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Agenda

- New Overtime Rule and Regular Rate of Pay
- Retaliation and Sexual Harassment Claims
- Good Faith Defense
- Supreme Court Review
- Gender Identity Discrimination
- Website Compliance
- Generational Differences in the Workplace
- ADA Issues
- Mental Health in the Workplace
- Politics at work
- NLRB Review
- New Joint Employer Standard
- EEOC Criminal Background Guidance

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New Overtime Rule

- The minimum salary threshold is $684 per week, annualized to $35,568 per year
- The rule provides for **one threshold** regardless of exemption, industry, or locality, subject to a few exceptions that already existed
- Employers will be able to credit certain non-discretionary payments in limited ways
- The highly compensated employee exemption's additional total annual compensation requirement will be set at $107,432 per year

New Overtime Rule

- No changes were made to the duties tests – the crux of the relevant exemptions.
- No change was made to the various other exemptions (for example, outside sales) that do not specifically include a salary requirement even if the employee happens to earn a salary.
- There will be no "automatic" updates, or even a formal schedule of future adjustments to these figures.

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Regular Rate of Pay

- Department of Labor announced a Final Rule that will allow employers to more easily offer bonuses and benefits without worrying about the regular rate of pay.
- The rule is the first major change to the regulations governing regular rate requirements under the Fair Labor Standards Act (FLSA) in over 50 years.

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Regular Rate of Pay

- When the Rule goes into effect, Employers may offer the following without risk of additional overtime liability:
  - Certain parking benefits, wellness programs, employee discounts, tuition benefits, adoption assistance.
  - Payments for unused paid leave, certain penalties required under state and local scheduling laws.
  - Reimbursed expenses for cell phone plans, credentialing exam fees, organization membership dues, and travel.
  - Sign on and longevity bonuses.
  - The cost of office coffee and snacks to employees as gifts.
  - Certain contributions to benefit plans.

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Are you in compliance?

- Analyze whether exemptions you have been relying upon still apply.
- Consider the possible application of alternative FLSA exemptions.
- Develop FLSA-compliant pay plans for employees who have been treated as exempt but who no longer will be.

Retaliation Claims Are Increasing

- Retaliation: 39,469 (51.6 percent of all charges filed in fiscal year 2018).
- Of course retaliation claims exist outside of EEO claims.

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Retaliation

- **Protected Activity**
- **Adverse Employment Action**
- **Causal Connection**

- Critical to remember the anti-retaliation provision under Title VII is very broad.
- An action that might deter a reasonable person from opposing discrimination or participating in the EEOC complaint process is an adverse action for retaliation claims under Title VII.

Laws with Retaliation Provisions Include

- Title VII of the Civil Rights Act of 1964 – **Title VII**
- Americans with Disabilities Act – **ADA**
- Age Discrimination in Employment Act – **ADEA**
- Equal Pay Act - **EPA**
- Genetic Information Non-Discrimination Act – **GINA**
- Fair Labor Standards Act - **FLSA**

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Laws with Retaliation Provisions Include

- National Labor Relations Act – ***NLRA***
- Family and Medical Leave Act – ***FMLA***
- Employee Retirement Income Security Act – ***ERISA***
- Uniformed Services Employment and Reemployment Rights Act – ***USERRA***
- Occupational Health and Safety Act – ***OSHA***

Employee Retirement Income Security Act (ERISA)

- ERISA offers retaliation protections to encourage people with knowledge of potential ERISA violations to share information in order to prevent or remedy those violations.
- ERISA prohibits employers from discharging, fining, suspending, expelling, disciplining, or discriminating against plan participants or beneficiaries for exercising or attempting to exercise their rights under ERISA or ERISA plans, or for planning to testify or otherwise taking part in any ERISA-related inquiries or proceedings.

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Red Flags for Retaliation

- Increased supervision
- "Monitoring"
- New performance issues
- Higher standards or expectations
- Supervisor complaints about employee

Decrease the Risk of Retaliation Claims

- Consistent enforcement of policies and procedures.
- Accurate documentation of performance and disciplinary issues.
- Training managers to identify protected activity.
- Publicize reporting procedure for employment concerns.

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Dramatic Increase in Anti-Harassment Litigation

- EEOC filed 66 harassment lawsuits (41 sexual) in 2018 - 50% increase over 2017.
- Over 7,600 Charges filed with EEOC alleged sexual harassment in FY 2018.
- EEOC reported that it obtained a record $56.6 million in settlements and awards for victims of sexual harassment.

#MeToo

- Many high profile companies are in the news for sexual harassment claims.
- Importance of enforcing anti-harassment and anti-retaliation policies.

What should you be doing?

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Prevention of Sexual Harassment

- Make sure your policies match modern standards: Zero tolerance, reporting procedures allow for immediate reporting, guarantee of no retaliation.
- Disseminate your policies in a thoughtful way.
- Train your managers to address issues and avoid common mistakes.
- Promptly investigate any issues raised.
- Consistently enforce your standards.

Today's Reality

- Just because conduct does not rise to the legal level of "harassment," "discrimination," or "retaliation" does not mean the Companies should not discipline an employee for unprofessional conduct
- Many employers no longer tolerate unprofessional behavior even by top producers or top managers.

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Defending Employment Decisions: Good Faith Belief

- **Rinchuso v. Brookeshire Grocery Company (8th Cir. 2019):** The absence of conclusive evidence that Rinchuso violated internet and conduct policies is insufficient to prove improper termination," the court said, "because the central question in determining if termination is proper is not whether the employee actually engaged in prohibited conduct, but **whether the employer believed so in good faith**."

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5 Steps To A Solid Good Faith Defense

- Ensure you can prove that employees are aware of your misconduct standards. The best way to do this is through signed acknowledgements of your policies.
- When an allegation of improper behavior is brought to your attention, make sure you launch an investigation as soon as possible

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5 Steps To A Solid Good Faith Defense

- Make sure all of the evidence gathered in the investigation is well documented. Notes from each person interviewed, each witness statement obtained, each document examined, each email or text message read – all should be maintained and ready to go in case you need them to defend your actions.

5 Steps To A Solid Good Faith Defense

- Don't jump to conclusions or you may be accused of a rush to judgment. If you feel the need to separate the alleged wrongdoer from the accuser, or to get the wrongdoer out of the workplace, you can always place them on an administrative leave pending the conclusion of the investigation. This temporary measure gives you some breathing room and will permit you to conduct your investigation without immediate pressure.
- Consistency is key. If you can prove that you have always taken the same disciplinary action against someone credibly accused of committing that form of misconduct, you will increase your odds of being viewed as operating in good faith.

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Supreme Court Cases

- **Sexual Orientation And Gender Identity Take Center Stage**
- Three pending cases will determine whether Title VII's ban against discrimination "because of sex" covers claims involving sexual orientation and gender identity.
- The consolidated cases were argued on October 8, 2019.

Supreme Court Cases

- **Comcast Corp. v. National Association of African American-Owned Media:** Whether a Section 1981 race discrimination claim fails absent "but for" causation.
- **Trump v. NAACP:** Whether the Department of Homeland Security's decision to wind down the Deferred Action for Childhood Arrivals (DACA) policy is judicially reviewable and lawful.

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Supreme Court Cases

- **Babb v. Wilkie:** Determining the correct standard when assessing ADEA age discrimination cases for federal sector workers.
- **Intel Corp. Investment Policy Committee v. Sulyma:** Whether the three-year statute of limitations period in ERISA, which begins on "the earliest on which the plaintiff had actual knowledge of the breach or violation," bars claims brought more than three years after the information was disclosed to the plaintiff, but the plaintiff chose not to read and could not recall having read such information.

SCOTUS Weighs In Again Regarding Arbitration

Lamps Plus Inc. v. Varela

- Following *Epic,* on April 24, 2019, SCOTUS recently ruled:
  - FAA does not allow a court to compel class arbitration when the agreement does not clearly provide for it.
  - Now, employers whose valid arbitration agreements do not contain an explicit class action waiver (assuming they do not expressly consent to class arbitration) can compel alleged class claims to individual arbitration.

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SCOTUS Decisions 2018-2019 Term

Mt. Lemmon Fire District v. Guido

- The 20-person minimum in the definition of "employer" does not apply to small, public sector employers.

Fort Bend County v. Davis

- SCOTUS unanimously held that Title VII's administrative exhaustion requirement is merely a claim-processing rule.
- As a result, a Court may retain jurisdiction over an employee's claim even if the employee fails to allege the basis for his discrimination claims in his charge.

SCOTUS Decisions 2018-2019 Term

Yovino v. Riizo

- SCOTUS vacated a 2018 appeals court Equal Pay Act decision because one of the judges counted in the majority was deceased by the time the decision was published.

Parker Drilling Management Services Ltd. v. Newton

- SCOTUS declined to extend California's wage-and-hour laws to employees working on offshore drilling platforms subject to the Outer Continental Shelf Lands Act. The Supreme Court held that "where federal law addresses the relevant issue, state law is not adopted as surrogate federal law on the OCS."

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SCOTUS Decisions 2018-2019 Term

Kisor v. Wilkie

- SCOTUS affirmed that interpretation of regulations rests with the agency that promulgated them, it also clarified the court's role in assessing ambiguities and the reasonability of agencies' interpretations.

SCOTUS Decisions 2018-2019 Term

Kisor v. Wilkie

- Reviewing courts should only defer to an agency's interpretation if, after exhausting all the "traditional tools" of construction: (1) the regulation is truly ambiguous; and (2) the interpretation was issued with fair notice to regulated parties, is not inconsistent with the agency's prior views, rests on the agency's expertise, represents the agency's authoritative or official position, and the agency's reading of the rule reflects its "fair and considered judgment."
- This decision to increase judicial scrutiny will either lead to additional challenges to vague and ambiguous regulations in federal court or will push agencies to create clearer regulations and guidance.

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Gender Identity Discrimination

- EEOC and several federal courts take the position that discrimination against a **transgender** or **transitioning** individual is discrimination on the basis of sex.
- For now, the best practice is that employers must accommodate a transgender employee.

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Gender Identity Discrimination

- Consider revising your policies.
- Confidentiality and privacy are key.
- During the hiring process, hiring managers and supervisors should be sensitive to the possibility that applicants have transitioned:
  - The name and gender on the application may correspond with the person's current usage; however, background or suitability checks may disclose a previous name that indicates a gender different from the one the applicant is currently presenting.
  - In such cases, hiring managers should respectfully ask whether the applicant was previously known by a different name, and confirm with the applicant the name and gender that should be used throughout the hiring process.

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Gender Identity Discrimination

- Do not ask employees to provide medical or legal documentation of their gender identity.
- Dress and appearance:
  - The Company is encouraged to evaluate, and consider eliminating, gender-specific dress and appearance rules.
  - Once an employee has informed management that he or she is transitioning, agency dress codes should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender.
  - Dress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity.

Gender Identity Discrimination

- Names and pronouns. Intentionally using the wrong pronoun can and has led to liability.
  - Managers, supervisors, and coworkers should use the name and pronouns appropriate to the gender the employee is now presenting at work.
  - Further, managers, supervisors, and coworkers should take care to use the correct name and pronouns in employee records and in communications with others regarding the employee.
  - Continued intentional misuse of the employee's new name and pronouns, and reference to the employee's former gender by managers, supervisors, or coworkers is contrary to the goal of treating transitioning employees with dignity and respect, and creates an unwelcoming work environment. Intentionally using the wrong pronoun can and has led to liability.

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Gender Identity Discrimination

- Workplace assignments and duties:
  - In some workplaces, specific assignments or duties are differentiated by gender.
  - For a transitioning employee, once he or she has begun working full-time in the gender that reflects his or her gender identity, employers should treat the employee as that gender for purposes of all job assignments and duties.
  - Transitioning employees should not be required to have undergone or to provide proof of any particular medical procedure (including gender reassignment surgery) in order to be eligible for gender-specific assignments or duties.
  - Under no circumstances may an agency require an employee to accept a gender-specific assignment or duty contrary to the gender the employee otherwise works as.

Gender Identity Discrimination

- Recordkeeping:
  - Records in the employee's personnel file should reflect the employee's new gender identity
- Sick and medical leave:
  - Employees receiving treatment as part of their transition may use sick leave under applicable regulations.
  - Employees who are eligible under the Family Medical Leave Act may also be entitled to take medical leave for transition-related needs of themselves or their families.

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Gender Identity Discrimination

- Restroom takeaways:
  - Check for local laws and regulations.
  - OSHA requires employers to provide “meaningful” access to workplace restrooms, including for transgender employees.
  - It is recommended allowing transitioning employee to use the restroom they identify with.
  - Do not require transgender employees to use certain restrooms. You can suggest other, more private facilities if available.

Hairstyles

- Federal does not explicitly ban hairstyle discrimination.
- However, hairstyles can be tied to **sex**, **race**, and/or **religion.**
- States like California and New York recently passed laws prohibiting hair discrimination.
- Do your policies create a respectful and open workplace for natural hair?

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Parental Bonding Time - Examples of Challenges

- When women are encouraged (or required) to take more time off or easier assignments to allow them “time to be a mom.”
- When men are expected to take (or allowed to take) less time to bond with newborn.

Other Claims Of Sex Discrimination

- Gender stereotyping
- Pregnancy and lactation breaks for women
- Caregivers

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Politics At Work

- There is no right to free speech in private sector workplaces. However, you must consider state and local laws.
- For example, Broward County, FL prohibits discrimination based on **political affiliation.**

Politics At Work – Practical Tips

If not properly addressed, political discourse can present unique challenges for employers trying to maintain a working environment free from conflict and distraction.

- Refresh and retrain employees on relevant anti-harassment, anti-discrimination, and equal employment opportunity policies.
- Encourage employees to promptly report any speech or activity they find to be harassing or in violation of company policy.
- If your company policies or employee handbook do not already address politics at work, consider adding a code of conduct advising employees that failure to respect divergent opinions, beliefs, and values may warrant disciplinary action.

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Generational differences in the workplace

Medical Marijuana

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Website Compliance Current Legal Landscape

- Title III governs the ADA's accessibility obligations for "public accommodations"
- Federal Circuit courts are split on website issue:
  - Some circuits say website alone is a public accommodation
  - Other circuits do not require a website standing alone to be covered by Title III – rather there must be a nexus between a physical facility and a website
- Until recently the DOJ has always used compliance with the Web Content Accessibility Guidelines 2.0 Level AA as the required standard of compliance. The DOJ now simply says a website has to be accessible

Company Websites

- Most companies have a marketing department in charge of their website.
- Is your marketing team aware of the company's legal obligations with respect to its website?
- Does marketing put provisions in its contracts with website developers requiring the developer to comply with the Web Content Accessibility Guidelines 2.0 Level AA?
- When it adds text does it check to determine whether doing so adversely affected accessibility?

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Leave As An Accommodation

John takes FMLA leave for cancer treatments. He exhausts his 12 workweeks of FMLA leave but is unable to return at the end of his leave. His doctor says he needs 3 more months of treatment.

Must you grant this much additional leave?

Leave as an Accommodation

- John's doctor now says that he needs 4 more months of leave to complete his cancer treatments and recuperate.

What about now?

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Additional Leave as an Accommodation

- Employer need NOT grant **indefinite, open-ended leave** – such leave is not a "reasonable accommodation"
- The leave must be for a **limited and finite period** of time
- The purpose of the additional leave has to be to allow the employee to recover and be able to return to work within a finite period

What do you do when the leave turns into "another 30 days" or "we will evaluate John's ability to return at his next appointment"?

Obesity

- Overweight individuals often suffer differential treatment including being perceived as lazy, emotionally unstable, lacking self-discipline and being less competent.
- Weight is **not** a protected class under federal law.

So if obesity is not a protected class under federal or state law, why are we talking about it?

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Obesity

Richardson v. Chicago Transit Authority

- Mark Richardson started driving buses for the City of Chicago in 1993. When he started working for the city, he weighed 350 pounds. By 2009, Mark weighed 566 pounds.
- In 2010, Mark was absent from work because he had the flu. The City required that he control his blood pressure before returning to work. When Mark was physically fit to work, the city then required that he be cleared again because the bus seats were not designed for drivers weighing over 400 pounds.
- The Court held that extreme obesity only qualifies as a disability under the ADA if it is caused by an underlying physiological disorder or condition.

Beware of State Law

- The Washington Supreme Court held that obesity is a protected class under state anti-discrimination law (Taylor v. Burlington Northern Railroad Holdings, Inc.).
- The main reason for this distinction is that Washington state disability discrimination law offers broader coverage than the federal Americans with Disabilities Act (ADA).

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Fear of Travel – *EEOC v. STME*

- A masseuse was traveling to Ethiopia to visit her family. Because she has frequent contact with massage customers, her employer insisted she cancel due to fear of her catching Ebola. The employee refused and the employer fired her.
- The 11th Circuit held the Plaintiff was not disabled or regarded as disabled at the time of the termination.
- The ADA does not provide protection where a healthy employee has only the potential to become ill and disabled in the future due to voluntary conduct of overseas travel.

Mental Health

- Before an employer can take adverse action against an applicant or employee based on mental health, it must have **objective** evidence that the applicant or employee can't perform his job duties, or would create a **direct threat to himself or others**, **even with a reasonable accommodation.**

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Mental Health

- Traits and Behaviors vs. Impairments
- "Traits or behaviors are not, in themselves, mental impairments. For example, stress, in itself, is not automatically a mental impairment. Stress, however, may be shown to be related to a mental or physical impairment. Similarly, traits like irritability, chronic lateness, and poor judgment are not, in themselves, mental impairments, although they may be linked to mental impairments."
  - EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities

Mental Health – **When Can You Ask?**

- You cannot ask about mental health unless you have a legitimate, business-related reason. Examples:
  1) After a job offer but before employment begins and then only if others in the same position have been asked;
  2) The information is needed to establish eligibility for benefits under other laws, such as the FMLA;
  3) If there is objective evidence that the employee is not able to do the job or poses a safety risk to others because of their mental health; and
  4) The employee has asked for a reasonable accommodation.

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Mental Health – **What should you do?**

- Consider the importance of having written job descriptions
- Train managers on how to identify and address issues
- Engage in the interactive process to determine if you can provide a reasonable accommodation

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Labor Department's New Joint Employer Rule

- Four-factor balancing test assessing whether the entity:
- 1. Hires or fires the employee;
- 2. Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- 3. Determines the employee's rate and method of payment; and
- 4. Maintains the employee's employment records.

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Labor Department Confirms That Certain School Meetings Are FMLA-Protected

- Parents attending certain school meetings for the benefit of their children are entitled to FMLA leave for their absences.
- The agency concluded that the need to attend school meetings to discuss individualized education programs for children with serious health conditions triggers intermittent FMLA leave protection.
- Employers should make note of this opinion and revise their family leave policies and practices as necessary in response.

Labor Board Makes It Harder For Employees To Claim Their Complaints Are Protected

- **Alstate Maintenance, LLC** reversed a 2011 Obama-era decision that was widely derided as tilting the playing field too far in favor of employees.
- Under that precedent, essentially any employee complaint made to management in the presence of coworkers was sufficient to qualify as protected concerted activity under the National Labor Relations Act (NLRA).
- Under Alstate Maintenance, however, the NLRB has returned to the more stringent standard whereby only those complaints that seek to initiate group action, or that involve truly "group" complaints, will be considered protected concerted activity.

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Labor Board Makes It Harder For Employees To Claim Their Complaints Are Protected

- ***Velox Express, Inc.*:** Employers found to have misclassified employees as independent contractors will no longer face the prospect of unfair labor practice charges for such actions alone.
- The majority ruled that Velox Express did not interfere with workers' Section 7 rights by misclassifying them as independent contractors because it did not "inherently threaten" them with discipline if they were to act in concert for their mutual aid or protection.

Federal Appeals Court Strikes Down EEOC's Criminal Background Guidance In Texas

- In April 2012, the Obama-era EEOC released its "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII."
- The 5th Circuit upheld an injunction barring the EEOC from enforcing the guidance against the state. The appeals court ruled that the EEOC "overstepped its statutory authority" in issuing the guidance because it lacks the authority to promulgate substantive rules implementing Title VII.

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EEOC Scraps Workplace Arbitration Policy

- EEOC withdrew its 1997 policy statement that had disapproved of the practice of requiring workers to enter into arbitration agreements to resolve workplace discrimination claims and instructed its staff to proceed with claims against employers despite the existence of such agreements.
- It's not yet known how this policy will impact day-to-day operations at the EEOC, but it could limit the type of enforcement action employers may face if they have enforceable arbitration agreements in place.

Issues You Need to Have on Your Radar

- Supreme Court decision regarding sexual orientation and gender identity as protected classes.
- Defending the New Overtime Rule, Apprenticeship Programs, Fluctuating Work Week Rules, Proposed Tip Sharing Rules, Revised Regular Rate Calculation, Joint-Employer Rule
- Salary history bans, sick and medical leave.
- Gig Economy Regulations.
- Predictive Scheduling Ordinances.
- New State and Local laws creating new workplace protections.

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Solutions to Help You Stay In Compliance

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- Training Managers to identify protected activity.
- Training Managers to document performance and discipline effectively and thoroughly.
- Creating effective reporting procedures for employees to address workplace concerns.

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