

# EMPLOYMENT LAWS FROM HIRING TO FIRING



HOSTED BY YAVAPAI COLLEGE  
SMALL BUSINESS DEVELOPMENT CENTER

PRESENTED BY  
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OCTOBER 28, 2021

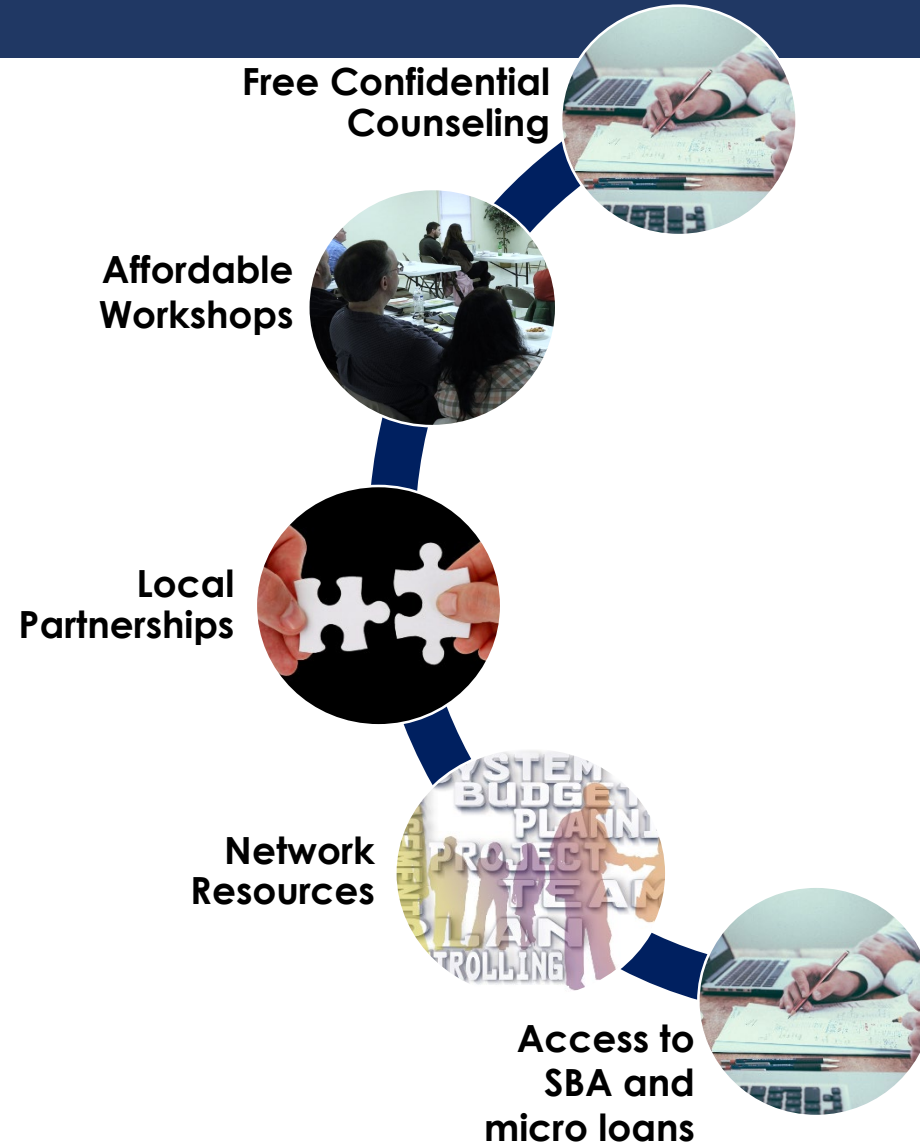


U.S. Small Business  
Administration



Northern Arizona

# SBDC Services



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# LAURA HAMBLIN

- Employment Lawyer and HR Consultant who works with Small Employers in North Central Arizona.
- Career with 3 nationwide retailers as employment lawyer and regional VP of Human Resources.
- Former Government Affairs Director for Prescott Area Human Resources Association (PAHRA).
  - Great Resources for HR Info—[shrm.org](http://shrm.org) & [pahra.shrm.org](http://pahra.shrm.org)



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***Necessary Disclaimer: Information that will be shared in today's presentation is for informational purposes only and does not constitute legal advice. Attending this workshop does not create an attorney-client relationship.***



# WORKSHOP OVERVIEW



- ✓ **Laws that are Triggered during each Stage of Employment**
  - **Recruiting People**
  - **Hiring People**
  - **Paying People**
  - **Managing People**
  - **Dismissing People**
- ✓ **Help You to Identify Possible Employment Landmines, So You Can Seek Assistance**
- ✓ **Give You Some Tools for Your HR Toolkit**

# 1. RECRUITING PEOPLE

## Recruiting Advertisements

- Use gender neutral terms for jobs (NOT “foreman” or “waitress”).
  - Can be used as evidence in sex discrimination claims.

## Employment Applications

- Shouldn't ask for Social Security numbers, medical questions, or the year graduated from high school or college.
  - Some info must wait until after an employment offer.
- Criminal Background Questions—Are they OK?
  - Yes, in Arizona, but many states ban them on applications.



# 1. RECRUITING PEOPLE



## Interviewing Applicants

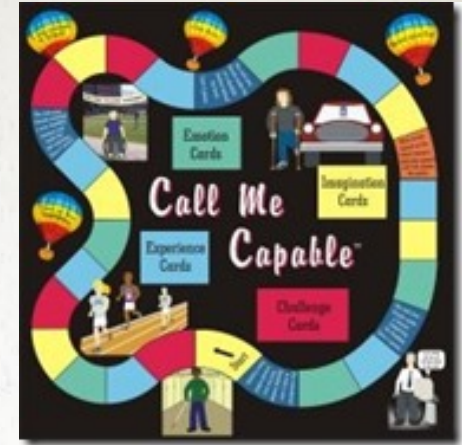
- Questions must be “*Job-Related.*”
  - Hobbies, children, marital status are usually not Job-Related.
- Avoid questions that will reveal protected characteristics that aren’t observable (pregnancy, religion, national origin, age, disability).
  - “Do you speak Spanish?” Can you ask that question?
- Social Media Screening—Should you do it?
  - It’s not illegal, but there are lots of Landmines!



# 1. RECRUITING PEOPLE

## Applicants and Disability Issues

- Americans with Disabilities Act (ADA) and similar AZ law apply to employers with 15 or more employees.
- Provide ALL applicants who are interviewed with a copy of the job description.
  - If no job description, bullet point essential job functions.
  - “Can you perform the essential functions of the job?”
- Unless it creates an undue hardship for the employer, reasonable accommodation is required for qualified individuals with disabilities.



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## 2. HIRING PEOPLE



### Conditional Offers of Employment

- If you drug test or do criminal background checks, the job offer should be *conditioned* on successful test results.
  - Don't test/check before making a job offer.
- Offers of employment should be in writing to avoid miscommunication. (Recommended--not a legal requirement.)
- “At-Will” employment statement should be included— “You or the employer may end your employment at any time for any reason.” (Well...almost any reason.)



## 2. HIRING PEOPLE



### Drug Testing

#### Should you do it?

- ✱ It's not required, but state law allows almost all forms of testing.
- ✱ Drug testing may minimize liability if employees work with hazardous machinery or vehicles, or are in homes of clients unsupervised.
- ✱ If your policy follows Arizona's drug testing statute you will have a "safe harbor" against lawsuits based on drug tests or the employer's good faith belief that the employee was impaired.
- ✱ You may exclude employees from safety sensitive jobs if the drugs they're taking may cause impairment, but be aware of ADA issues.

## 2. HIRING PEOPLE

### Recreational Marijuana Law—“Smart & Safe Arizona Act”

- ✱ Employers have the right to maintain a drug-and-alcohol free workplace and have workplace policies restricting the use of marijuana by employees or prospective employees.
- ✱ Employers can prohibit the use, consumption, possession, transfer, transportation, sale, or cultivation of marijuana in the workplace.
- ✱ Communicate expectations to your employees!

### Should employers test for marijuana?

- ✱ Marijuana is detectable in urine for 3 to 30 days.
- ✱ Not always a reflection of impairment.





## 2. HIRING PEOPLE



### Arizona Medical Marijuana Law

- ✿ Employers can't refuse to hire, nor can they discharge, discipline or discriminate against a cardholder because they are a cardholder or based on a marijuana-positive drug test.
- ✿ Positive tests—Don't fire or not hire if they are a cardholder.
- ✿ Employers can verify cardholder status through AZ DHS  
<https://www.azdhs.gov/licensing/medical-marijuana/index.php#id-verify-employers>
- ✿ Employees who are cardholders can't use, possess, or be impaired by marijuana at or during work.



## 2. HIRING PEOPLE



### Criminal Background Checking

- Employers who use vendors to do background checks, must comply with the Fair Credit Reporting Act (FCRA).
  - ❑ FCRA requires specific employee notifications.
  - ❑ FCRA does not apply if employer does its own checking.
- Criminal conviction may be a justifiable reason to not hire someone; BUT, the employer must consider the type of crime, job being hired to perform, length of time since conviction, etc.
  - ❑ A blanket “no felon” policy could run afoul of nondiscrimination laws.

# 2. HIRING PEOPLE

## Other Hiring-Related Laws

- Form I-9 (Federal law requirement)—All new hires must complete this form and provide documentation to show identity and right to work in the U.S.
  - ❑ Can't require drivers' license and Social Security card; those are among the acceptable documents.
  - ❑ Employee fills out on day #1, employer fills out no later than day #3.
- E-Verify Program (State law requirement)—Arizona employers must also verify new hires' employment eligibility through E-Verify.
  - ❑ Use with Form I-9 and complete by no later than day #3.

**Employment Eligibility Verification**  
Form I-9  
OMB No. 1615-0047  
Expires 09/30/2009

**U.S. Citizenship and Immigration Services**

**START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

**ANTI-DISCRIMINATION NOTICE:** It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which documents an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

**Section 1. Employee Information and Attestation** (Employer must complete and sign Section 1 of Form I-9 no later than the first day of employment. Do not follow accepting a job offer.)

Last Name (Family Name)	First Name (Given Name)	Middle Initial	Other Last Name Used (if any)
Address (Street Number and Name)		Apt. Number	City or Town
State		ZIP Code	
Date of Birth (mm/dd/yyyy)	U.S. Social Security Number	Employee's Current Address	Employee's Telephone Number

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

- 1. A citizen of the United States
- 2. A noncitizen national of the United States (See instructions)
- 3. A lawful permanent resident (Alien Registration Number/USCIS Number)
- 4. An alien authorized to work until expiration date, if applicable, mm/dd/yyyy (Some aliens may write "N/A" in the expiration date field. (See instructions))

Alien authorized to work must provide only one of the following document numbers to complete Form I-9:  
Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number

1. Alien Registration Number/USCIS Number: \_\_\_\_\_  
OR  
2. Form I-94 Admission Number: \_\_\_\_\_  
OR  
3. Foreign Passport Number: \_\_\_\_\_  
Country of Issuance: \_\_\_\_\_

Signature of Employee: \_\_\_\_\_ Today's Date (mm/dd/yyyy): \_\_\_\_\_

**Preparer or Translator Certification (check one)**

I did not use a preparer or translator.  A preparer(s) and/or translator(s) assisted the employee in completing Section 1. (Fields below must be completed and signed when preparer and/or translator assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator: \_\_\_\_\_ Today's Date (mm/dd/yyyy): \_\_\_\_\_

Last Name (Family Name)	First Name (Given Name)
Address (Street Number and Name)	
City or Town	State
ZIP Code	

Form I-9 (01/19/07) N Page 1 of 3



## 2. HIRING PEOPLE

### More Hiring-Related Laws

- Arizona New Hire Reporting

- AZ employers must submit new hire reports to AZ Dept. of Economic Security within 20 days after hire or rehire.

- Workers' Compensation Insurance

- AZ employers are required to have this coverage to compensate employees who have work-related injuries or illnesses.
- Larger employers can be self-insured.





# 3. PAYING PEOPLE

## Wage Claims are #1 Claims Against Employers

- Don't mess with employees' pay!
- Understand the federal and state legal requirements because mistakes can be costly.



# 3. PAYING PEOPLE



## Fair Labor Standards Act (FLSA)—Federal Law

- Minimum Wage
  - ❑ \$12.15 Hour in AZ (2021)—Higher than \$7.25 Federal Minimum Wage
  - ❑ \$12.80 Hour in AZ (2022)—Annual cost of living adjustment after 2020.
  - ❑ Tipped Rate is \$3.00 less than regular Minimum Wage rate.
- Overtime Pay Requirement: 1 ½ X regular hourly rate for all hours worked over 40 in a week.
  - ❑ Can't move hours from week to week or do "comp-time".
  - ❑ Some bonuses, premium pay, etc. must be considered in determining "regular rate of pay" for overtime purposes.



# 3. PAYING PEOPLE



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## FLSA Small Business, Non-Profit Charitable Organization Exceptions to Minimum Wage and OT Requirements

- **Small Business—Annual gross sales volume < \$500,000**
- **Non-Profit Charitable—If engage in commercial activities, count \$\$ towards \$500k (i.e., thrift store sales, t-shirt sales)**
  - Don't count donations, membership fees, etc.**
- **Employees may still be covered if they engage in interstate commerce.**
  - Internet ordering, accept credit cards or non-AZ checks, etc.**
- **It's hard to recruit if you pay below minimum wage!**



# 3. PAYING PEOPLE



## “I’ll Pay Employees by the Job instead of by the Hour”

- You can pay by the job, but that won’t let you off the hook for minimum wage and overtime requirements.
- “Piecework” or “Pay by the Day/Job”—Employer must still track hours worked to ensure that employees aren’t paid less than minimum wage and they still must be paid overtime (1/2 time) for hours worked over 40.
- Example: Pay employees \$200 day, 5 days week, 10 hours day
  - $\$1000 \text{ wk.} \div 50 \text{ hrs.} = \$20 \text{ hr.}$ ; 10 hrs. over 40, so owe additional  $\frac{1}{2}$  time (\$10) for 10 hrs. = \$100

# 3. PAYING PEOPLE



## More FLSA Issues...

- No “Off-the-Clock” Work—Pay them even if the time wasn’t authorized.
  - Caution supervisors against texting or calling employees during time off, and prohibit employees from doing work related emails during time off, unless you pay them.
- Travel Time—Employees who work at multiple sites during a day must be paid for time traveling from site to site.
- Wage Deductions for Uniforms, Breakage, etc.—Paychecks can’t drop below minimum wage (federal law) & employee must provide a written acknowledgment in advance of the deductions (AZ law).



# 3. PAYING PEOPLE

## And More on the FLSA...



- Independent Contractors vs. Employees
  - ❑ The more control the employer has over the worker, the more likely the worker will be viewed as an employee.
  - ❑ When employers mischaracterize employees as contractors, they face high liability (IRS, DOL, State).
- “Exempt” (Salaried) Employees—Exempt from overtime pay requirements of FLSA.
  - ❑ Must pay exempt employees at least \$684 week (\$35,568 annually).
  - ❑ Job must meet certain FLSA duties tests to be lawfully treated as exempt (i.e., supervise others, manage a department, etc.).

# 3. PAYING PEOPLE



## Arizona Pay Laws

- Pay Days
  - ❑ Must pay at least twice a month—2 fixed paydays, no more than 16 days apart.
  - ❑ Pay within 5 working days after the end of the last pay period.
- Paid Sick Time (PST) Law—Applies to almost all AZ employers.
  - ❑ All employees accrue 1 hour of PST for every 30 hours worked.
  - ❑ Employers with 1-14 employees, PST accrual and use limited to 24 hours a year; employers with 15 or more—40 hour PST limit.
  - ❑ Very strong no retaliation provisions—90 day presumption.



# 4. MANAGING PEOPLE

## Not a Law, but it Ties in...



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- **“Probationary Periods”**
  - ❑ **Nothing magical about 90 days (carryover from union contracts).**
  - ❑ **It gives employees the impression that they are promised at least 90 days of employment, and if they make it past 90 days the employer is held to a higher standard to end their employment.**
  - ❑ **“At-will employment” is the established legal principle in AZ (unless there’s a union or employment contract)-- Employer or employee can end employment at any time for (almost) any reason.**
  - ❑ **Suggest that you don’t have one or call it an “Introductory Period.”**

# 4. MANAGING PEOPLE

## Avoiding Legal Problems...



- **Counseling Employees**
  - Ask the employee for his or her side of the story before counseling or firing, even when the situation seems clear cut.
- **Warnings should be detailed and stated objectively.**
  - Include full dates.
  - Avoid general statements like “Bad Attitude”—describe it instead.
  - Include potential consequences if there’s no improvement.
- **Be respectful, but straightforward.**



## 4. MANAGING PEOPLE

### Title VII of the Civil Rights Act of 1964, as Amended

- Applies to employers with 15 or more employees.
- Prohibits discrimination and harassment based on race, color, sex (including pregnancy), religion, and national origin.
- US Supreme Court ruled that discrimination based on sexual orientation or transgender status are forms of sex discrimination.
- Federal law enforced by the Equal Employment Opportunity Commission (EEOC).
- Retaliation claims are very common when employees have complained of discrimination or stood up for others.

# 4. MANAGING PEOPLE

## Age Discrimination in Employment Act (ADEA)

- Covers employers with 20 or more employees.
- Prohibits discrimination against employees who are age 40 and older—the “protected age group”.
- Avoid pressuring people to retire (focus on job performance instead); no comments about needing “young blood” or being “over the hill”, etc.
- ADEA is a federal law enforced by the EEOC.





# 4. MANAGING PEOPLE



## Americans with Disabilities Act (ADA)

- Federal law, applies to employers with 15 or more employees and is enforced by the EEOC.
- Prohibits discrimination against people with disabilities (or perceived disabilities) in employment and public accommodations.
- Requires reasonable accommodation to allow qualified individuals with disabilities to perform the essential job functions, unless it creates an undue hardship on the employer (rare).
  - Job Accommodation Network (JAN)— [www.askjan.org](http://www.askjan.org)
- Keep medical records separate from personnel files.

## 4. MANAGING PEOPLE



### Arizona Civil Rights Act

- Same coverage as Title VII, the ADEA, and the ADA, but if the complaint involves sexual harassment, it applies to employers with only one employee.
- The law is enforced by the Civil Rights Division of the state Attorney General's office.
- If an employee files with both the EEOC and ACRD, one of the agencies will handle the complaint.



# 4. MANAGING PEOPLE

## Break Time for Nursing Mothers

- Fair Labor Standards Act (FLSA) requires employers to provide “reasonable break time” for nursing mothers to express breast milk, for up to 1 year after birth.
- Breaks don’t have to be paid, unless other employees get paid breaks.
- Private area, but it cannot be a bathroom.
- Employers with less than 50 employees don’t have to comply IF they can show undue hardship.



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# 4. MANAGING PEOPLE



## Occupational Safety and Health Act

- Requires all employers to provide workplaces that are free from serious hazards, provide employee safety training, maintain safety data sheets, etc.
- Most employers with 10 or more employees must track and record workplace illnesses and injuries on the OSHA Form 300, and post it from February to April.
- Federal law enforced by Occupational Safety and Health Administration (OSHA), and a similar state law is enforced by the Arizona Industrial Commission.



# 4. MANAGING PEOPLE



## National Labor Relations Act (NLRA)

- Prohibits employers from disciplining employees for engaging in “concerted activity for the purpose of collective bargaining or mutual aid or protection.”
- Applies to union and non-union workplaces with 2+ employees.
- Employees are allowed to discuss or protest issues involving wages, hours and working conditions.
  - Wages are NOT confidential!
- Federal law enforced by the National Labor Relations Board— regional office that covers AZ is very aggressive.

# 4. MANAGING PEOPLE

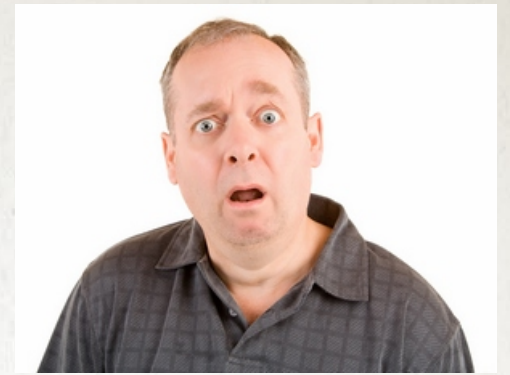


## Legally Protected Time Off

- Workers' Compensation
  - ❑ Be discreet if question legitimacy of the claim. Can't retaliate.
- State Paid Sick Time
  - ❑ Can't question them unless off for 3 consecutive work days.
- Jury Duty and Military Leave
  - ❑ Not required to pay for time off, but need to allow it.
- Family and Medical Leave
  - ❑ Employ 50+ employees—12 to 26 weeks of unpaid leave.



# 5. DISMISSING PEOPLE



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## Basic Steps to Follow

- ✓ It should never be a surprise.—Address and document performance problems and list consequences if they don't improve. They need to know they're on the edge.
- ✓ Firing on a first offense is ok for serious infractions.
- ✓ Be consistent!
- ✓ Be respectful, but plan for potential violence.
- ✓ Resignation in lieu of discharge is sometimes ok.—It allows the employee to be truthful when applying for work elsewhere.

# 5. DISMISSING PEOPLE

## Final Paychecks

- Involuntary Separations—Pay within 7 business days or the end of the next pay period, whichever is first.
- Voluntary Quits—Pay at the next regular pay day.
  - Always get resignations **IN WRITING** when the employee first tells you, including the last day to be worked.
- Withholding Pay—You can't hold paychecks hostage until employees return company property.
  - Can explain that keeping property without permission is possible criminal offense that you'll pursue.





# 5. DISMISSING PEOPLE



## Employment References

- AZ employers can provide information about reason for termination, job performance, behavior or evaluations of former employees and be shielded from civil liability.
  - ❑ If you provide information, it should be factual and objective.
  - ❑ “He was more than an hour late to work every Monday for the last month”, not “I think he was on drugs because he was often late.”
- Neutral Reference—Most common—Provide dates of employment, position held and sometimes pay rate.

# 5. DISMISSING PEOPLE



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## Claims for Unemployment Compensation

- Standards to deny claims are *“Misconduct in Connection with Work”* or *“Voluntarily Quit without Good Cause in Connection with Work.”*
  - ❑ Written policies regarding expected conduct are important.
  - ❑ Need to show that employee was aware of the policy.
- Employers should respond to claims.
  - ❑ Not responding can be a “pattern of failure” and cause employer to pay for benefits for which they are otherwise not responsible.
  - ❑ If employer is concerned about providing evidence for a potential legal claim, consult with legal counsel before responding.





# QUESTIONS?

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