective bargaining agreement, and managers should be aware of those provisions.

## 8.4 COMPENSATION

Generally, employers are free to establish wages and salaries as they see fit. In some cases, however, the law affects the wage relationship between employer and employee. For example, the Equal Pay Act, passed in 1963 by the federal government, provides that equal pay must be paid to men and women for equal work, if the jobs they perform require “equal” skill, effort, and responsibility, and are performed under similar working conditions. An employee’s gender, personal situation, or financial status cannot serve as a basis for making wage determinations. In addition to equal pay for equal work, there are a variety of other laws that regulate how much an employer must pay its employees. In the hospitality industry, these laws have a broad impact.

### Minimum Wage and Overtime

As mentioned in the previous chapter, the Fair Labor Standards Act (FLSA) established child labor standards in the United States. In addition, it established the *minimum wage* that must be paid to covered employees, as well as wage rates that must be paid for working overtime. The FLSA applies to all businesses that have employees who are engaged in producing, handling, selling, or working on goods that have been moved in or manufactured for interstate commerce. Some, but not many, hospitality operations may be too small to be covered under the FLSA. To be sure, a small business owner should check with the local offices of the Wage and Hour Division, listed in most telephone directories under U.S. Government, Department of Labor, Wage and Hour Division ([www.dol.gov/whd](http://www.dol.gov/whd)).

#### LEGALESE

**Minimum wage:** The least amount of wages that an employee covered by the FLSA or state law may be paid by his or her employer.

The minimum wage is established and periodically revised by Congress. Nearly all hospitality employees are covered by the minimum wage, but there are some exceptions. The FLSA allows an employer to pay an employee who is under 20 years of age a training wage, which is below the standard minimum, for the first 90 consecutive calendar days of employment. Also, tipped employees can be paid a rate below the minimum, if the tips they report plus the wages received from the employer equal or exceed the minimum hourly rate.

Some states have also established their own minimum wages. In those states, employees are covered by the law most favorable to them (in other words, whichever wage is higher, state or federal). The differences in state laws can be significant. Compare the current federal minimum compensation provisions in Figure 8.5 with those of several other states. You can see that each state has a great deal of latitude in enacting its own wage and overtime laws.

The FLSA does not limit the number of hours in a day or days in a week an employee over the age of 16 may work. Employers may require an employee to work more than 40 hours per week. However, under the FLSA, covered employees must be paid at least one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek.

Some employees are exempt from the overtime provision of the FLSA. These include salaried professional, administrative, or executive employees. Recently, the DOL has instituted its FairPay Overtime Initiative, which was created to assist employers in understanding the FairPay rules and guidelines for overtime eligibility. Go to [www.dol.gov/whd/regs/compliance/fairpay/main.htm](http://www.dol.gov/whd/regs/compliance/fairpay/main.htm) for the most current information on eligibility and potential exemptions.

Wage and Hour Division investigators stationed throughout the country carry out enforcement of the FLSA. When investigators encounter violations, they recommend changes in employment practices in order to bring the employer into compliance, and may require the payment of any back wages due employees. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil penalties of up to \$1,000 per violation. Employees may also bring suit, when the Department of Labor has not, for back pay, and other compensatory damages, including attorney's fees and court costs.

State	Minimum Wage	Overtime Hours	Maximum Tip Credit	Rest Breaks
Federal	\$7.25/hour regular rate	1.5 times	\$3.02/hour	None required
Oregon	\$8.50/hour regular rate	1.5 times	None Allowed	10 minutes per 4 hours worked
South Carolina	No state law	No state law	No state law	No state law
Vermont	\$8.15/hour	1.5 times, but hotels and restaurants are exempt	\$4.20/hour	No state law

Remember that whenever a state law or regulation is different from the federal law or regulation, the law or regulation most favorable to the employee must be followed.

**Figure 8.5** Variances in federal and state compensation provisions.

**LEGALESE**

**Tip:** A gratuity given in exchange for a service performed. Literally an acronym for “to improve service.”

**Tipped Employees**

The hospitality industry employs a large number of individuals who customarily receive *tips* in conjunction with their work duties. On the one hand, some employees, such as hotel housekeepers, may receive tips only occasionally. Food servers, on the other hand, often receive more income in tips than their employer pays them in wages.

**Search the Web 8.1**

Go to the Internet and enter [www.dol.gov](http://www.dol.gov).

1. Select: Search.
2. Enter: State Minimum Wages in the search box.
3. Select: Minimum Wage Laws in the States from the search results.
4. Select: The state where you live or go to school.
5. Identify the minimum wage rate for workers in your state.
6. Identify the overtime provisions (referred to as premium pay) for workers in your state.
7. Identify any exemptions or exceptions that relate to the hospitality industry.

Because the minimum wage and the laws related to it change on a regular basis, it is a good idea to regularly contact your local office of the Wage and Hour Division, listed in most telephone directories under U.S. government, Department of Labor, Employment Standards Administration, for legal updates.

The FLSA defines tipped employees as individuals engaged in occupations in which they customarily and regularly receive more than \$30 a month in tips. The employer may consider tips as part of wages, but the employer must pay at least \$2.13 an hour in direct wages. If an employer elects to use the tip credit provision, they must inform the employee in advance, and must be able to show that the employee receives at least the applicable minimum wage when direct wages and the tip credit allowance are combined. If an employee’s tips combined with the employer’s direct wages of at least \$2.13 an hour do not equal the minimum hourly wage, the employer must make up the difference. Also, employees must retain all of their tips, except to the extent that they participate in a valid tip pooling or sharing arrangement.

Consider the case of Lawson Odde. Lawson is employed in a state that has adopted the federal minimum wage guidelines, which is a minimum wage of \$7.25 per hour. Under the law, his employer is allowed to consider Lawson’s tips as part of his wages, thus the employer is required to pay Lawson at least \$2.13 per hour, and take a *tip credit* for the remainder of the wages needed to comply with the law. However, if Lawson does not make enough money in tips to equal \$5.12, the remainder of the minimum wage amount less the hourly wage already paid by the employer, then the employer must pay Lawson the remaining difference so that Lawson is paid a minimum wage.

**LEGALESE**

**Tip credit:** The amount an employer is allowed to consider as a supplement to employer-paid wages in meeting the requirements of applicable minimum wage laws.

Like the minimum wage and the requirements for overtime pay, state laws regarding tipped employees and allowable tip credits can also vary. Figure 8.5 details some selected differences in how state and federal laws consider tip credits. It is important to remember that because tips are given to employees, and not employers, the law carefully regulates the influence that you, as an employer, have over these funds. In fact, if an employer takes control of the tips an employee receives, that employer will not be allowed to utilize the tip credit provisions of the FLSA. For more information on tipped employees, read “Uncovering the Mysteries of the Tip Wage” by Terrence Robinson, found at: [www.hospitalitylawyer.com/index.php?id=72](http://www.hospitalitylawyer.com/index.php?id=72).

## LEGALLY MANAGING AT WORK:

### Calculating Overtime Pay for Tipped Employees

Tipped employees are generally subject to the overtime provisions of the FLSA. The computation of the overtime rate for tipped employees when the employer claims a tax credit can be confusing to some managers. Consider, for example, a state in which the minimum wage is \$8.00 per hour and the applicable overtime provision dictates payment of one and one-half the normal hours rate for hours worked in excess of 40 hours per week. To determine the overtime rate of pay, use the following three-step method:

1. Multiply the prevailing minimum wage rate by 1.5.
2. Compute the allowable tip credit against the standard hourly rate.
3. Subtract the number in step 2 from the result in step 1.

Thus, if the minimum wage were \$8.00 per hour, and the allowable tip credit were 50 percent, the overtime rate to be paid would be computed as:

1.  $\$8.00 \times 1.5 = \$9.00$
2.  $\$8.00 \times 5.0 = \$3.00$
3.  $\$9.00 - \$3.00 = \$6.00$  overtime rate

## Tip Pooling

In some hospitality businesses, employees routinely share tips. Consider, for example, the table busser whose job includes refilling water glasses at a fine dining establishment. If a guest leaves a tip on the table, the size of that tip will certainly have been influenced by the attentiveness of the busser assigned to that table. The FLSA does not prohibit *tip pooling*, but it is an area that employers should approach with extreme caution. A tip, by its nature, is given to an employee, not the employer. In that way, a tip is different from a *service charge* that is collected from the guest by the employer and distributed in the manner deemed best by the employer.

### LEGALESE

**Service charge:** An amount added to a guest's bill in exchange for services provided.

### Tip-Pooling Consent Form

1. Employee name
2. Date
3. A complete explanation of the facility's tip-pooling policy
4. The statement: "I understand the tip-pooling procedures and procedures stated above, and agree to participate in the tip-pooling and redistribution program."
5. Employee signature line below the preceding statement

**Figure 8.6** Tip-pooling consent form.

Generally speaking, when a tip is given directly to an employee, management has no control over what that employee will ultimately do with the tip. An exception to this principle is the tip-pooling arrangement.

Tip pooling/sharing is a complex area, because the logistics of providing hospitality services is sometimes complex. When a hostess seats a guest, a busser—who has previously set the table—provides water and bread, a bartender provides drinks, and a member of the waitstaff delivers drinks and food to the table, the question of who deserves a portion of the tip can become perplexing.

Employers are free to assist employees in developing a tip-pooling/sharing arrangement that is fair, based on the specific duties of each position in the service area. This participation should be documented in the employee's personnel file. The tip-pooling/sharing consent form should include the information presented in Figure 8.6.

Because it involves compensation, even well-constructed, voluntary tip-pooling arrangements can be a source of employee conflict. In addition, state laws in this field do vary, so it is a good idea to check with your state trade association or Wage and Hour Division regulator to determine the regulations that apply in your own area.

#### LEGALESE

**Tip pooling/sharing:** An arrangement whereby service providers share their tips with each other on a predetermined basis.

### » ANALYZE THE SITUATION 8.2

STEPHEN ROSSENWASSER WAS HIRED as a busser by the Sportsman's Fishing Club. This private club served its members lunch and dinner, as well as alcoholic beverages. Stephen's duties were to clear tables, replenish water glasses, and reset tables for the waitstaff when guests had finished their meals. Stephen's employer paid a wage rate below the minimum wage, because they utilized the tip credit portion of the FLSA minimum wage law.

When he was hired, Stephen read the tip-pooling policy in place at the club and signed a document stating that he understood it and voluntarily agreed to participate in it. The policy stated that, "All food and beverage tips are to be combined at the end of each meal period, and then distributed, with bussers receiving 20 percent of all tip income."

John Granberry, an attorney, was a club member, and a guest who enjoyed dining in Stephen's assigned section, because Stephen was attentive and quick to respond to any guest's needs. Mr. Granberry tipped well, and the dining room staff was aware that Mr. Granberry always requested to be seated in Stephen's section.

One day after Mr. Granberry had finished his meal, had added his generous tip to his credit card charge slip, and had begun to depart; he stopped Stephen in the lobby of the club, and gave him a \$20 bill, with the words, "This is for you. Keep up the good work." A club bartender observed the exchange.

Stephen did not place Mr. Granberry's tip into the tip pool, stating that the gratuity was clearly meant for him alone. Stephen's supervisor demanded that Stephen contribute the tip to the pool. Stephen refused.

1. Is Stephen obligated to place Mr. Granberry's tip into the tip pool?
2. If Stephen continues to refuse to relinquish the tip, what steps, if any, can management take to force him to do so?
3. Can Stephen voluntarily withdraw from the tip-pool arrangement and still maintain his club employment?

## Taxes and Credits

Employers are required to pay taxes on the compensation they pay employees and to withhold taxes from the wages of employees. Federal and state statutes govern the types and amounts of compensation taxes that must be paid or withheld. In some cases, tax breaks, called credits, are granted to employers or employees. While these taxes and credits can change, the most important employee taxes are the following:

**Income tax:** Employers are required to withhold state and federal income taxes from the paychecks of nearly all employees. These taxes are paid by the employee, but collected by the employer and forwarded to the Internal Revenue Service (IRS) and state taxation agency. The amount that is to be withheld is based on the wage rate paid to the employee and the number of federal income tax dependents and deductions the employee has indicated he or she is entitled to. It is important to remember that tips are considered wages for income tax purposes if they are paid by cash, check, or credit card, and amount to more than \$20.00 per calendar month.

**FICA:** Often called Social Security taxes, the Federal Insurance Contribution Act (FICA) taxes to fund the Social Security and Medicare programs. Both employers and employees are required to contribute to FICA. FICA taxes must be paid on the employee's wages, which include cash wages and the cash value of all remuneration paid in any medium other than cash. The size of the FICA tax and the amount of an employee's wages subject to it are adjusted on a regular basis by the federal government.

**FUTA:** The Federal Unemployment Tax Act (FUTA) requires employers, but not employees, to contribute a tax based on the size of the employer's total payroll. Again, it is important to remember that payroll includes tip income and remuneration paid in forms other than cash.

**EIC:** The Earned Income Credit (EIC) is a refundable tax credit for workers whose incomes fall below established levels. The credit increases for families with two or more children, for families with a child under one year old, and for families that pay for health insurance for their children. Most workers entitled to the EIC choose to claim the credit when they file their federal income taxes. However, employees who elect to submit a Form W-5 (Earned Income Credit Advance Payment Certificate) have the option of getting the money in advance by receiving part of the credit in each paycheck (see Figure 8.7). Employers are required to include the EIC in the paycheck of any employee who submits a W-5,

# 2010 Form W-5



## Instructions

### Purpose of Form

Use Form W-5 if you are eligible to get part of the earned income credit (EIC) in advance with your pay and choose to do so. See *Who Is Eligible To Get Advance EIC Payments?* below. The amount you can get in advance generally depends on your wages. If you are married, the amount of your advance EIC payments also depends on whether your spouse has filed a Form W-5 with his or her employer. However, your employer cannot give you more than \$1,830 throughout 2010 with your pay. You will get the rest of any EIC you are entitled to when you file your 2010 tax return and claim the EIC.

If you do not choose to get advance payments, you can still claim the EIC on your 2010 tax return.

### What Is the EIC?

The EIC is a credit for certain workers. It reduces the tax you owe. It may give you a refund even if you do not owe any tax.

### Who Is Eligible To Get Advance EIC Payments?

You are eligible to get advance EIC payments if **all four** of the following apply.

1. You (and your spouse, if filing a joint return) have a valid social security number (SSN) issued by the Social Security Administration. For more information on valid SSNs, see Pub. 596, Earned Income Credit (EIC).
2. You expect to have at least one qualifying child and to be able to claim the credit using that child. If you do not expect to have a qualifying child, you may still be eligible for the EIC, but you cannot receive advance EIC payments. See *Who Is a Qualifying Child?* beginning on this page.
3. You expect that your 2010 earned income and adjusted gross income (AGI) will each be less than \$35,535 (\$40,545 if you expect to file a joint return for 2010). Include your spouse's income if you plan to file a joint return. As used on this form, earned income does not include amounts inmates in penal institutions are paid for their work or amounts received as a pension or annuity from a nonqualified deferred compensation plan or a nongovernmental

section 457 plan. Generally, earned income also does not include nontaxable earned income, but you can elect to include nontaxable combat pay in earned income.

4. You expect to be able to claim the EIC for 2010. To find out if you may be able to claim the EIC, answer the questions on page 2.

### How To Get Advance EIC Payments

If you are eligible to get advance EIC payments, fill in the 2010 Form W-5 at the bottom of this page. Then, detach it and give it to your employer. If you get advance payments, you must file a 2010 Form 1040 or 1040A income tax return.

You may have only one Form W-5 in effect at one time. If you and your spouse are both employed, you should file separate Forms W-5.

This Form W-5 expires on December 31, 2010. If you are eligible to get advance EIC payments for 2011, you must file a new Form W-5 next year.

**TIP** You may be able to get a larger credit when you file your 2010 return. For details, see Additional Credit on page 3.

### Who Is a Qualifying Child?

A qualifying child is any child who meets all four of the following conditions.

1. The child is your son, daughter, stepchild, foster child, brother, sister, half brother, half sister, stepbrother, stepsister, or a descendant of any of them (for example, your grandchild, niece, or nephew). An adopted child is always treated as your own child. An adopted child includes a child lawfully placed with you for legal adoption. A foster child is any child placed with you by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.
2. The child is under age 19 at the end of 2010 and younger than you (or your spouse, if filing jointly); or under age 24 at the end of 2010, a student, and younger than you (or your spouse, if filing jointly); or any age and permanently and totally disabled. A student is a child who during any 5 months of 2010 (a) was enrolled as a full-time student at a school or (b) took a full-time, on-farm training course given by a school or a state, county, or local government

(continued on page 3)

Give the bottom part to your employer; keep the top part for your records.

Detach here

Form <b>W-5</b> Department of the Treasury Internal Revenue Service Print or type your full name	<b>Earned Income Credit Advance Payment Certificate</b> ▶ Use the current year's certificate only. ▶ Give this certificate to your employer. ▶ This certificate expires on December 31, 2010.	OMB No. 1545-0074 <div style="font-size: 2em; font-weight: bold; text-align: center;">2010</div> Your social security number
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**Note.** If you get advance payments of the earned income credit for 2010, you **must** file a 2010 federal income tax return. To get advance payments, you **must** have a qualifying child and your filing status must be any status **except** married filing a separate return.

- 1 I expect to have a qualifying child and be able to claim the earned income credit for 2010 using that child. I do not have another Form W-5 in effect with any other current employer, and I choose to get advance EIC payments  Yes  No
- 2 Check the box that shows your expected filing status for 2010:  
 Single, head of household, or qualifying widow(er)  Married filing jointly
- 3 If you are married, does your spouse have a Form W-5 in effect for 2010 with any employer?  Yes  No

Under penalties of perjury, I declare that the information I have furnished above is, to the best of my knowledge, true, correct, and complete.

Signature ▶ \_\_\_\_\_ Date ▶ \_\_\_\_\_

Figure 8.7 Form W-5.

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**Questions To See if You May Be Able To Claim the EIC for 2010**


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You **cannot** claim the EIC if you file either Form 2555 or Form 2555-EZ (relating to foreign earned income) for 2010. You also **cannot** claim the EIC if you are a nonresident alien for any part of 2010 unless you are married to a U.S. citizen or resident, file a joint return, and elect to be taxed as a resident alien for all of 2010.

- 1 Do you expect to have a qualifying child? Read *Who Is a Qualifying Child?* that starts on page 1 before you answer this question. If the child is married, be sure you also read *Married child* on page 3.

- No. You may be able to claim the EIC but you **cannot** get advance EIC payments.  
 Yes. *Continue.*



If the child meets the conditions to be a qualifying child of both you and another person, see *Qualifying child of more than one person* on page 3.

- 2 Do you expect your 2010 filing status to be married filing a separate return?

- Yes. You **cannot** claim the EIC.  
 No. *Continue.*



If you expect to file a joint return for 2010, include your spouse's income when answering questions 3 and 4.

- 3 Do you expect that your 2010 earned income and AGI will each be less than: \$35,535 (\$40,545 if married filing jointly) if you expect to have one qualifying child; \$40,363 (\$45,373 if married filing jointly) if you expect to have two qualifying children; or \$43,352 (\$48,362 if married filing jointly) if you expect to have three or more qualifying children?

- No. You **cannot** claim the EIC.  
 Yes. *Continue.* But remember, you **cannot** get advance EIC payments if you expect your 2010 earned income or AGI will be \$35,535 or more (\$40,545 or more if married filing jointly).

- 4 Do you expect that your 2010 investment income will be more than \$3,100? For most people, investment income is the total of their taxable interest, ordinary dividends, capital gain distributions, and tax-exempt interest. However, if you plan to file a 2010 Form 1040, see the 2009 Form 1040 instructions to figure your investment income.

- Yes. You **cannot** claim the EIC.  
 No. *Continue.*

- 5 Do you expect that you, or your spouse if filing a joint return, will be a qualifying child of another person for 2010?

- Yes. You **cannot** claim the EIC.  
 No. You may be able to claim the EIC.
- 

**Figure 8.7** (Continued)

agency. A school includes a technical, trade, or mechanical school. It does not include an on-the-job training course, correspondence school, or Internet school.

3. The child lives with you in the United States for over half of 2010. But you do not have to meet this condition if (a) the child was born or died during the year and your home was this child's home for the entire time he or she was alive in 2010, or (b) the child is presumed by law enforcement authorities to have been kidnapped by someone who is not a family member and the child lived with you for over half of the part of the year before he or she was kidnapped. Also, temporary absences, such as for school, vacation, medical care, or detention in a juvenile facility, count as time the child lived with you. Members of the military on extended active duty outside the United States are considered to be living in the United States.

4. The child does not file a joint return for 2010 (or files a joint return for 2010 only as a claim for refund).

**Married child.** A child who is married at the end of 2010 is a qualifying child only if the child meets the four conditions just listed and:

1. You can claim him or her as your dependent, or
2. You are the custodial parent and would be able to claim the child as your dependent, but the noncustodial parent claims the child as a dependent because:
  - a. You signed Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or a similar statement, agreeing not to claim the child for 2010, or
  - b. You have a pre-1985 divorce decree or separation agreement that allows the noncustodial parent to claim the child and he or she gives at least \$600 for the child's support in 2010.

Other rules may apply. See Pub. 501, Exemptions, Standard Deduction, and Filing Information, for more information on children of divorced or separated parents.

**Qualifying child of more than one person.** Even if a child meets the conditions to be a qualifying child of more than one person, only one person can treat that child as a qualifying child for 2010 and take, if otherwise eligible, all of the following tax benefits using that child: the child's dependency exemption, the child tax credit, head of household filing status, the credit for child and dependent care expenses, the exclusion for dependent care benefits, and the EIC. No other person can take any of these six tax benefits unless he or she has a different qualifying child. To determine which person can treat the child as a qualifying child, the following rules apply.

- If only one of the persons is the child's parent, the child is treated as the qualifying child of the parent.
- If the parents do not file a joint return together but both parents claim the child as a qualifying child, the IRS will treat the child as the qualifying child of the parent with whom the child lives for the longer period of time in 2010. If the child lives with each parent for the same amount of time, the IRS will treat the child as the qualifying child of the parent who has the higher AGI for 2010.
- If no parent can claim the child as a qualifying child, the child is treated as the qualifying child of the person who has the highest AGI for 2010.
- If a parent can claim the child as a qualifying child but no parent does so claim the child, the child is treated as the qualifying child of the person who has the highest AGI for 2010, but only if that person's AGI is higher than the AGI of any of the child's parents who can claim the child.

Subject to the rules just described, you and the other person(s) may be able to choose which of you treats the child as a qualifying child. For example, if you, your 3-year-old child, and your mother all live together and your child's other parent does not live with you, you can treat your child as a qualifying child, or you can choose to let your mother do so if her AGI is higher than yours. For details, more examples, and a special rule for divorced or separated parents, see Pub. 596.



**Caution.** A qualifying child whom you use to claim the EIC must have a valid social security number unless he or she is born and dies in 2010.

### What if My Situation Changes?

If your situation changes after you give Form W-5 to your employer, you will probably need to file a new Form W-5. For example, you must file a new Form W-5 if any of the following applies for 2010.

- You no longer expect to have a qualifying child. Check "No" on line 1 of your new Form W-5.
- You no longer expect to be able to claim the EIC for 2010. Check "No" on line 1 of your new Form W-5.
- You no longer want advance payments. Check "No" on line 1 of your new Form W-5.
- Your spouse files Form W-5 with his or her employer. Check "Yes" on line 3 of your new Form W-5.

**Note.** If you get advance EIC payments and find you are not eligible for the EIC, you must pay back these payments when you file your 2010 federal income tax return.

### Additional Information

#### How To Claim the EIC

If you are eligible, claim the EIC on your 2010 tax return. See your 2010 tax return instruction booklet.

#### Additional Credit

You may be able to claim a larger credit when you file your 2010 Form 1040 or Form 1040A because your employer cannot give you more than \$1,830 throughout the year with your pay. You may also be able to claim a larger credit if you have more than one qualifying child. But you must file your 2010 tax return to claim any additional credit.

**Privacy Act and Paperwork Reduction Act Notice.** We ask for the information on this form to carry out the Internal Revenue laws of the United States. Internal Revenue Code sections 3507 and 6109 and their regulations require you to provide the information requested on Form W-5 and to give it to your employer if you want advance payment of the EIC. As provided by law, we may give the information to the Department of Justice and other federal agencies. In addition, we may give it to cities, states, and the District of Columbia so they may carry out their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism. Failure to provide the requested information may prevent your employer from processing this form; providing false information may subject you to penalties.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

but are not required to verify the worker's eligibility for the credit. The extra money for EIC payments does not come from the employer but is deducted from the income and payroll tax dollars they would normally be required to deposit with the IRS.

**WOTC:** The Work Opportunity Tax Credit was enacted in 1996 to replace the expired Targeted Jobs Tax Credit. The WOTC gives employers a tax credit of up to \$2,100 for hiring certain disadvantaged workers, including certain disabled persons, recipients of Aid to Dependent Children, qualified veterans, qualified ex-felons, youths living in urban empowerment zones, some summer workers, and food-stamp recipients.

As a hospitality manager, it is critical that you keep up to date with the compensation, taxes, and credit legislation enacted at both the federal and state level. Certainly, all taxes that are due should be paid, but the hospitality industry often employs workers who are eligible for tax credits. In addition, employing certain individuals may make the employer eligible for tax credits as well.

## 8.5 MANAGING EMPLOYEE PERFORMANCE

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Most employees come to a job with the expectation that they can complete or learn to complete the tasks assigned to them. In the hospitality industry, some of the workers hired are entering the workforce for the first time, while others may have many years of experience. Regardless of ability or background, to effectively manage employee performance, employers must have a valid and defensible system of employee evaluation, discipline, and, if necessary, termination.

### Evaluation

*Employee evaluation* is often used in the hospitality industry as a basis for granting pay increases, determining who is eligible for promotion or transfer, or as a means of modifying employee performance. Unfortunately, the subjective nature of many employee evaluation methods makes them susceptible to misuse and bias. When the employee can demonstrate that the evaluation system is biased against a class of workers specifically protected by the law, the liability to the employer can be great.

In most larger hospitality companies, the human resource department will have some type of form or procedure in place for use in employee evaluations. In smaller organizations, the process may be less formalized. In all cases, however, the hospitality manager must use great care to ensure that all employees are evaluated on the basis of their work performance, and nothing else. Therefore, it is critical that you base evaluations only on previously established criteria and expectations, such as the job descriptions discussed in Chapter 7, "Legally Selecting Employees."

A false negative employee evaluation that results in loss of employment for the employee subjects the employer to even greater liability. *Wrongful termination* is the term used to describe the unlawful discharge of an employee. The at-will employment status that exists in most states does not mean employers are free to unfairly evaluate employees, then use the results of the evaluation as the basis for a termination.

### Discipline

Companies have the right to establish rules and policies for their workplace, as long as those rules do not violate the law. Even potentially controversial policies such as drug testing or surveillance have been upheld by the courts, provided that those policies do not discriminate against or single out specific groups of employees.

#### LEGALESE

**Employee evaluation:**

A review of an employee's performance, including strengths and shortcomings; typically completed by the employee's direct supervisor.

#### LEGALESE

**Wrongful termination:**

A violation, by the employer, of the employment relationship resulting in the unlawful firing of the employee.

Workplace rules should be properly communicated and consistently enforced. The communication process can include written policies and procedures (including an employee manual), one-on-one coaching, and formal training sessions. The enforcement process is just as important a part of the discipline process as is training. If, for example, a restaurant manager, in violation of stated sanitation policies, allows the cook to work without an effective hair restraint on Monday, it will be difficult for the employee to understand why the rule is enforced on Tuesday.

Many organizations implement a policy of *progressive discipline* for employees. This system is used for minor work rule infractions, and some major ones.

### » ANALYZE THE SITUATION 8.3

GERRY HERNANDEZ WORKED AS a breakfast cook at a large day-care facility. His attendance and punctuality were both good. Written into the facility's employee manual (which all employees sign when they begin their employment) was the following policy: "To be fair to the facility, your fellow employees, and our clients, you must be at your work station regularly and on time."

Gerry had worked at the facility for 10 months when, one day, he was 15 minutes late for work. While Gerry was aware of the facility work rule regarding punctuality, Gerry's supervisor, Pauline Cooper, rarely enforced the rule. Employees who were 5 to 20 minutes late may have been scolded, but no disciplinary action was usually taken, unless, according to Ms. Cooper, the employee was "excessively" tardy. She preferred to, in her words, "cut some slack" to employees, and thus was considered one of the more popular supervisors.

On the day Gerry was late, a variety of problems had occurred in the kitchen. Frozen food deliveries arrived early and no cook was available to put them away; the sanitation inspector arrived for an unannounced inspection; and the rinse agent on the dish machine stopped functioning so dishes had to be washed by hand. Ms. Cooper was very angry, so when Gerry arrived at work, she terminated him, stating, "If you can't get here on time, I don't need you here at all!"

The next day, Gerry filed suit against the day-care facility claiming that he was terminated because of his ethnic background. Ms. Cooper and the day-care facility countered that Gerry was an at-will employee, and thus the facility had the right to terminate employees as they see fit, especially when the employee was in violation of a communicated work rule.

1. Does Ms. Cooper have the right, under at-will employment, to terminate Gerry?
2. If Ms. Cooper has no records documenting her actions in cases similar to Gerry's, is it likely she will be able to help defend her organization against a discrimination charge?
3. How would you advise Ms. Cooper to handle tardy employees in the future?

In a progressive disciplinary system, employees pass through a series of stages, each designed to help the employee comply with stated organizational workplace rules.

Progressive disciplinary systems usually follow five steps:

1. *Verbal warning.* In this first step, the employee is reminded/informed of the workplace rule and its importance. The employee is clearly told what constitutes a violation and how to avoid these violations in the future.
2. *Documented verbal warning.* In step 2, the supervisor makes a written record of the verbal reprimand, and the document is signed by both the supervisor and employee. One copy is given to the employee and one copy is retained in the employee's file.
3. *Written warning.* An official, written reprimand is the third step, generally accompanied by a plan for stopping the unwanted behavior and a setting forth of consequences if the behavior does not stop. This document is placed in the employee's file.
4. *Suspension.* In this step, the employee is placed on paid or unpaid leave for a length of time designated by management. A record of the suspension, its length and conditions, is placed in the employee's file.
5. *Termination.* As a last option, the employee is terminated for continued and willful disregard of the workplace rule.

In all of these steps, a written record of the action is required. Figure 8.8 is an example of a form that can be used to document the steps in the progressive discipline process.

Not all incidents of workplace rule violations are subject to progressive discipline. Destruction of property, carrying weapons, falsifying records, substance abuse while on the job, and some safety violations may be cause for immediate termination; in fact, failure to do so may place the employer in greater legal risk than not terminating the employee. Employers should make it clear that they reserve the right to immediately terminate an employee for a serious workplace violation as part of the progressive disciplinary procedure.

## Termination

Although states and the federal government give employers wide latitude in the hiring and firing of workers, the at-will employment doctrine does not allow an employer unrestricted freedom to terminate employees. An employer may not legally terminate an employee if it is done:

1. *In violation of company employee manuals or handbooks.* Failure to follow the procedures outlined in employee manuals and handbooks may result in legal action against the employer because of the implied contract such documents may establish.
2. *To deny accrued benefits.* These benefits can include bonuses, insurance premiums, wages, stock or retirement options, and time off with pay. If, however, the employee is fired for cause, the firing may be legal, and the accrued benefits may be forfeited.
3. *Because of legitimate illness or absence from work.* This is especially true if the employee was injured at work and has filed a workers' compensation claim. Should the absence become excessive, however, the employer may be able to force the employee to accept disability status.

### LEGALESE

#### **Progressive discipline:**

An employee development process that provides increasingly severe consequences for continued violation of workplace rules.

### Employee's Progressive Performance Review

Date \_\_\_\_\_

Employee's Name: \_\_\_\_\_

Employee's Position: \_\_\_\_\_

Type of Action for this Discussion:

Oral Warning   
  Written Warning   
  Probation   
  Suspension

Employer's view of the violation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Employee's view of the violation: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Is the employee being placed on probation?     No     Yes, until what date: \_\_\_/\_\_\_/\_\_\_

Is the employee being suspended?     No     Yes, until what date: \_\_\_/\_\_\_/\_\_\_

What specific action steps have been agreed upon between the employee and supervisor to improve and/or resolve the violation? (action steps and date): \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

I have reviewed and discussed this performance violation with my supervisor and understand the terms listed above to correct my performance.

Employee's signature	Date
Employer's representative signature	Date
Signature of Human Resources witness	Date

**Figure 8.8** Progressive discipline form.

**LEGALESE**

**Whistle-blowers protection**

**acts:** Laws that protect employees who have reported illegal employer acts from retaliation by that employer.

4. *For attempting to unionize coworkers.* Some employers are reluctant to allow this type of activity to occur, but it is a right protected by federal law.
5. *For reporting violations of law.* In some states, private business *whistle-blowers protection acts* have been passed to ensure that employees who report violations of the law by their employers will not be terminated unjustly. These laws penalize employers that retaliate against workers who report suspected violations of health, safety, financial, or other regulations and laws.
6. *For belonging to a protected class of workers.* Employers may not fire an employee because he or she is over 40; is of a particular race, color, religion, gender, or national origin; or is disabled. In addition, employers may not treat these workers any differently than they would those workers who are not members of a protected class.

7. *Without notice.* This is true under some circumstances related to massive layoffs or facility closings. In general, larger employers are covered by the Worker Adjustment and Retraining Notification (WARN) Act. WARN provides protection to workers, their families, and their communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. A covered plant closing occurs when a facility or operating unit is shut down for more than six months or when 50 or more employees lose their jobs during any 30-day period at the single site of employment.

Consider the case of the Mayflower Hotel, a large, independent facility employing 150 people. The hotel is purchased by new owners on June 1. On June 2, the new owners announce that all employees will be terminated from employment by the old owners, then rehired by the new. But employees will be subject to review before rehiring. In such a circumstance, the WARN Act would allow any employees who prefer not to work for the new company the time required to secure other employment.

8. *If the employee has been verbally promised continued employment.* The courts have ruled, in some cases, that a verbal employment contract is in effect if an employer publicly and continually assures an employee of the security of his or her employment.
9. *In violation of a written employment contract.* This is true whether the contract is written for an individual worker or the worker is a member of a labor union that has a collective bargaining agreement (CBA).

In some cases, an employer may be called on to produce evidence that an employee was terminated legitimately and legally. The seven guidelines in the upcoming Legally Managing at Work section can be used to ensure that terminations are defensible, should the need arise.

## LEGALLY MANAGING AT WORK:

### Guidelines for Conducting Defensible Employee Terminations

1. Conduct and document regular employee evaluations.

It is the rare employee whose performance becomes extremely poor overnight. Generally, employee performance problems can be identified in regular employee evaluation sessions. These evaluations should be performed in a thoughtful, timely manner, with an opportunity for employee input. These written evaluations should be reviewed by upper management to ensure consistency between and among reviewers.

2. Develop and enforce written policies and procedures.

As a manager, you may set yourself up for accusations that your discharge policies are unfair if you cannot show that employees were told, in writing, of the organization's rules of employee conduct. All employees should be given a copy of any employment rules, both because it is a good employment practice and to help avoid potential lawsuits. Employees should be given the chance to thoroughly review these rules and ask questions about them, and then they

should be required to sign a document stating they have done so. This document should be placed in the employee's personnel file.

**3. Prohibit "on-the-spot" terminations.**

The hospitality industry is fast-paced, and tensions can sometimes run very high. Despite that, it is never a good idea to allow a supervisor or manager to terminate an employee without adequate consideration. This is not to say that a violent employee, for example, should not be required to leave the property immediately if his or her presence poses a danger to others. It does say, however, that terminations made in the heat of the moment can be very hard to defend when the emotion of the moment has subsided.

**4. Develop and utilize a progressive disciplinary system.**

Make sure that each step of the disciplinary process is reviewed by at least one person other than the documenting manager and the employee. A representative from the human resources department is a good choice, or in small properties, the general manager of the facility.

**5. Review all documentation prior to discharging an employee.**

Because of the serious nature of employee termination, it is a good idea to thoroughly review all documentation prior to dismissing an employee. If the evidence supports termination, it should be undertaken. If it does not, the organization will be put at risk if the discharge is undertaken despite the lack of documentation. If a progressive disciplinary process is in place, each step in that process should be followed every time. In this way, you can defend yourself against charges of discriminatory or arbitrary actions.

**6. When possible, conduct a termination review and exit interview.**

Employees are less likely to sue their former employers if they understand why they have been terminated. Some employers, however, make it a policy to refuse to tell employees why they have been let go, citing the at-will status of employment as their rationale. Each approach has its advantages and disadvantages. An employee who is shown documented evidence of his or her consistent, excessive absence, along with the results of a well-implemented progressive discipline program, is less likely to sue, claiming unfair treatment because of nonrelated demographic issues such as gender, race, ethnicity, and other protected class status.

**7. Treat information regarding terminations as confidential.**

In the most common case, an employee's discharge will be initiated by the employee's supervisor or manager, and should be reviewed prior to implementation by the immediate superior of that supervisor or manager. The actual exit interview may be witnessed by a representative from human resources or a second manager.

Employee termination reflects a failure on the part of both the employer and employee. The employee has performed in a substandard manner, but perhaps the employer has improperly selected or poorly trained and managed that person. The details of these failures need not be shared with those who do not have a need to know. Nothing is gained; in fact, greater employer liability is incurred when management shares details of an employee's termination with others.

## In-House Dispute Resolution

The cost of a lawsuit is very high. In the case of employment litigation, many companies have found that the cost of defending themselves against the charges of an unfair employment practice is extremely high, often exceeding the amount of the employee's claim of damages. For example, a simple dispute where an employee asks for damages in the amount of \$5,000 may cost the employer five times that amount to defend the charge.

The cost to employees to pursue such an unfair employment claim is high also. Because the employee who charges an employer with an unfair practice is often no longer employed, the employee may face great legal expense at a time he or she can least afford to do so.

Cases involving unfair employment practices may drag on for years, which not only increases legal expenses but can also diminish the likelihood of an amicable settlement between employer and employee. By the time the litigation has been completed, several years may have passed, much expense may have been incurred on both sides, the personal relationship between the employee and employer has been damaged, and both sides may well have come to realize that having one's day in court is often too long in coming and too expensive to undertake.

Because of the disadvantages just listed, a system of resolving disputes between employers and employees that is gaining widespread acceptance is the *in-house dispute resolution* process.

The in-house dispute resolution process is a management tool that seeks to provide three benefits:

1. *Fairness to employees.* This is achieved by involving employees in the development and implementation of the program. At a corporate level, employers should realize that the purpose of an in-house dispute resolution program is the prevention of litigation, not the winning of every dispute.
2. *Cost savings to employers.* The in-house dispute resolution program should result in reduced costs for employers. It is also important to realize that costs can be measured in terms beyond legal fees.
3. *Timely resolution of complaints.* An in-house dispute resolution program grants, as its greatest advantage, the ability to deal quickly with a problem. Sometimes, this can save the employee/employer relationship and get the employee back to work feeling that his or her concern has been heard and that the employer really cares about him or her, something that rarely happens at the conclusion of a lawsuit.

A well-designed in-house dispute resolution program can have an extremely positive effect on an organization if it is established and operated in the proper manner. Here are four features of an effective in-house dispute resolution program:

1. *Development with employee input.* Employees and employers generally will work toward developing a program that is easy to access, is perceived as fair, provides a rapid response, and includes a legitimate appeal procedure.

### LEGALESE

#### **In-house dispute resolution:**

A program, funded by employers, that encourages the equitable settlement of an employee's claim of unfair employment, prior to or without resorting to litigation.

**LEGALESE**

**Ombudsperson:** A company official appointed to investigate and resolve worker complaints.

2. *Training for mediators.* Those individuals who will hear and help resolve disputes should be specially trained in how to do so. In some companies, these individuals are called *ombudspersons*. Effectively trained mediators can resolve up to 75 percent of all worker complaints without litigation. The resolutions can range from a simple apology to reinstatement and substantial monetary damages.
3. *Legal assistance for employees.* The best programs take into account that employees may need advice from their own legal counsel, and thus payment for this advice is provided. While it might seem strange to fund the legal counsel of an employee in a work-related dispute, the reality is that costs savings will occur if an amicable solution to the problem can be developed.
4. *Distinct and unique chain of command for appeal.* Sometimes, the original finding of the review process will be perceived by the employee as unfair. When this is the case, employees need to know that they can appeal the decision, without further complicating their relationship with the company. Also, they need to be assured that such an appeal will be heard by those who are un beholden to the first decision maker. Obviously, not all employees will be satisfied with the resolution of their complaint. In addition, some areas such as workers' compensation claims may not be included in the program.

**LEGALESE**

**Unemployment insurance:** A program, funded by employers, that provides temporary monetary benefits for employees who have lost their jobs.

**LEGALESE**

**Unemployment claim:** A petition, submitted by an unemployed worker to his or her state unemployment agency, which asserts that the worker is eligible to receive unemployment benefits.

**8.6 UNEMPLOYMENT CLAIMS**

Of the many costs related to maintaining a workforce, the cost of unemployment insurance is one of the largest and most difficult to administer. The *unemployment insurance* program is operated jointly by the federal and state governments. Each state imposes different costs on employers for maintaining the state's share of a pool of funds for assisting workers who have temporarily lost their jobs.

Figure 8.9 details the contribution rate charged to employers in the state of Ohio in 2009, 2010, and 2011. It is presented as an example of a method used by several states to charge higher taxes to those employers that cause more of the fund pool to be used, and less to those with fewer claims. Thus, two restaurants with identical sales volume, but very different experiences in maintaining staff, can pay widely different unemployment tax rates based on how well they manage their staffs and their *unemployment claims*.

Contribution Rates			
For 2009, 2010 and 2011 the ranges of Ohio unemployment tax rates (also known as contribution rates) are as follows:			
	2009	2010	2011
Lowest Experience Rate	0.7%	0.5%	0.7%
Highest Experience Rate	9.4%	9.4%	9.6%
Mutualized Rate	0.4%	0.2%	0.4%
New Employer Rate	2.7%	2.7%	2.7%
*Construction Industry	5.8%	6.0%	6.4%
Delinquency Rate	11.8%	11.8%	12.0%

\*except construction

**Figure 8.9** Unemployment tax rates for Ohio.  
 Source: Ohio Job and Family Services, available at [jfs.ohio.gov/ouc/uctax/rates.stm](http://jfs.ohio.gov/ouc/uctax/rates.stm).

**Rate Notification**

Contribution Rate Determinations are mailed for the coming calendar year on or before December 1. The tax rate is also printed on the employer's Quarterly Tax Return (JFS-20125), which is mailed to employers quarterly for *reporting* and payment of taxes due. To determine how much tax is due each quarter, multiply the rate by the total *taxable wages* you paid during the quarter.

**Experience Rate**

Once an employer's account has been chargeable with benefits for four consecutive calendar quarters ending June 30, the account becomes eligible for an experience rate beginning with the next calendar year. The experience includes taxable wages reported, contributions paid (including voluntary payments) and benefits charged. Unemployment taxes paid are credited to an employer's account. Unemployment benefits paid to eligible claimants are charged to the accounts of the claimant's employers during the base period of the claim. These factors are recorded on the employer's account and are used to compute the annual tax rate after the employer becomes eligible for an experience rate.

Due to recent economic conditions and the resulting increase of unemployment claims filed, the Ohio Unemployment Compensation Trust Fund is more than sixty percent below the "minimum safe level" as of the computation date of the 2011 rates (The "minimum safe level" is, in essence, the balance required in the UC Trust Fund to fund a moderate recession). Therefore, the tax rate schedule in effect for 2011 includes an across the board minimum safe level increase to protect the financial integrity of the trust fund. This increase will help re-build the trust fund to the appropriate level. The additional taxes paid as a result of the minimum safe level increase are credited fifty percent (50%) to the mutualized account and fifty percent (50%) to the employer's account.

The experience rate shown on the Contribution Rate Determination is a combined total of the employer's individual experience rate and the minimum safe level increase.

**Mutualized Rate**

A separate account, known as the mutualized account, is maintained for the primary purpose of recovering the costs of unemployment benefits that were paid and not chargeable to individual employers for a variety of reasons. When the mutualized account has a negative balance, the costs are recovered and the money restored to the account through a mutualized tax levied on all employers who are eligible for an experience rate. The mutualized tax is used solely for the payment of unemployment benefits.

As of the computation date for the 2011 rates, the mutualized account had a negative balance and a mutualized rate of four-tenths of one percent (0.4%) was levied on all employers who were eligible for an experience rate. The mutual rate is shown on the Contribution Rate Determination. The additional taxes paid as a result of mutualized rate will be credited one hundred percent (100%) to the mutualized account to recover the costs of unemployment benefits charged to the account.

**New Employer Rate**

If an employer's account is not eligible for an experience rate, the account will be assigned a standard new employer rate of 2.7% unless the employer is engaged in the construction industry, in which case the 2009 rate is 5.8%, the 2010 rate is 6.0% and the 2011 rate is 6.4%.

**Figure 8.9** *(Continued)*

**Delinquency Rate**

Employers who did not furnish the wage information necessary for the computation of their 2011 experience rate by September 1, 2010, were assigned a contribution rate equal to one hundred twenty-five percent (125%) of the maximum experience rate possible for 2011. However, if the employer files the necessary wage information by December 31, 2010, the rate will be revised to the appropriate experience rate.

**Penalty Rate**

Employers who file the necessary wage information after December 31, 2010, but within 18 months after that date, will have their 2011 rate revised to one hundred twenty percent (120%) of the rate that would have applied if the employer had timely furnished the wage information.

**Figure 8.9** *(Continued)*

A worker who submits an unemployment claim does not automatically qualify for payments. The employer has the right to challenge this claim. It is important to remember that each successful claim will have an impact on the employer's experience rate, which is the rate by which future contributions to the unemployment fund are determined. Thus, it is in your best interest, as an employer, to protest any unjust claim for unemployment benefits made by your ex-employees.

## Criteria for Granting or Denying Benefits

Each state will set its own criteria for determining who is eligible for unemployment benefits. Variances can occur based on answers to any of the following questions:

- How soon can the unemployed worker petition for benefits?
- When will any allowable payments begin?
- What will the size of the payments be?
- How long will the payments last?
- What must the unemployed worker do in order to qualify and continue receiving benefits?
- How long does the employee have to work for the former employer in order to qualify for assistance?

Generally speaking, an employee who quits his or her job for a nonwork-related reason is not eligible for benefits. Employees who are terminated, except for good cause associated with their work performance, generally are eligible. Again, the laws in this area are complex and vary widely; thus, it is a good idea to thoroughly understand who is eligible for unemployment benefits in the state where you work. This can be accomplished by visiting a branch of your state agency responsible for administering unemployment compensation benefits.

The following are common examples of acts that usually justify the denial of unemployment benefits based on employee misconduct:

- Insubordination or fighting on the job
- Habitual lateness or excessive absence
- Drug abuse on the job
- Disobedience of legitimate company work rules or policies
- Gross negligence or neglect of duty
- Dishonesty

## Claims and Appeals

If the state agency responsible for granting unemployment benefits receives a request for unemployment assistance from an unemployed worker, the employer will be notified and given a chance to dispute the claim. It is important that you, as an employer, respond to any unemployment claims or requests for information in a timely manner.

An employer should not protest legitimate unemployment benefit payments. It is appropriate, however, to protest those that are not legitimate. Employers often have difficulty proving that workers should not qualify for unemployment benefits, even in situations that might seem relatively straightforward. In addition, the state unemployment agents who determine whether or not to grant benefits often initially decide in favor of the employee. If an employer does not agree with the state's decision, that employer has the right to appeal.

In an appeal of unemployment benefits, each party has the right to take these steps:

1. Speak on his or her own behalf.
2. Present documents and evidence.
3. Request that others (witnesses) speak on his or her behalf.
4. Question those witnesses and parties who oppose his or her position.
5. Examine and respond to the evidence of the other side.
6. Make a statement at the end of the appeals hearing.

An unemployment hearing is often no different from a trial. Witnesses must testify under oath. Documents, including personnel information, warnings, and performance appraisals, are submitted as exhibits. The atmosphere is usually not friendly. You must organize your case before the hearing to maximize your chances of success. If you have elected to have a lawyer help you, meet with him or her before the hearing to review your position.

Decisions are not typically obtained immediately after the hearing. You will probably be notified by mail of the judge's decision. If you lose the decision, read the notice carefully. Most judges and hearing examiners give specific reasons for their rulings, and this information may help you avoid claims in the future.

### Search the Web 8.2

Go online to [www.stateofflorida.com](http://www.stateofflorida.com).

1. Select: Florida Business.
2. Select Labor & Employment.
3. Select: Unemployment Compensation.
4. Click on the Appeals tab.
5. Select: Frequently Asked Questions about the Appeal Process.

Review the FAQs supplied by the State of Florida, and then answer the following questions:

1. To whom does an employer appeal an unemployment insurance claim in the state of Florida?
2. How long does the average appeals hearing last?
3. Is the hearing recorded? Why or why not?

**» ANALYZE THE SITUATION 8.4**

CAROLYN MOREAU WAS EMPLOYED for nine years as a room attendant for the Windjammer Hotel. The hotel was moderately busy during the week and filled up with tourists on the weekends.

In accordance with hotel policy, Carolyn submitted a request on May 1 for time off on Saturday, May 15, to attend the graduation ceremony of her only daughter. The hotel was extremely short-handed on the weekend of the 15th due to some staff resignations and a forecasted sell-out of rooms. Carolyn's supervisor denied her request for the day off. Carolyn was visibly upset when the schedule was posted and she learned that her request had been denied. She confronted her supervisor and stated, "I am attending my daughter's graduation. No way am I going to miss it!" The supervisor replied that she was sorry, but all requests for that particular weekend off had been denied and Carolyn was to report to work as scheduled.

On the Saturday of the graduation, Carolyn called in sick four hours before her shift was to begin. The supervisor, recalling the conversation with Carolyn, recorded the call-in as "unacceptable excuse," and filled out a form stating that Carolyn had quit her job voluntarily by refusing to work her assigned shift. The supervisor referred to the portion of the employee manual that Carolyn signed when joining the hotel. The manual read, in part:

Employees shall be considered to have voluntarily quit or abandoned their employment upon any of the following occurrences:

1. Absence from work for one (1) or more consecutive days without excuse acceptable to the company;
2. Habitual tardiness;
3. Failure to report to work within 24 hours of a request to report.

Carolyn returned to work the next day to find that she had been removed from the schedule. She was informed that she was no longer an employee of the hotel. Carolyn filed for unemployment compensation. In her state, workers who voluntarily quit their jobs were not eligible for unemployment compensation.

1. Do you believe Carolyn was terminated or that she resigned from her position?
2. Do you believe Carolyn is eligible for unemployment compensation?
3. Whose position would you prefer to defend in the unemployment compensation hearing? Why?

## 8.7 EMPLOYMENT RECORDS AND RETENTION

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Several federal and state agencies require employers to keep employee records on file, or to post information relative to employment. Although the number of requirements is large and can frequently change, the following examples will illustrate the type of responsibility employers have for maintaining accurate employment records.

### Department of Labor (DOL) Records

Every employer subject to the Fair Labor Standards Act (FLSA) must maintain the following records for every employee:

- Employee's full name and social security number
- Address, including zip code
- Birthdate, if younger than 19
- Sex and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day
- Basis on which employee's wages are paid (e.g., "\$9 per hour," "\$440 a week," "piecework")
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

### *DOL Records on Employee Meals and Lodging*

Every employer that makes deductions from wages for meals, uniforms, or lodging must keep records substantiating the cost of providing these items. For example, David Pung manages a cafeteria in the southwest. As part of his employees' compensation, they are allowed one meal per four-hour work shift. Employees who participate in this meal program are charged a rate of \$0.25 per hour worked, or \$1.00 per meal. David must document both the deductions he makes for the meal (according to the preceding list), and the cost of providing the meal. Since it is impossible to determine the cost of each employee's meal, David uses a method whereby the cost of the meal is determined by the following formula:

1. Total food sales less gross operating profit
2. Equals cost of all meals provided
3. Divided by total meals served (including all employee meals)
4. Equals cost per meal served

David documents this cost on a monthly basis, using his profit and loss statement as the source of his sales and gross operating profit figures, and using a daily customer count as his total number of meals served. Generally, the DOL will provide a good deal of latitude as to how an employer computes the cost per employee meal or costs of providing other services. These costs must be computed and maintained in the employer's records.

### ***DOL Records for Tipped Employees***

All employers must keep the following records for tipped employees:

- A symbol, letter, or other notation placed on the pay records identifying each employee whose wage is determined in part by tips.
- Weekly or monthly amount reported by the employee, to the employer, of tips received.
- Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of 40 percent of the applicable statutory minimum wage). The amount per hour that the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.
- Hours worked each workday in any occupation in which the employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours.
- Hours worked each workday in occupations in which the employee receives tips and total daily or weekly straight-time earnings for such hours.

In larger organizations, the payroll department will maintain the records required by the DOL. It is important to remember, however, that it is the facility manager who is responsible for producing these records, if required to do so by the DOL. Under current DOL rules, employers must maintain their records for the following time periods.

#### **For Three Years**

- Collective bargaining agreements
- Sale and purchase records
- From the date of last entry, all payroll records
- From the last effective date, all certificates, such as student certificates

#### **For Two Years**

- From the date of last entry, all employee time cards
- All tables or schedules used to compute wages
- All records explaining differences in pay for employees of the opposite sex in the same establishment

### ***DOL Records on Family and Medical Leave***

The federal Family and Medical Leave Act (FMLA), requires employers to maintain the following records for at least three years:

- Employee name, address, and position
- Total compensation paid to employees
- Dates FMLA-eligible employees take FMLA leave
- FMLA leave in hours, if less than full days are taken at one time
- Any documents describing employee benefits or employer policies regarding the taking of FMLA leave

## **Immigration-Related Records**

As discussed in Chapter 7, the Immigration Reform and Control Act (IRCA), requires employers to complete an employment eligibility verification form (Form I-9) for all employees hired after November 6, 1986. Employers must retain all I-9 forms for three years after the employee is hired or one year after the employee leaves, whichever is later.

## Records Required by the ADEA

The federal Age Discrimination in Employment Act (ADEA) requires that employers retain employee records that contain the employee's name, address, date of birth (established only after the hiring decision), occupation, rate of pay, and weekly compensation. In addition, records on all personnel matters, including terminations and benefit plans, must be kept for at least one year from the date of the action taken.

As can be seen from the list of recordkeeping requirements just given, these stipulations in the hospitality industry are varied, complex, and sometimes overlapping. As a manager, it is important for you to ensure that your facility's recordkeeping is current and complete. An employment attorney who specializes in hospitality employment law can be very helpful in ensuring compliance in this area.

### 8.8 EMPLOYMENT POSTERS

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Often, regulatory agencies will require that certain employment-related information be posted in an area where all employees can see it. The following regulations demonstrate that fact:

- DOL regulations require that every employer subject to the FLSA post, in a conspicuous place, a notice explaining the FLSA. Posters can be obtained by contacting a regional office of the DOL.
- EEOC regulations require that every employer subject to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990 post in a conspicuous place a notice relating to discrimination prohibited by such laws. These posters may be combined, and they can be obtained by contacting a regional office of the EEOC.
- OSHA regulations require that every employer post in a conspicuous place a notice informing employees of the protections and obligations under OSHA. Posters can be obtained by contacting a regional office of OSHA.
- DOL regulations require that every employer post in a prominent and conspicuous place a notice explaining the Employee Polygraph Protection Act of 1988. Posters can be obtained by contacting a regional DOL office.
- DOL regulations require that every employer subject to the Family and Medical Leave Act post in a conspicuous place in the establishment a notice (as shown in Figure 8.10) explaining this federal leave law. Posters can be obtained by contacting a regional DOL office.

### 8.9 WORKPLACE SURVEILLANCE

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Surveys by the American Management Association reveal that up to 43 percent of U.S. businesses monitor their employees electronically. Some common procedures include listening in on phone calls, reviewing voicemails, monitoring email and computer files (such as sites visited on the Internet), or some form of video surveillance. That number grows even higher if you add in the companies that monitor their employees in other ways such as by conducting locker, bag, and desk searches.

Unfortunately, there is no one national policy that you can look to for guidance regarding privacy in the workplace. Many companies believe that they are protecting their proprietary business interests by monitoring employees and their work product. Additionally, as companies establish work conduct guidelines (such as zero tolerance sexual harassment policies) to comply with the law, monitoring employees enables the employer to ensure compliance. Even though the law is difficult to pin down in this area, a few general principles can be established by reviewing a cross-section of federal and state laws and court cases.

## EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

### Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- For incapacity due to pregnancy, prenatal medical care or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

### Military Family Leave Entitlements

Eligible employees with a spouse, son, daughter, or parent on active duty or call to active duty status in the National Guard or Reserves in support of a contingency operation may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered servicemember during a single 12-month period. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who has a serious injury or illness incurred in the line of duty on active duty that may render the servicemember medically unfit to perform his or her duties for which the servicemember is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list.

### Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

### Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

### Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

### Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

### Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

### Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

### Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

### Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

### Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

**FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.**



For additional information:  
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627  
[WWW.WAGEHOUR.DOL.GOV](http://WWW.WAGEHOUR.DOL.GOV)



U.S. Wage and Hour Division

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 Revised January 2009

**Figure 8.10** Employee rights under the Family and Medical Leave Act of 1993.

Whether or not a particular monitoring technique is legal usually depends on four factors:

1. *Did the employee have a legitimate expectation of privacy as to the item searched, or the information, conversation, or area monitored?* In an employee lounge, probably not; in a restroom, absolutely!
2. *Has the employer provided advance notice to the employees, and/or obtained consent for the monitoring activity from the employee?* If so, it is difficult for employees to argue that they had an expectation of privacy.
3. *Was the monitoring performed for a work-related purpose, and was it reasonable given all of the circumstances?* Generally, the courts have allowed searches and monitoring that seem to be necessary for operating a business (e.g., protecting trade secrets, enforcing policies and procedures, and ensuring high-quality service levels).
4. *Was the search or monitoring done in a reasonable or appropriate manner?* Was it discriminatory? In other words, was it only utilized on a minority work subgroup?

If you do elect to monitor specific activities of employees, adopting the Employee Privacy Policy in Figure 8.11 is a good way to minimize any misunderstandings or legal difficulties. Let your employees know exactly what is expected of them, and give them a chance to question any part of your policy about which they are unclear. Because the laws in this area are complex and vary by location, it is a good idea to have your attorney review your company's monitoring/privacy policy before it is implemented.

### **Policy Regarding Employee Privacy**

The Company respects the individual privacy of its employees. However, an employee may not expect privacy rights to be extended to work-related conduct or the use of company-owned equipment, supplies, systems, or property. The purpose of this policy is to notify you that no reasonable expectation of privacy exists in connection with your use of such equipment, supplies, systems, or property, including computer files, computer databases, office cabinets, or lockers. It is for that reason the following policy should be read; if you do not understand it, ask for clarification before you sign it.

I, \_\_\_\_\_, understand that all electronic communications systems and all information transmitted by, received from, or stored in these systems are the property of the Company. I also understand that these systems are to be used solely for job-related purposes and not for personal purposes, and that I do not have any personal privacy right in connection with the use of this equipment or with the transmission, receipt, or storage of information in this equipment.

I consent to the Company monitoring my use of company equipment at any time at its discretion. Such monitoring may include printing and reading all electronic mail entering, leaving, or stored in these systems.

I agree to abide by this Company policy and I understand that the policy prohibits me from using electronic communication systems to transmit lewd, offensive, or racially related messages.

\_\_\_\_\_  
Signature of employee

\_\_\_\_\_  
Date

**Figure 8.11** Employee privacy policy.

Obviously, it is in the best interest of both employers and employees to work together to create a workplace that is productive for management and fair to all employees. As a hospitality manager, your legal liability will definitely be affected by your ability to achieve this goal. Figure 8.12 summarizes some of the most significant federal laws related to human resources management. Following the guidelines presented in this chapter will help you manage your operation legally and reduce your risk of liability.

<i>Equal Pay Act of 1963</i> →	Prohibits pay differences for men and women doing equal work.
<i>Title VII of the Civil Rights Act of 1964</i> (as amended) →	Prohibits discrimination in employment based on race, color, religion, sex, or national origin.
<i>Age Discrimination Employment Act of 1967</i> (as amended) →	Prohibits discrimination in employment against persons over 40; restricts mandatory retirement.
<i>Occupational Safety and Health Act of 1970</i> (OSHA) →	Establishes mandatory safety and health standards in workplaces.
<i>Vocational Rehabilitation Act of 1973</i> →	Prohibits discrimination in employment based on physical or mental disability.
<i>Pregnancy Discrimination Act of 1978</i> →	Prohibits employment discrimination against pregnant workers.
<i>Immigration Reform and Control Act of 1986</i> →	Prohibits knowing employment of illegal aliens.
<i>Americans with Disabilities Act of 1990</i> →	Prohibits discrimination against a qualified individual on the basis of disability.
<i>Civil Rights Act of 1991</i> →	Reaffirms Title VII of the 1964 Civil Rights Act, reinstates burden of proof by employer, and allows for punitive and compensatory damages.
<i>Family and Medical Leave Act of 1993</i> →	Allows employees up to 12 weeks of unpaid leave with job guarantees for childbirth, adoption, or family illness.

**Figure 8.12** Overview of significant laws impacting the management of employees.

Source: John R. Schermerhorn Jr. *Management, 6th ed*, New York: John Wiley & Sons, Inc., 1999. Used by permission.



## INTERNATIONAL SNAPSHOT

### Managing Employees Abroad

Today's hoteliers may be called on to travel to different countries to manage hospitality facilities. The laws and regulations governing employment are different in every country, sometimes in ways that are subtle, but just as often in ways that are fundamental. Some of the most common and most obvious examples are described here.

#### THE NATURE OF THE EMPLOYMENT RELATIONSHIP

In most places in the United States, an employer or employee may terminate the employment relationship

at any time, for any lawful reason or no reason at all; this is often referred to as "employment at will." Although this notion seems natural in the United States, it often does not apply overseas.

To the contrary, many countries have laws that are much more protective of employees' right to retain their employment. Such laws may explicitly define the permissible reasons for terminating the employment relationship, or they may more broadly prohibit termination except in the most egregious of circumstances. There may be more intensive regulation

of layoffs for economic or operational reasons (sometimes called “retrenchment” or “redundancy”).

In some cases, an employer may simply be prohibited from terminating the employment relationship; if the law is violated, the government may require that the employee be reinstated. In other cases, the employer can end the relationship by the payment of a defined monetary amount, sometimes called “redundancy payments.”

## WORK PERMITS

Some countries protect their citizens’ right to work by prohibiting the employment of foreigners except with special permission of the government. Employers may be required to look first to the local population for all employment needs at every level. Sometimes permits are easily obtainable for executive-level management or for persons with rare skill sets. Often, though, the employer will be required to demonstrate its efforts to hire employees within the jurisdiction before permits are issued. As a result, it may be more difficult, and it may take more time, to fill key vacancies.

## APPLICATION OF U.S. LAWS IN FOREIGN COUNTRIES

Employers based in the United States (or controlled by U.S. companies) that employ U.S. citizens in locations outside of the country are subject to most of the antidiscrimination laws discussed earlier in this chapter with respect to those U.S. citizens. The

United States’ discrimination laws do not apply to noncitizens of the United States in operations outside the United States.

Conversely, multinational companies that operate in the United States are subject to the laws of the United States to the same extent as U.S. employers. Just as managers familiar with U.S. employment laws must be aware of potentially drastic differences in employment laws (and the respective effect on operations) when they move abroad, those entering the United States must adjust to the differences in this country, as compared to the places from which they came.

## OTHER DIFFERENCES

These examples demonstrate just a few of the more common and obvious differences between U.S. employment laws and those that may be typical in other countries. There are likely to be other significant differences in such areas as minimum wages and methods of compensation, required compliance with government welfare benefits programs, workplace safety standards, and taxation schemes. Upon beginning work in any foreign country, every manager should quickly become familiar not just with local customs and practices but with the laws that must be observed with respect to the hotel’s employees.

Written by David Comeaux. Provided by David Comeaux of the Ogletree and Deakins Law Firm, St. Thomas, Virgin Islands. [www.ogletreedeakins.com](http://www.ogletreedeakins.com).

## WHAT WOULD YOU DO?

Naomi Yip is the sous chef at one of the city clubs managed by Clubs International, a company that specializes in the operation of golf, city, and other private clubs. The company manages

over 50 clubs nationally. Naomi has been with the organization for five years and is considered one of the company’s best and brightest culinary artists.

Thomas Hayhoe is the executive chef at the club where Naomi works and is Naomi’s immediate supervisor. Naomi’s annual evaluations have been very good, and she has been designated as “ready for promotion” in her past two evaluations. In January, Naomi announces she is pregnant and her due date is in July. In March,

Chef Hayhoe completes his annual evaluation of Naomi. He does not recommend her for promotion to executive chef, Naomi’s next step up, citing, “the extraordinary demands on time placed on an executive chef within the Clubs International organization,” which he claims Naomi will be unable to meet. Chef Hayhoe also cites conversations he has overheard with Naomi in which she declares, “I’m looking forward to spending as much time as possible with my baby.”

Clubs International has just been awarded the contract to operate a new and lucrative account, the Hawk Hollow Golf Club. Assume that you were the human resource director advising the company’s vice president of operations.

1. Do you feel Chef Hayhoe's evaluation of Naomi is valid?
2. Based on Chef Hayhoe's recommendation, would you recommend Naomi for the executive chef's position at the new account?
3. How would you respond if the new client objected to the appointment of Naomi based on her pregnancy?

## THE HOSPITALITY INDUSTRY IN COURT

To understand how important it is to do a thorough investigation and take employee complaints seriously, consider the case of *Romero v. Howard Johnson Plaza Hotel*, 1999 U.S. Dist. Lexis 15264 (S.D.N.Y. 1999).

### FACTUAL SUMMARY

Rose Romero (Romero) was a guestroom attendant for Howard Johnson Plaza Hotel (Howard Johnson). Romero was employed with Howard Johnson from 1987 until 1993. During her employment she was sexually harassed by a number of her coworkers on a number of occasions. In one incident, a male coworker responded to a request made by Romero with a string of vulgar comments. Another incident involved Romero and an intoxicated male coworker, who approached Romero stating he knew "how to please a woman" and then exposed himself. Romero reported some of the incidents to supervisors, the general manager of the hotel, security, her union, and ultimately the police.

After Romero made a complaint to the police, the management of Howard Johnson sent the male coworker involved a letter stating the company's policy on sexual harassment. The letter also stated the allegations made by Romero could neither be confirmed nor denied due to the absence of a third-party witness. Romero also requested a union meeting be held so she could discuss her harassment claims. The meeting was conducted publicly, with several of her alleged harassers present. Despite the meeting and a reminder of Howard Johnson's harassment policy for the parties involved, the harassment continued.

After several fabricated reprimands, and at least two suspensions based on false accusations, Romero left Howard Johnson in 1993. She sued Howard Johnson, two of her former coworkers, and three managers for sexual harassment.

### QUESTION FOR THE COURT

The court was faced with at least two questions in this case. The first was whether Romero waited too long after the last incident of sexual harassment to bring her lawsuit against the defendants. Under Title VII of the Civil Rights Act of 1964, a person claiming workplace harassment or a hostile work environment must file a charge with the Equal Employment Opportunity Commission (EEOC) within 300 days of the unlawful action. Romero filed her claim with the EEOC on June 13, 1993. Howard Johnson argued Romero could not file complaints about incidents prior to August 22, 1992, and most of the incidents occurred before then. Romero argued that all of the incidents were part of an ongoing act of discrimination and could be considered a continuing violation. Romero also argued she was subjected to a hostile work environment, which involves a continuing pattern of discrimination or sexual harassment rather than one isolated event.

The second question for the court concerned the liability of Howard Johnson. Romero argued Howard Johnson created the hostile work environment because it either failed to provide a reasonable avenue for complaints or knew about the harassment and did nothing to stop it. If Howard Johnson created or contributed to a hostile work environment, it was liable for the misconduct also.

## DECISION

The court decided Romero was subjected to a hostile work environment and that the sexual harassment was a continuing violation. Therefore she could sue based on all of the past incidents. The court also found evidence Howard Johnson either knew or should have known of the harassment and failed to stop it.

## MESSAGE TO MANAGEMENT

Harassment of any kind must not be tolerated in the workplace.

To understand the Supreme Court's view of an employer's obligation regarding prevention of sexual harassment, consider the case of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

## FACTUAL SUMMARY

Throughout college, Beth Ann Faragher (Faragher) worked part-time and during the summers for the Parks and Recreation Department of Boca Raton, Florida (Boca Raton). While employed as a lifeguard from 1985 to 1990, Faragher was supervised by Bill Terry, David Silverman, and Robert Gordon. Terry and Silverman inappropriately touched female lifeguards, including Faragher, and regularly made lewd comments and sexual advances toward the female lifeguards. In 1986, the city of Boca Raton instituted a sexual harassment policy, but it is unclear whether the entire Parks and Recreation Department received a copy of the policy. Faragher and other female lifeguards mentioned the harassment to Gordon in conversation but never made formal complaints. In 1990, a complaint was finally initiated by a former lifeguard, which resulted in disciplinary action against Terry and Silverman. In 1992, Faragher filed suit against the city of Boca Raton, Terry, and Silverman, alleging a Title VII hostile work environment claim.

## QUESTION FOR THE COURT

The question for the court was whether an employer (Boca Raton) could be held liable for the acts of its supervisory employees (Terry and Silverman) whose sexual harassment of a subordinate created a hostile work environment. Faragher argued the sexual harassment and discrimination was so widespread the city of Boca Raton either knew or should have known of the conduct of Terry and Silverman. Therefore, she argued, the city of Boca Raton was liable for the conduct of Terry and Silverman. Boca Raton argued the conduct of Terry and Silverman was outside the normal job functions for which they were hired and was so unreasonable the city was not responsible.

## DECISION

The court held in favor of Faragher and found the city of Boca Raton liable for the conduct of Terry and Silverman. But it also found that Boca Raton could claim a potential defense. If the employer (Boca Raton) exercised reasonable care to prevent and correct any sexually harassing behavior, and if the employee-victim failed to take advantage of any preventive or corrective measures provided, then the employer would not be liable for sexual harassment.

## MESSAGE TO MANAGEMENT

Create a policy of zero tolerance; educate your employees as to what constitutes appropriate and inappropriate behavior; provide a path of relief for victims, investigate all claims promptly, and hold people accountable for their actions.

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It is a good practice to define the employment relationship between employers and employees. The agreement can be spelled out in an offer letter. An employee manual can help employees understand what is expected from them, as well as set out policies and procedures for the workplace.

WHAT DID YOU  
LEARN IN THIS  
CHAPTER?

Just as you cannot discriminate illegally in the selection process, you cannot discriminate after someone has been hired. Both federal and state civil rights laws exist to protect employees against discrimination in the workplace. You must invoke a zero tolerance policy for sexual harassment and other forms of illegal discrimination. Educate your employees about appropriate and inappropriate behavior. You must also be prepared to do a thorough investigation if inappropriate behavior is brought to your attention.

The Family and Medical Leave Act (FMLA) allows most employees of larger companies to take time off to address personal issues such as the birth of a child or to take care of an injured servicemember.

Compensation for employees is a complex area, particularly in the hospitality industry, as it is labor-intensive and the primary beneficiary of the tip credit toward the minimum wage. Utilizing an objective method to evaluate employees can help to reduce potential litigation for discrimination and wrongful termination. Establishing an in-house dispute resolution program can also reduce potential liability from employee conflict or disputes. Unemployment insurance is available for employees who are discharged without cause related to the workplace (i.e., layoffs).

Certain records and documents (e.g., applications and payroll information) must be retained for a certain length of time. Also, several posters that outline employee rights in several areas must be displayed prominently in the workplace.

## RAPID REVIEW

After you have studied this chapter, you should be prepared to:

1. Compose an employment offer letter that does not jeopardize the at-will employment status of an assistant manager of a quick-service restaurant.
2. Draft a voluntary tip-pooling arrangement for use in a sports bar that employs both bartenders and waitstaff. Assume that 75 percent of sales are generated in the seating area and 25 percent are generated at the bar itself.
3. Define the following concepts as they relate to sexual harassment.
  - Zero tolerance
  - Prevention
  - Investigation
  - Resolution
4. Use the Internet to look up and identify whether tip pooling is permitted in the state where you work or go to school. Cite your information source and the path to get there.
5. Contrast the concepts of at-will employment and wrongful termination.
6. List and discuss four advantages of an in-house dispute resolution plan.
7. Discuss the pros and cons of tying an employer's unemployment insurance tax rate to the number of claims successfully filed by ex-employees.
8. Detail a procedure for establishing the "cost" of providing lodging to summer college students employed by a theme park and living in dormitory-style housing provided by the park. Explain why this cost is important.

## TEAM ACTIVITY

In teams, put yourself in the position of the human resources director of the XYZ Hotel. It has come to your attention through the employee grapevine that one of your male executive housekeepers is making romantic overtures to several of the female housekeepers. How will you handle this situation? Be as specific as possible, given the page-length limitation (two pages, double-spaced). Address all issues and concerns, including yours and those of the accused, as well as privacy, and, finally, recommend a solution.