Effective Employee Management for Agribusinesses

- Hiring Employees
- Conflict Resolution
- Multicultural Workforce Issues
- Legal Considerations
- Retaining Employees

Waxahachie Texas Civic Center
March 3-4, 2009

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Ag Enterprise Managers:  
Can You Manage Your Employees Like Other Industry Managers Do? 

Thomas Fuhrmann  
DairyWorks  
March 3, 2009
Managing Agricultural Enterprises

Management Principles you may need to know.

• Getting larger……
• More sophisticated…
• Employees & cattle………………..
You can manage like other industries if........

- You understand management principles that are universal
- You structure your business
- You realize that people are your commodity
- Implementation techniques may differ
- Records to monitor people are as critical as monitoring animal performance
DAIRY WORKS

Operational Management Principles
DAIRY WORKS
5 Operations Management Principles

Organization
(Organizational Diagram)

Objectives
(Key Performance Indicators)

Organizing work
(systems, flow charts)

Building teamwork
(training & motivating workers)

Records
(feedback; KPI’s)
DAIRY WORKS
Dairy Business Cycle

Organization for a manageable business

Objectives for each department or area

Records to monitor results

Building teamwork (motivating workers)

Organizing work (systems)
DAIRY WORKS

We need to better understand the principles of ..................

“MANAGEMENT”

Personnel Management
DAIRYWORKS

SYSTEMS ......that are in control

PEOPLE ........that implement systems correctly

MONITORING......to assure that both people and systems are in control
DAIRY WORKS

SYSTEMS ......that are in control

PEOPLE ........that implement systems correctly

MONITORING ......to assure that both people and systems are in control
Work can be defined as a SYSTEM that has structure:

• a series of related tasks is a process
• a group of related processes is a system

“The more we understand about work the more we can shape it and control it.”
Flow Diagram to “feed colostrum”
DAIRYWORKS

Organizing Work ….

2. Define the processes of the system

- Collect and process colostrum
- Prepare colostrum to feed
- Feed colostrum
- Record information
Organizing Work ....

3. Define the tasks

1. Collect and process colostrum
   - Milk and co-mingle 1st milk from fresh cows 2X/day
   - Measure aby’s with colostrometer
   - Store in nipple bottles (refrigerate)
   - Date bottles

2. Prepare colostrum to feed
   - Warm freshest colostrum when calf is born
   - Bring calf to barn to dip navel

3. Feed colostrum
   - Feed by suckling for 15 minutes
   - Force-feed by esophageal feeder after 15 minutes

4. Record information
   - Record date and hour
   - Record dam calf ID
   - Record feeder
   - Wash equipment
1. Break work routines down into each step
2. Evaluate each step for “correctness” and sequence
3. Rebuild a better work routine
DAIRY WORKS

“WORK”

1. Better work routines can produce better results

   or

2. Better work routines can maintain good results with less cost
DAIRYWORKS

SYSTEMS ……that are in control

PEOPLE ……..that implement systems correctly

MONITORING……to assure that both people and systems are in control
Once you organize work, decide exactly “this is how we do it”, how do you get your workers to do it that way all the time?

• The individual worker

• Teams of workers
DAIRY *WORKS*

Affecting worker attitudes...how you can manage the **individual:**

- **What you CAN NOT change:**
  - Personal background
  - Self esteem
  - Previous experience
Managing the Individual Worker:

But what you can try to do is....

“Motivate” .............

an individual worker
Managing the Individual Worker ….

“Motive”: Some inner drive, impulse, intention, etc. that causes a person to do something or get a certain way

“worker”

“Motivate”: Creating an environment where people work toward a pre-determined outcome

“Manager”
Motivating Workers

**Manager:**
- Establish Goals
- Devise systems
- Train Workers
- Compare results with goals and Feedback

**Worker:**
- Learn work systems
- Bring the right “attitude”
- Work correctly
- Improve with feedback

Motivate! Motivated!
Managing the Individual Worker ....

*Extrinsic motivation:* Based on rewards or punishment

*Controllable*  “gasoline”

*Intrinsic Motivation:* Based on pride, in work and accomplishment; inner drive

*Uncontrollable*  “fire in belly”
Managing the Individual Worker

Extrinsic Motivation: “Incentives”

**PLUSES:**

1. Forces managers to set goals
2. Managers measure performance
3. Sets clear standards for workers
4. Rewards extra work and interest
DAIRYWORKS
Managing the Individual Worker……..

Extrinsic Motivation: “Incentives”

NEGATIVES:
1. Destroys “teamwork” // workers blame other workers
2. Workers try to “beat the system”
3. Workers can’t control circumstances that affect their bonus
4. Send signal: pay more just to do it right
5. Good effort but no bonus: de-motivate workers unexpectedly
6. Get bonus once, expect it all the time
7. “Sales personnel“ vs “Service providers”
8. Workers required to solve problems….appropriate?
Motivating Workers

Manager:
• Establish Goals
• Devise systems
• Train Workers
• Compare results with goals and Feedback

Worker:
• Learn work systems
• Bring the right “attitude”
• Work correctly
• Improve with feedback

Motivate! Motivated!
DAIRY WORKS

Affecting worker attitudes...how you can manage the individual:

• Hire the correct type of people
• Determine if there is “fire in their belly”
• Teach & Train “to your STANDARDS”
• Talk to them about results “Feedback”
Communication is Critical

- Talking with your workers is essential
- Bridge the language barrier
• Worker attitudes......what managers CAN CHANGE is the
  – Compensation or hours
  – Clear Job Description
  – Feedback
  – Recognition/Incentives
  – Knowledge, training or skill level
DAIRY WORKS

• Worker attitudes.......what you CAN CHANGE is the workplace
  – Compensation or hours
  – Clear Job Description
  – Feedback
  – Recognition/Incentives
  – Knowledge, training or skill level
DAIRYWORKS
Personnel Management

Once you organize work, decide exactly “this is how we do it”, how do you get your workers to do it that way all the time?

- The individual worker
- Teams of workers
DAIRY \textit{WORKS}

There are \textit{TWO} kinds of people in the world:

1. Leaders
   \begin{itemize}
   \item \textbf{“TEAM”}
   \end{itemize}

2. Followers
Lead: To guide on a way, to direct the operations of an activity or performance, to go at the head of: be first, to tend toward a definite result (Supervisor, boss, coach).

Follow: To come after in order of rank or natural sequence (workers, players).
DairyWorks

Principle: Organize the Enterprise

Owner/Manager
Calvin

Doctoring Crew Mgr.
(David)

Asst. for babies
(Jerry)

(Rick) (Frank) (James) (Harvey)

Asst. for > 30 days
(Carol)

Milk Mixing Mgr.
(Tony)

Grain Feed Mgr.
(Peder)

Processing Crew Mgr.
(Jimmy)

Maintenance and Relief
(Jacob)

Assistant
(Arnold)

Assistant
(Jose Mavis)

Asst Calves
(Alvin)

Asst Bulls
(Roy)

Asst
(Jerry)

(Carol)
TEAM
of Workers

“A group of people with a high degree of interdependence geared toward the achievement of a goal or completion of a task; they recognize the need to work together.”
Do You Manage Your Workers as **Teams**?

- **Players**
- **Coach**
- **Measure of Performance**
- **Field of Play and Rules of the Game**
Responsibilities of a Boss

5 principles:

1. **Know and understand work**
2. **Train workers**
3. **Monitor results:**
   - records
   - observation
4. **Focus workers:**
   - positive reinforcement
   - motivation
   - retrain (when negative results occur)
5. **Communicate:**
   - upward to your boss
   - downward to your workers
DAIRY WORKS

SYSTEMS ……that are in control

PEOPLE ……..that implement systems correctly

MONITORING .to assure that both people and systems are in control
If you can **measure** something
you can manage it.
If you can measure something you can manage it.
**DAIRY WORKS**

**What are the “key performance indicators” on a dairy?**

A small number of strategic measurements ........

collected from each area of the dairy..............

that are representative of general performance....

and can be measured and monitored daily.
DAIRY *WORKS*

Information management on a dairy:

- collect
- analyze
- interpret
- take action
Maternity & Fresh Cow Herdsman
Job Description
(Tony)
Responsible to the Dairy Manager to manage all cows & heifers from when they enter close up pen until they leave the fresh pen. Specific duties include:

1. Observe closeups, assist at calvings as necessary
2. Process fresh animals according to “Fresh Cow Processing” protocol
3. Feed the first gallon of colostrum according to the “Colostrum Delivery” protocol
4. Move animals to fresh pen
5. Lock up, evaluate and treat fresh cows according to the “Fresh Cow Management” protocol
6. Complete all “Calving and Fresh Cow Forms” daily
7. Manage assistants and associate workers in his/her department
Maternity & Fresh Cow Herdsman
Job Description
(Tony)

Responsible to the Dairy Manager to manage all cows & heifers from when they enter close up pen until they leave the fresh pen.  

KPI’s:

1. DOA (Dead On Arrival) Rate  \hspace{1cm} \text{Goal: < 7\%}
   \hspace{1cm} \text{•} \hspace{1cm} \# calves born dead / \# births

2. Total Protein Levels in Newborns  \hspace{1cm} \text{Goal: > 95\%}
   \hspace{1cm} \text{•} \hspace{1cm} \text{24 hour blood samples measured with refractometer}
   \hspace{1cm} \text{•} \hspace{1cm} \# samples > 5.0 / total \# samples evaluated

3. % culls < 60 DIM  \hspace{1cm} \text{Goal: < 7\%}
   \hspace{1cm} \text{•} \hspace{1cm} \# cull & dead < 60 DIM / total \# fresh animals

4. % incidence of DA’s  \hspace{1cm} \text{Goal: < 1\%}
   \hspace{1cm} \text{•} \hspace{1cm} \# DA’s / \# fresh animals
Maternity & Fresh Cow Herdsman
KPI tabulations & calculations

1. **Collection:** Calving & Fresh Cow Preprinted forms daily

2. **Analysis:**
   - DOA: data entered into DC 305; report generated anytime
   - Total Protein: data entered into separate spreadsheet; calculated
   - % culls < 60 DIM: culls entered into DC 305; report generated
   - % DA’s: DA’s and fresh entered into DC 305; report generated

3. **Interpretation:**
   - Goals established
   - Actual results tabulated in spreadsheet next to goals weekly

4. **Action:**
   - Weekly management meeting to discuss results
DAIRY WORKS
Dairy Business Cycle

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- **Implementation techniques may differ**
- **Records to monitor people are as critical as monitoring animal performance**
What Every Employer Should Know about Labor and Employment Law

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Four Reasons You Should Care About Labor and Employment Law

1. Your Employer Cares
2. Your Government Cares
3. Your Employees Care
4. You Should Care
1. Know When the “Employee-Employer” Relationship Exists.

Wage, hour and benefits;
Payment of employment taxes;
Unemployment insurance;
Workers’ Compensation;
Eligibility to participate in employee benefit plan;
Employer liability for the wrongful acts of its employees;
Applicability of federal and state anti-discrimination laws.
Common Law.


2. "At-will" employment means that, with limited exceptions, employment for an indefinite term may be terminated at the will of either party with or without cause. This rule is tempered by exceptions including the following:
   a. An employer cannot discharge an employee for refusing to commit an illegal act at the employer's request.
   b. Federal, State and Local Anti-Discrimination statutes and ordinances.
   c. An employer must abide by its own agreements, policies and procedures that expressly limit its right to discharge employees.
   d. The Employee Retirement Income Security Act (ERISA) prohibits employers from discriminating against employees for purposes of interfering with an employee's ERISA rights e.g., discharging an employee to prevent the vesting of his/her pension benefits.
   e. Whistleblower Acts.

1. Reports of Nursing Home Abuse - Section 242.121 of the Texas Health and Safety Code. This section prohibits retaliation, including termination, of the employment of any person who reports suspected abuse or neglect of a resident of a convalescent, nursing home or related institution

2. Reports of Health Regulation Violations - Section 161.131 of the Texas Health and Safety Code. This section prohibits retaliation, including termination, against any employee for reporting a violation of the law, regarding any hospital, mental health facility or treatment facility.

g. Workers' Compensation.
h. Bankruptcy.
2. Know the Various Employment and Labor Law Statutes, Their “Magic” Numbers and Requirements

a. Age Discrimination in Employment Act ("ADEA").
   (1) Employers Covered: 20 or more employees.
   (2) Employees Protected: 40 years of age or older.
   (3) Prohibition: Discrimination as to terms or conditions of employment based, in whole or in part, upon the employee’s age.

   **Special Note:** Supreme Court has adopted a "substantially younger" test.

b. Americans With Disabilities Act ("ADA").
   (1) Employers Covered: 15 or more employees.
   (2) Employees Protected: Employees with a "disability", history of a disability or those perceived by employers as being disabled.
   (3) Prohibition: Discrimination as to terms or conditions of employment based, in whole or in part, upon an otherwise qualified employee's disability, history of disability or perceived disability.

   **Special Note:** Employers are required to make reasonable accommodations to an employee's known disability, if possible.
c. Congressional Omnibus Budget Reconciliation Act ("COBRA").
   (1) Employers Covered: 20 or more employees.
   (2) Employees Protected: Participating employees and qualified beneficiaries.
   (3) Requirement: Employees and qualified beneficiaries are permitted to elect continuation coverage of group health insurance for specified periods.
      Employees pay the premiums for this coverage.

      Special Note: Employers (or insurers) are required to provide notices to employees and qualified beneficiaries of their COBRA election rights. Failure to provide the required notice leaves the election period open beyond the normal 60 days.

d. Equal Pay Act ("EPA").
   (2) Employees Protected: All employees.
   (3) Prohibition: Discrimination in wage rates between men and women who perform substantially the same work.

      Special Note: The job duties held by men and women employees do not have to be exactly the same to require on equal wage rate. Employees may have disparate wage rates based upon a bona fide merit or seniority system or compensation based upon productivity e.g., commissions.
f. Fair Credit Reporting Act ("FCRA").
   (1) Employers Covered: All employees.
   (2) Employees Protected: All applicants and employees.
   (3) Requirements: Regulates the use of consumer reports for establishing a consumer's eligibility for hire, promotion, reassignment or retention.

Special Note: The Act has detailed notice and authorization requirements for allowing challenges to reports.

g. Fair Labor Standards Act ("FLSA").
   (1) Employers Covered: All employers.
   (2) Employees Protected: All employees.
   (3) Requirements: Sets minimum wage/maximum hour requirements.

Special Note: Current minimum wage is $5.15. Overtime is calculated on a per week basis. Non-exempt employees are entitled to time and a half for time worked over 40 hours.
h. Family Medical Leave Act ("FMLA").
   (1) Employers Covered: 50 or more employees in each working day of 20 calendar weeks of the current or the preceding calendar year.
   (2) Employees Protected: Employees who request leave for certain specified reasons and have worked a minimum of 1,250 hours within the previous 12 months of employment.
   (3) Requirements: 12 weeks of unpaid leave for (a) a serious health condition, or (b) birth or adoption of a child or the placement of a child in foster care. Employees using leave must be returned to the same or equivalent position. Taking FMLA cannot result in the loss of any employee benefit.

   Special Note: Employers can require employees to use paid leave as FMLA leave.

i. Immigration Reform and Control Act ("IRCA").
   (1) Employers Covered: All employers (anti-discrimination provision applies to employers who have 4 or more employees).
   (2) Employees Protected: All employees.
   (3) Requirements: Employers are required to verify employee's right to work in U.S. Act also prohibits discrimination on citizenship and/or national origin.

   Special Note: Documentation requirements must be followed exactly. Employers cannot require applicants to provide more proof of citizenship or lawful alien status than what is provided for in the Act.
j. National Labor Relations Act ("NLRA").
   (1) Employers Covered: Most employers except federal, state and local governments, railroads and airlines.
   (2) Employees Protected: All employees except agricultural laborers.
   (3) Requirements: Provides for and regulates the collective bargaining process between employers and employees. The Act entitles employees to act as a group and to be represented by a union.

Special Note: Most employment issues are subject to and resolved by the collective bargaining agreement or "contract". Certain practices are subject to mandatory bargaining which means that the employer cannot unilaterally implement the practice without union participation e.g. drug testing policies.

k. Texas Labor Code.
   Wage and Hours.
   - Employers Covered: All employers.
   - Employees Protected: All employees.
   - Prohibition: Regulates pay days, minimum wage/maximum hours and provides means of resolving wage disputes.

Special Note: Non-exempt employees must be paid twice a month. Exempt employees once a month. If an employee is discharged, she/he must receive his/her final check within six days. If the employee quits, payment must be made at the next regularly scheduled payday.

(2) Prohibition on Discrimination.
   (a) Employers Covered: 15 or more employees.
   (b) Employees Protected: Employees of covered employers.
   (c) Prohibition: Prohibits employment discrimination based on age, race, color, sex, religion, national origin, and disability.

Special Note: Courts can provide more protection under state law than what is available under federal law. Texas courts generally follow federal precedent, but this is not true of all jurisdictions e.g., Nevada, Oklahoma and California.
(3) Occupational Health & Safety ("OSHA").
   (a) Employers Covered: All employers with one or more employees.
   (b) Employees Protected: All employees of covered employers.
   (c) Requirement: Establishes safety and health standards in the work place.

I. Title VII of the Civil Rights Act of 1964 ("Title VII").
   (1) Employers Covered: 15 or more employees.
   (2) Employees Protected: All employees who work for covered employers including former employees.
   (3) Prohibition: Discrimination as to terms or conditions of employment based, in whole or part, of employee's race, color, sex, national origin, or religion.

m. Uniformed Services Employment & Reemployment Rights Act ("USERRA").
   (1) Employers Covered: 15 or more employees.
   (2) Employees Protected: Veterans or current service personnel.
   (3) Prohibition: Discrimination as to terms or conditions of employment based, in whole or part, upon veteran's status or military salary.

n. Worker Adjustment & Retraining Notification Act ("WARN").
   (1) Employers Covered: 100 or more employees.
   (2) Employees Protected: All employees of covered employers.
   (3) Requirements: Regulates mass layoffs and relocation of work sites.
   (1) Race based statute which provides equal rights to all persons regardless of race or ethnicity.
   (2) Prohibits race discrimination by employers because employment has been held to fall within the statute's "make and enforce contracts" provision.
   (3) Claims brought under section 1981 do not have to be submitted to the EEOC.
   (4) All employers are covered under section 1981 regardless of the number of employees they have. The caps on compensatory and punitive damages found in Section 422 U.S.C., 1981a do not apply.
   (5) This section only prohibits intentional discrimination; therefore, recovery for claims of disparate impact do not apply.
Three Types of Unlawful Employment Discrimination

1. Disparate Treatment  
   (intent to discriminate required)  
   A. Individual  
   B. Systemic  

2. Disparate Impact  
   (no intent to discriminate required)  
   A. Uniform Policy  
   B. Impacts (in an adverse way) members of a protected class  

3. Unlawful Harassment  
   A. Harassment on account of a person’s race, color, national origin, disability, religion, age, veteran status (some states include “sexual preference”)  
   B. Sexual Harassment
Common Pitfalls

1. Equal Pay Act
2. Pregnancy Discrimination Act
3. Title VII
   A. Religious discrimination
   B. National origin discrimination
   C. Unlawful harassment
Common Pitfalls

1. National Labor Relations Act
2. Immigration Reform and Control Act
3. Fair Credit Reporting Act
3. **Know the Wage and Hour Requirements of the FLSA and Texas Pay Day Act**

The payment of wages and hours is regulated by both federal and state law. The applicable federal statute is the Fair Labor Standards Act ("FLSA"). The applicable state statute is found in Texas Labor Code, Chapters 61, 62, 63 and 64.
A. Texas Labor Code

While most wage and hour issues are governed by federal law, Texas statutory law governing wages and hours should not be overlooked. State law generally governs how wages are to be paid. The term "wages," for purposes of the Texas Labor Code, is defined as compensation owed by an employer for labor or services rendered by an employee regardless of how the compensation is calculated and vacation pay, holiday pay, sick leave pay, parental leave pay, or severance pay owed to an employee under a written agreement with employer or under a written policy with employer.
Section 61.001 et seq. of the Texas Labor Code provides the following basic requirements:

a. Employers are required to pay wages either in United States currency, by a negotiable instrument, or by an electronic transfer of funds. Payment of wages in any other form must be agreed to by the employee in writing. Section 61.016.

b. Employers may not withhold or divert any portion of an employee's wages unless ordered to do so by a court of competent jurisdiction, is authorized to do so by state or federal law, or does so by written authorization from the employee and the deduction is for a lawful purpose. Section 61.018.

c. Employers are required to designate pay days in accordance with Section 61.011. Employees who are exempt from the overtime provisions of the FLSA must be paid at least once a month. Employees who are not exempt from the FLSA must be paid at least twice a month. If an employee is paid on a salary basis, incremental payments must be equally prorated as nearly as possible. Section 61.011.

d. If the employer fails to designate pay days in accordance with 61.011, the employee's pay days are the first and fifteenth for each month.
e. If an employee is paid wages based upon commission or bonuses, such payment is due according to the terms of the agreement between the employer and employee or the applicable collective bargaining agreement.

f. If an employee is discharged, the employer is required to pay an employee, in full, all wages due within six days from the date of discharge. If an employee’s employment is terminated for reasons other than discharge, the employer must pay the employee by the next scheduled work day. Section 61.014.

g. An employee's assignment of his/her wages or salary is not effective against the employer and any suit for wages or salaries that are unearned at the time of the assignment is executed unless the employer is given written notice of the assignment immediately after execution of the assignment. Section 63.001.

h. Employers are required by Texas statutory law to pay an employee a rate of not less than $3.35 an hour unless the employee is exempted by Section 62.005. Section 62.005 provides that an individual may be employed at a wage less than the applicable minimum wage, but not less than 60% of the minimum wage if the person’s earning or productive capacity is impaired by age, physical or mental deficiency, or injury; or the person is over the age of 65. (I don't recommend doing this.)
B. FLSA

In 1996, Congress made significant changes to the FLSA. These changes have been summarized below for your review.

1. **Increase in the Minimum Wage.** Beginning on October 1, 1996, the minimum wage was raised to $4.75 an hour. The minimum wage increased to $5.15 an hour beginning on September 1, 1997.

2. **Computer Employee Exemption.** The FLSA was amended to provide an exemption for computer professionals which takes them out from under the Act's minimum wage and minimum hour/overtime provisions of the Act. See 29 U.S.C., 206 and 207. Section 29 U.S.C., 213(a)(17) of the Act provides:
(17) An employee who is a computer-systems analyst, computer programmer, software engineer, or other similarly skilled worker whose primary duty is -

(A) The application of systems-analyst techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;

(B) The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and relating to user or system design specification;

(C) The design, documentation, testing, creation or modification of computer programs relating to machine operating systems; or

(D) The combination of duties described in subparagraphs A, B, and C, the performance of which requires the same level of skills.
29 U.S.C. 213(a)(17). Accordingly, this exemption, by its broad scope, will exempt a substantial portion of workers in the computer technology industry. However, there is a cost. Employees who are classified as exempt under this provision must be paid in excess of $27.63 an hour.

c. **Opportunity Wage.** One of the recent amendments to the FLSA creates a provision to allow the payment of an "opportunity wage." This "wage" may be paid to qualified employees who are under twenty years of age. It was passed as a result of pressure put on Congress by the fast food industry and other industries who regularly employ teenagers to counter-balance the rise in the minimum wage. Section 29 U.S.C. 206 provides the following:
(g)(1) In lieu of the rate prescribed by Section (A)(1), any employer any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) No employer may take any action to displace employees, (including partial displacement, such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1).

(3) Any employer who violates this subsection shall be considered to have violated Section 15(a)(3).

(4) This Section shall apply only to an employee who has not obtained the age of 20 years.
However, employers are prohibited from any adverse action against existing employees in order to take advantage of the opportunity wage.
C. Coverage Under The FLSA

1. Employees qualify for FLSA coverage if their employment meets by either the "enterprise" test or the "employee" test.

2. The "enterprise" test is based upon the employer's activities. To qualify, an employer must have two or more employees engaged in interstate commerce and have a gross annual volume of business of at least $250,000. When these conditions are met, all employees are covered by the FLSA. 29 U.S.C. 203(r),(s).

3. The "employee" test examines the worker's impact on interstate commerce. If an individual engages in interstate commerce or helps to produce goods for interstate commerce, that employee is covered by the FLSA. 29 U.S.C. 206(a). Employees who are covered by the Act for part of a work week are entitled to minimum wage and overtime benefits for the entire week. 29 U.S.C. 206-7.
D. Application of the FLSA

The protections granted to workers by the FLSA are generally interpreted broadly and construed to the benefit of employees. *Tennessee Coal & Iron Co. v. Muscoda Local #123*, 321 U.S. 590, 597-98 (1944). The burden of proof is on the employee in a back-wage suit and on the Department of Labor in a suit to restrain violations of the Act. *Beliz v. W. H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330 (5th Cir. 1985). However, the employer has the burden of proving it is entitled to any claimed FLSA exemption. *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 209 (1966). In addition, if an employee produces any evidence of overtime hours worked, that evidence may be considered as evidence of FLSA violations unless the employer refute that proof by using payroll and hour records.
E. Minimum Wage Requirement

As noted, the FLSA requires that all non-exempt employees be paid the applicable minimum wage. This rate has been raised to $5.15 an hour effective September 1, 1997. 29 U.S.C. 206(6)(a)(1).

Employers may pay non-exempt employees a fixed salary rather than by the hour. Interpretive Bulletin, 778.113 et seq., However, if the employer chooses to do this, the salaries paid must equal or exceed the total number of hours worked multiplied by the applicable minimum wage plus overtime.
F. Overtime Pay

All non-exempt employees whose hours in excess of 40 during any work week are entitled to receive one and a half times the regular wage for each hour of overtime accumulated. 29 U.S.C., 207(a).

Non-Productive Hours. A common violation occurs when employers fail to compensate their employees for time spent on "non-productive hours." This situation usually occurs when an employer requires its employees to report early for shifts or otherwise remain available even though the employee is not working. According to the Department of Labor, the FLSA requires that an employee be compensated for "all hours worked." The Department has interpreted "hours worked" to include:
• All time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed work place; and

• All time during when an employee is suffered or permitted to work whether or not he is required to do so. 29 C.F.R., 778.223.
Consequently, the Department has determined that working time is not limited to the hours spent in active productive labor, but inclusive time given by the employee to the employer even though part of the time may be spent in idleness. 29 C.F.R. 778.223. This includes activities such as waiting for work, remaining on call, traveling on an employer's business, or to and from the work place, and meal and rest periods. Such time is calculated as work time for determining both overtime and minimum wage requirements. To avoid compensation for idle time, employers must show that the employee can effectively use the time for personal purposes.
Unauthorized Overtime. Another common problem occurs when employees work "unauthorized" overtime. Employers must take affirmative steps to prevent the accumulation of such overtime, otherwise they will be responsible for paying it. For example, in Tew v. Food Lion, Inc., 756 F.Supp. 238 (E.D.N.C. 1991), an employer had a policy for all of its stores that employees were not to work "off-the-clock." Apparently, the employees were aware of the rule and were told that violations of it would be subject to disciplinary action. Even so, because the Court found that the employer knew that its employees were, in fact, working "off-the-clock," it awarded the employees overtime pay and liquidated damages.
Compensatory Time. Overtime calculations must be made on the basis of each work week as a separate unit of time. With very few exceptions, overtime may not be averaged from one week to another, nor may a long week be offset against a short one. Interpretive Bulletin., 778.103 et seq.
(1) If an employee is employed for a fixed workweek, the employee may be given compensatory ("comp") time during the pay period to offset the amount of overtime work. 6A Wage & Hour Man. (BNA) 94:1002.

(2) Comp time must be computed on the basis of time and a half for each overtime hour worked. Four hours of overtime equals six hours of comp time. 6A Wage & Hour Man. (BNA) 94:1002.

(3) If an employee does not take all comp time he or she is entitled to, the paycheck must include overtime pay for all such hours. The extra overtime cannot be carried over into the next pay period. 6A Wage & Hour Man. (BNA) 94:1002.
INTRODUCTION TO WHITE COLLAR EXEMPTIONS

The Basics:

1. Fair Labor Standards Act
2. Exemption vs Non-Exempt
3. United States Department of Labor
Non-Exempt Employees

Minimum Wage
Regular Rate
40 Hour – Straight Time
Excess of 40 Hours in a Work Week – Time and Half

Work Week = Seven Consecutive Work Days
Exempt Employees

Exempt employees are not paid overtime on the 40 Hour Workweek basis

Exempt employees must:
1. Be paid on a salary basis
2. Must meet the definition of a overtime exemption

Employees are presumed to be non-exempt and Employers have the burden to establish an exemption
Revised White Collar Exemption Rules

- Fair Pay Act
- Effective August 24, 2004
- Increased the minimum wage for exempt employees
- Revised the “duties”
Administrative Employees

(1) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer of the employer’s customers; and

(2) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
Learned Professionals

(a) To qualify for the learned professional exemption, an employee’s primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:
(1) The employee must perform work requiring advanced knowledge;
(2) The advanced knowledge must be in a field of science or learning; and
(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
Executive Employees

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.
Minimum Salary Levels Increased

Minimum Salary Level Increased: Under current rules, an employee earning only $155 a week can qualify as a “White Collar” employee not entitled to overtime pay. The Department’s proposal would raise this minimum salary to $425 a week—an increase of $270 a week and the largest increase since the Fair Labor Standards Act was passed by Congress in 1938.
Salary Basis Test

An exempt white-collar employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. 29 C.F.R. § 541.118(a).
Partial Week Deductions

a. During initial and terminal weeks of employment
b. Deductions for personal absences of a day or more (other than sickness)
c. Deductions for personal absences for sickness or disability
d. Family Medical Leave Act
e. Violations of Safety Rules of Major Significance
Disciplinary Deduction

The DOL will allow deductions from the salary of exempt employees for full-day absences taken for disciplinary reasons, such as sexual harassment or workplace violence. Currently, only hourly workers’ wages are subject to such deductions. The proposal retains the “salary basis” rule prohibiting deductions from exempt salary for partial-day absences.
Highly Compensated Employees

a. Employees that earn at least $100,000 annually
b. Performing any one or more of the exempt duties articulated in the Regulations
c. If these two factors are met, no detailed analysis of the employee’s job duties will be necessary.
Safe Harbor

a. Employer has a policy prohibiting improper deductions

b. Employer has not repeatedly and willfully violated the policy or continued to make improper deductions after receiving employee complaints.
Section 29 C.F.R., 516.2(a) interpreting of the FLSA requires employers to compile and keep certain records on their employees. These records must contain the following information:

- a. name and identifying number or symbol;
- b. home address;
- c. date of birth if under the age of 19;
- d. occupation;
- e. time of day and day of week on which employee's workweek begins;
- f. regular hourly rate of pay for weeks when overtime is worked, basis on which wages are paid, and amount and nature of each payment not included in the regular rate;
- g. hours worked each work day and total hours worked each workweek;
- h. total daily or weekly straight-time earnings or wages;
- i. total weekly overtime excess compensation;
- j. total additions to or deletions from wages paid each pay period;
- k. total wages paid each pay period; and
- l. date of payment and the pay period covered by payment.
Each employee for whom an exemption is claimed must be provided sufficient information in which to calculate their hours worked and wages. 29 C.F.R. 516.3.

Generally, records must be preserved for two or three years depending upon the nature of the type of information contained in them. 29 C.F.R. 516.6. Failure to keep accurate records places the burden upon the employer to disprove the number of hours claimed by an employee seeking recovery for unpaid wages. Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946).
9.  Enforcement and Penalties Under the FLSA

The wage and hour requirements of the FLSA are enforced by the Wage and Hour Division of the Department of Labor.

The Division may inspect all employee records employers are required to keep pursuant to the FLSA and applicable regulations.
a. The Secretary of Labor may initiate a lawsuit against employers accused of violating any provision of the Act.
b. Employees may bring suit in a court of competent jurisdiction.
c. Employees may recover unpaid wages, unpaid overtime wages, liquidated damages and mandatory attorneys' fees.
d. Civil penalties of up to $1,000 may be assessed for each violation depending on the size of the business and the severity of the violation.
e. An employer may also face criminal proceedings for serious and willful violations of the FLSA. Criminal penalties include up to a $10,000 fine or six months imprisonment.
4. Know the Basics Concerning Employee Testing

1. Applicant Testing.
   a. These tests cannot have the purpose discriminating against protected classes of employees or applicants. These tests cannot have the effect of disparately impacting protected classes of employees or applicants.
Drug Testing.

a. The policy must be reasonable.
   1. The policy should be in writing;
   2. The policy should specify under what circumstances testing will be required;
   3. Employees should sign statement acknowledging receipt of the policy and agreeing to abide by its terms;
   4. The policy should specify specifically what constitutes a violation of its terms and state potential penalties for violations.

b. Adherence to the policy should be made a condition of continued employment.
Polygraph Testing.

a. Employee Polygraph Protection Act ("EPPA").

b. The EPPA effectively removes polygraph testing as a means of conducting investigations of employees and applicants.
5. Know the Common State Law Claims that can be Asserted Against Employees.

The following claims are commonly brought against individual managers and co-employees in sexual harassment cases:

**Assault & Battery**

(1) In Texas, "battery" occurs when an individual intentionally or knowingly causes physical contact to the person of another and the individual either knew or should have known that the other person would regard the contact as offensive or provocative. "Assault" occurs when you place a person in apprehension of such conduct.

(2) Note the element of intent which is required.
b. Invasion of Privacy

Arises from the constitutional right to privacy defined as the right to be left alone, to live a life of seclusion, to be free from unwarranted publicity. Billings v. Atkinson, 498 S.W.2d 858 (Tex. 1973).

This definition has been refined into four separate torts which could arise in the employment law context.
(1) Unreasonable intrusion upon the seclusion or private affairs of another;
   (i) Inspection of an area or item without consent and which an employee has a reasonable expectation of privacy, i.e., purses, wallets, bags, briefcases etc.  
   (ii) Inquiries into the personal and private life of another which would be highly offensive to a reasonable person.

(2) Unreasonable publicity given to an aspect of one's private life in which the public has no legitimate concern;
   (i) Information given in confidence.
   (ii) Information obtained during an investigation.

(3) Publicity that unreasonably places another in false light before the public; and the false light would be highly offensive to a reasonable person.
c. Unwarranted appropriation of one's name and likeness.

Rarely found in the employment law context.
d. Defamation

(1) Elements:
   (a) A defamatory statement made by the defendant about the plaintiff;
   (b) Communicated orally (slander) or in writing (libel) to a third party;
   (c) Without legal excuse, i.e., privilege;
   (d) Resulting in harm to the plaintiff or actionable *per se*.

Qualified Privilege exists for statements made by the employer to other persons in the employment context, where such persons have a "corresponding interest or duty to which the communication relates." Can be lost if the statement is made with malice - knowledge that the statement was false or making the statement with reckless disregard for its truthfulness.
e. Intentional Infliction of Emotional Distress

(1) Elements:
(a) The defendant acted intentionally;
(b) The conduct was extreme and outrageous;
(c) The actions of the defendant caused the plaintiff to suffer emotional distress;
(d) The emotional distress suffered by the plaintiff was severe.
(e) To be actionable, the "extreme and outrageous conduct" must be so outrageous in character and so extreme in degree that it goes beyond all possible bounds of decency, and can only be regarded as atrocious and utterly intolerable in a civilized community.
f. Interference with Contractual Relations

(1) Elements:
   (a) There was a contract subject to interference;
   (b) The act of interference was willful and intentional and without justification;
   (c) Such interference was a proximate cause of plaintiff's damages;
   (d) Actual damages occurred.

This cause of action can exist even in the context of employment "at-will."
Negligent Supervision. It is possible for an employer and/or its managers to be held liable for damages sustained by an employee as a result of conduct which constitutes sexual harassment caused by the employer's and/or manager's negligence. The employer and/or manager must act "reasonably" in hiring and supervising employees. The cause of action for negligent hiring, retention and supervision requires proof that:

1. The employee was unfit for hiring;
2. The employer knew or should have known the employee was unfit;
3. The employer could foresee that the employee in his/her employment would come into contact with the plaintiff, creating a risk of danger to the plaintiff;
4. The employer's negligence was a proximate cause of injury to the plaintiff;
5. The plaintiff was injured.
The controlling case in Texas is Shutters v. Dominos Pizza, Inc., 795 S.W. 2d 800 (Tex. App. - Tyler 1990) in which the court recognized a cause of action for negligent hiring, training, and supervision. In that case, the plaintiff was sexually assaulted by a co-worker and brought a negligence action against the employer. The reasoning used to establish this cause of action may be extended if an employee who has a known proclivity to engage in conduct which constitutes sexual harassment is either hired or retained despite this knowledge.
g. Retaliation

Both Title VII and Section 21.051 of the Texas code make it unlawful for an employer to retaliate against an employee who brings a complaint of sexual harassment or one who cooperates in the investigation or in proceedings relating to a complaint.
42 U.S.C. 2000e-3(a) provides that:

It shall be an unlawful employment practice for an employer to discriminate against any of its employees or applicants . . . because [the individual] has opposed any practice made unlawful [under Title VII] or because he made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing . . .
Section 2.058 of the Texas Labor Code provides:

An employer . . . commits an unlawful employment practice if the employer . . . retaliates or discriminates against a person who, under this chapter:

1. opposes a discriminatory practice;
2. makes or files a charge;
3. files a complaint; or
4. testifies, assists, or participates in any manner in an investigation, proceeding, or hearing.
Acts of retaliation may include termination, transfer to a less-desirable position, demotion, or any other act or omission on behalf of the employer which causes the employee detriment and was motivated by the employee's bringing a complaint or participating in an investigation.
Retaliation may also be found with respect to conduct aimed at a former employee. Such conduct includes false reference, malicious prosecution (civil or criminal), threats and abuse.
The End

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Managing Cultural Differences

Thomas Fuhrmann
DairyWorks
March 3, 2009
Managing Cultural Differences
DAIRYWORKS

MANAGEMENT:

SYSTEMS .... that are in control

PEOPLE ...... that implement systems correctly

MONITOR .... assure results
Expect a lot from your employees!
Managing Workers (Hispanics)

- **Similarities:**
  - Workers need leadership
  - Explain what you want (teach)
  - Monitor
  - Motivate; discipline
  - Focus

- **Differences:**
  - Language barrier (how to explain, motivate, discipline)
  - “Standards”
  - Trust & Values
  - Want to know “how they are doing”
  - Value of money
Responsibilities of a Boss

5 principles:

1. **Know and understand work**
2. **Train workers**
3. **Monitor results:**
   - records
   - observation
4. **Focus workers:**
   - positive reinforcement
   - motivation
   - retrain (when negative results occur)
5. **Communicate:**
   - upward to your boss
   - downward to your workers
Mexican Society

Speaking Spanish:

- You must “cross this bridge” (training and disciplining)
- Try to speak, but you “don’t have to” (relate to your workers)
- Bilingual Hispanic on your staff (translates and manages crew)
- Understand “head nod”
In Mexico, one is born “high” or “low.” A two class society, the very rich and the very poor and it’s believed that the poor are poor and the rich are rich because God ordained it that way.

(Managing Cultural Differences)
Mexican Society

**Rich vs. Poor:**

- $\text{count}\ldots$
- Socialism vs. Capitalism
- Expectations // Standards
Lead: To guide on a way, to direct the operations of an activity or performance, to go at the head of: be first, to tend toward a definite result. “Gringo Patron”

Follow: To come after in order of rank or natural sequence. “Mexican worker”
Mexican Society

Socialistic Society:

• Don’t EXPECT a Mexican worker to want to take on more responsibility for more pay!!!!

• Outline responsibilities of a higher position and explain the “consequences”!!!!

• Herdsman//Head Milker…..

• Friendship, live together and are usually related…….
Mexican Society

Socialistic Society:
- Don’t EXPECT a Mexican worker to be efficient!!!! (e.g. digging hole)
- Don’t EXPECT him/her figure out the solution (intelligence vs. education)
- Set YOUR standards (e.g. their living conditions)
- Explain exactly what you want (e.g. training/followers)
Mexican Society

• CORRUPTION:
  • Don’t trust government!!!!
  • Don’t trust employer!!
  • Don’t trust neighbor!!
  • Family is OK!!!!
  • Watch out for the “Mexican Mafia”!!!
Remember that the family (familia) is very important!

Anything that reinforces social acceptance and belonging will be an effective motivator!

• Family dinner, picnic or barbeque
• Volleyball or soccer game
• Little league or soccer games for the kids
• Boxing matches on cable 😊
Mexican Fears:

• Fear of:
  • Loosing job!
  • Our police!!
  • Bosses, “Patrones” and not doing things RIGHT to please YOU!!!!
  • Friends are OK!!!!
Be Visable
Communicate
Monitor Results
Feed Back
Mexican Societal Respect

- Respect for:
  - Parents
  - Elders
  - Trusting boss
  - “Muy abigable”
  - Parent/Child respect for authority!!!
Eye contact is a sign of honesty and integrity.

Lack of eye contact is a sign of respect.
Mexican people will **shake hands, hug and touch** as a sign of **friendship**. Touching another’s arm or shoulder during conversation is common.
Interact In Their Environment
Fear Causes:

1. Low Morale
2. Uncertainty
3. Low Trust
4. Resistance to Change
5. No Choice / Powerless
6. Self Rather Than Work Focus
The challenge of management is organizing work in such a way that you break down large jobs into small tasks. This will lead to improved performance and most importantly, NO FEAR!
I hear …. I forget

I see …. I remember

I DO …I Understand!
Develop Trust
No Idea Is A Bad Idea

I value & respect you!

You are important!
Rewards & Recognition

Thank You!
“There is no job so simple that it cannot be done wrong”
Hey Man, I’m proud to be a Mexican
Managing Cultural Differences
Becoming a Better Boss

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Introduction

- No supervisor or employer likes being known as a “poor boss.”
- Yet many bosses suffer from:
  - Bad reputations
  - A well-known history of treating people badly
  - Lack of support from people above and below them
- Why?
  - *The choices they have made and continue to make!*
Take home messages

1. You will be about as good a boss as you choose to be!
2. Your human resource management choices are more important than your natural abilities.
3. You can learn from the successes and mistakes of other bosses.
Important questions

Think of the person you would least like to have as your boss.

- What two traits best describe this person?
- How many of these traits is it possible to change?
Encouragement

- You can become a better boss through better choices no matter how badly you are now doing.

- You can become a better boss no matter how good you already are.
A fact

- Complaints never heard:
  - “I have improved too much.”
  - “I have become too good a boss.”
Overview

- This session is designed to give you ideas to help make choices

- New ideas are critical for people who have never experienced good bosses
Ten areas of choice

1. Welcome change
2. Emphasize communication
3. Have clear procedures, policies and rules
4. Show enthusiasm
5. Be fair
6. Show empathy
7. Display trust
8. Continue learning
9. Be flexible
10. Envision success
1. Welcome change

- Accept that change is difficult for most people
- Lead by showing your willingness to change
- Give timely information about the what, why and when of change
- Understand why employees are resisting change & then address their concerns
- Allow time for changes to be accepted
2. Emphasize communication

- Make communication the key to building relationships with employees
- Send important messages over and over
- Vary how you send messages
- Improve your communication skills especially the ability to send clear messages & to listen
- Encourage questions; don’t wait for employees to ask
3. Have clearly understood procedures, policies & rules

- Teach procedures for doing critical tasks
- Make procedures understandable, practical and as simple as possible
- Have clear policies & rules to guide employee behavior
- Explain the whys behind procedures, policies & rules
- Consider written job descriptions, an employee handbook & regular staff meetings
- Welcome employee input on how procedures, policies & rules can be improved
4. Show enthusiasm

- Display lively interest in your job, employees and the business
- Make your enthusiasm contagious
- Make believe you are enthusiastic until your bad moods pass
- Take advantage of your charisma (if you are lucky enough to have it)
5. Be fair

- **General guideline**
  - Avoid bias, dishonesty and injustice

- **Discipline**
  - Have consistent enforcement of your rules
  - Base discipline decisions on facts while avoiding gossip and rumor

- **Rewards**
  - Reward on the basis of merit not need & favoritism
  - Reward in a variety of ways: wages, benefits, unexpected one-time perks, promotion, information, delegation
5. Be fair (Continued)

- **Buddies and friends**
  - Be friendly with all employees
  - Be a buddy with no employee

- **Family**
  - Separate family and business
  - Treat family employees in the workplace as if they were non-family employees
  - “Be family” away from the workplace

- **Reasonableness**
  - What employees consider reasonable usually has little to do with their careful reasoning
  - Reasonableness usually depends on their general agreement and emotion
6. Show empathy for the people you supervise

*Empathy – Understanding another person’s situation, feelings and attitudes*

- **Non job pressures**, e.g., family illness, marital problems, family financial pressures
- **Safety**, e.g., not wanting to use safety equipment although required
- **Disappointment**, e.g., disappointment with not getting a promotion or an expected raise in pay
7. Display trust

- Believe in your employee’s word, integrity, strengths and assurances
- Treat your own word as an enforceable contract
- Expect employees to treat their word as an enforceable contract
- Deliver more than you promised
8. Continue learning

- Be humble about how much you know and hesitant to criticize others who know less than you
- Recognize that to be competent, you must never stop learning
- Take full advantage of employees and others who can help you learn
- Be a patient teacher in helping others
9. Be flexible

- Adjust your leadership style for each person supervised to fit his or her experience, capabilities, psychological needs and self-confidence
- Delegate as much authority and responsibility as circumstances will allow
- Provide feedback on performance in whatever manner best fits each employee
10. Envision success

- Have a vision of what is necessary for the company’s success & yours
- Seek stability in strategic goals, direction & organizational structure
- Insist on high standards for all important tasks
- Treat mediocrity like the poison it is
Notice what was **not** said

- “Employees will respect me as a boss if I work harder than them.”
- “Fear is a good motivator.”
- “Paying well makes me a good boss.”
- “Respecting me is more important than liking me.”
- “Employees will know they are appreciated if I am not criticizing them.”
What are the next steps to becoming a better boss?

1. Give yourself a grade on each of the ten items
2. Ask one of your employees to administer an anonymous request for all people you supervise to give you a grade on each of the ten items
3. Ask a trusted co-manager to give you a grade on each item
4. Compare the three sets of grades
5. Choose 2 of the 10 items for improvement
6. Develop a 12-month plan for improving as a boss
7. Implement the plan
8. Monitor progress & modify the improvement plan as needed
Conclusion

- The danger is that many of you will be just about as good a boss one year from now as you are today.
- What will increase your chances of success:
  - Specific, measurable and timed goals for your planned changes.
  - A coach, mentor, change-partner or respected grump to help you along.
Compliance Issues with a Non-Citizen Workforce

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The INA and IRCA

• The Immigration and Naturalization Act (INA) requires employers to hire and/or retain those persons authorized to work in the United States.
• However, the Immigration Reform and Control Act of 1986 (IRCA) makes it unlawful for employers knowingly to hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.
Authorized Non-Citizens

Authorized Non-Citizens

- Employers are required to treat all job applicants equally, whether they are U.S. citizens or non-citizens.
- This means that employers may not discriminate in hiring, firing, recruiting, or referring for a fee, nor are employers permitted to retaliate against an employee who has filed a discrimination charge or participated in an investigation.
Current H-2A Process

• Currently, the H-2A process is cumbersome and expensive. A detailed source of information, including forms and instructions, may be obtained on-line at www.dol.gov. A detailed examination is beyond the scope of this presentation; however, a brief description is provided below.

• Generally, employers must satisfy two criteria to hire nonimmigrant workers when filing an application with the USCIS:
  • 1. The employer must show that able, willing, and qualified US workers are not available at the time and place needed
  • 2. The employer must show that an adverse effect on wages or working conditions of similarly employed US workers will not result from the employment of foreign workers
H-2A Process

1. Who may file an application for an H-2A visa?
   - An agricultural company or employer who expect a shortage of U.S. workers needed to perform temporary or seasonal agricultural labor or services
   - An authorized agent filing on behalf of an agricultural employer
   - The employer may be an individual proprietorship, a partnership or a corporation. A collective of agricultural producers may file as either a sole employer, a joint employer with its members, or act as an agent on behalf of its members.
H-2A Process

2. What steps must employers follow to obtain workers via the H-2A process?

- First, two copies of the ETA-750 are filed, of which one should be sent to the appropriate Department of Labor ("DOL") region, and the other to the respective state workforce agency ("SWA") for the state in which the work is sought. This application has to be submitted at least 45 days before the H-2A temporary workers are needed and it also has to be approved by the DOL before the starting work date. The application fees, which must be paid by the employer, include $100 base fee plus $10 for each position certified, up to a maximum of $1000.

- Second, recruitment efforts follow, which are directed by the SWA for H-2A positions in one of three ways: the SWA refers candidates to the employer (with the employer using the state’s electronic data bank), the employer conducts independent recruitment, or the recruitment is conducted after the SWA certifies the applications. Generally, referrals come from the state agencies. Employers are required to hire US workers who apply for work until half of the contract period is over.

- Third, following the recruitment period, a decision is made regarding certification. The SWA subtracts the number of US workers successfully referred from the total number of workers requested by employers to calculate and certify the remaining job openings.

- Once certification is granted, the application is then filed with the DOL national processing center, which it may be filed for multiple unnamed workers. As they become available, however, the DOL must be provided with names. Finally, following DOL approval, the workers can then apply for visas at the appropriate consulate office.
H-2A Process

3. **What might be some reasons for which the DOL might not issue certification?**

   - One pitfall preventing certification is if the DOL determines that US workers have filled all the job openings, or for example, if the DOL determines that H-2A candidates have been offered better working conditions than their US counterparts. Another reason preventing certification could be if a strike or a lockout results, or if the employer is in significant violation of the H-2A program with the previous two years. Yet another block could be if the employer fails to show that H-2A workers will be covered by workers compensation, or if the employer fails to comply with the recruitment efforts.
**H-2A Process**

- **4. How long are the H-2A visas valid?**
  - Generally, the H-2A visas are valid for a one year maximum. Extensions of up to one year, however, are possible but with a maximum of three years. After the alien has spent three years in the US under the H-2A status, then the alien must leave for six months before continuing H-2A employment. Subsequent to this time, however, the alien can reenter the US in any status not based on the performance of agricultural work.
H-2A Process

5. How do employers calculate workers’ earnings?
   - Usually farm workers receive either an hourly wage or are paid by the piece. Under the H-2A program, however, workers have to be offered a wage equal to that of US workers. In the past, this has been interpreted to mean the higher payout of the following: a) the prevailing industrial wage in the relevant labor market, b) the state or federal minimum wage and c) the “adverse effect wage rate” (“AEWR”).
   - For workers earning money by the piece, an employer must pay any difference between worker earnings and the AEWR. Additionally, on or before each day the H-2A worker is paid, the employer must provide the worker with an earnings statement listing total earnings, hours of work offered versus actually worked, and whether the worker is paid hourly or by the piece.
   - What benefits are employers required to provide the workers?
   - Transportation to and from the workers’ temporary home to the workplace
H-2A Process

- When the contract period is up, transportation home or to their next workplace
- Housing to all workers who do not commute, which must be inspected by the Department of Labor as well as meet minimum federal standards for temporary labor camps
- Either three meals a day or facilities in which the workers can prepare food
  
- Any tools and supplies necessary to perform the work

• Workers compensation insurance where required by state law; if state law does not require it, the employer must provide equivalent insurance
Types of Immigration-Related Discrimination

• Citizenship status discrimination refers to unequal treatment because of citizenship or immigration status.

• National Origin discrimination refers to unequal treatment because of nationality, which includes place of birth, appearance, accent, and can include language.
Compliance with the INA’s Anti-Discrimination Provisions

• Let the employee choose which documents to present in the I-9 process as long as the identity and work authorization forms are included in the acceptable list.

• Accept documents that appear to be genuine.
Avoiding Employment Discrimination Based on Nationality or Citizenship Status

• Treat all people the same in announcing the job opening, taking applications, interviewing, offering the job, verifying eligibility to work, hiring, and firing.

• Avoid blanket policies requiring citizen only hiring or requiring that applicants have particular immigration status.

• Give out the same job information over the telephone and use the same application form for all applicants.

• Base decisions about firing on job performance and/or behavior and not appearance, accent, name, or citizenship status of your employees.
Unauthorized Non-Citizens


- Remedies in these cases are not necessarily the same as cases with authorized non-citizens or U.S. citizens.

- For instance, awards of backpay to undocumented workers have been disallowed because such an award would represent wages that undocumented workers could not legally have earned. See Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).
"WHITE" I-551 "RESIDENT ALIEN" CARD

FRONT WHITE BACKGROUND (BLUE HEADER BAR) SALMON LINES COVER THE PHOTO IN AN UNBROKEN PATTERN. PRINTING "DETAIL" IN EAGLE IS EXCELLENT.

BACK PALE GREENISH BACKGROUND, MAP OF U.S. IN WHITE. THREE LINES OF MACHINE READABLE CODES.

BEARER MAY LIVE AND WORK IN THE U.S.
"BLUE" I-151 (7-1-72 REVISION)
ALIEN REGISTRATION RECEIPT CARD

FRONT: WHITE DOTS ON BLuish BACKGROUND. GREEN Wavy LINE OVER PHOTO AND "I&NS" PERFORATED THROUGH PHOTO.

BACK: LIGHT BLUE BACKGROUND, DARK BLUE PRINTING AND RED SERIAL NUMBER. QUALITY OF PRINTING IS ALWAYS EXCELLENT.

BEARER MAY LIVE AND WORK IN THE U.S.
"RED" I-688A "EMPLOYMENT AUTHORIZATION"

FRONT WHITE BACKGROUND, RED HEADER BAR, GOLD I.N.S. SEAL BECOMES VISIBLE WHEN TILTED UNDER NORMAL LIGHT.

BACK RED OUTLINE OF THE U.S. THE WORD "VOID" IS CAPITALIZED AND UNDERLINED.

The person identified on the reverse is an applicant for Temporary Resident status under a provision of the Immigration and Nationality Act, as amended by P.L. 98-603. This document, protected during its validity period by the person to whom it was issued, is a document of identity and employment eligibility required to be examined by an employer under Section 213A of the Act. This document is evidence of alien registration and must be carried at all times and is VOID if altered.

BEARER MAY TEMPORARILY LIVE AND WORK IN THE U.S. UNTIL THE EXPIRATION DATE CITED ON THE CARD.
"GREEN" I-688 "TEMPORARY RESIDENT"

FRONT WHITE BACKGROUND, GREEN HEADER BAR. GOLD L.N.S. SEAL BECOMES VISIBLE WHEN TILTED UNDER NORMAL LIGHT.

BACK GREEN OUTLINE OF THE U.S. THE WORD "VOID" IS CAPITALIZED AND UNDERLINED.

BEARER MAY TEMPORARILY LIVE AND WORK IN THE U.S. UNTIL THE EXPIRATION DATE CITED ON THE CARD.
"RED" I-688B "EMPLOYMENT AUTHORIZATION"

**FRONT** WHITE BACKGROUND, RED HEADER BAR AND YELLOW INTERLOCKING WAVY LINES. GOLD I.N.S. SEAL BECOMES VISIBLE WHEN TILTED UNDER NORMAL LIGHT.

**BACK** RED OUTLINE OF THE U.S., ALASKA AND HAWAII. THE WORD "VOID" IS CAPITALIZED AND UNDERLINED.

**BEARER MAY WORK IN THE U.S. UNDER THE TERMS AND CONDITIONS CITED ON THE CARD.**
"BEIGE" I-586 "BORDER CROSSER"

FRONT: BEIGE WAVY LINE BACKGROUND, GREENISH STRIP & I.N.S. SEAL. BEIGE WAVY LINES COVER PHOTO IN AN UNBROKEN PATTERN.

BACK: COLOR GRADUALLY CHANGES FROM ORANGE TO GREEN, MAP OF THE U.S. IN WHITE. THREE LINES OF MACHINE READABLE PRINTING AT BOTTOM ON WHITE BACKGROUND.

BEARER MAY NOT LIVE OR WORK IN THE U.S.
"BLUE" I-586 "BORDER CROSSER"

FRONT  BLUE WAVY LINE BACKGROUND, YELLOW (BUTTERSCOTCH) STRIP & I.N.S. SEAL. BLUE LINES COVER PHOTO IN AN UNBROKEN PATTERN.

BACK  ORANGE BACKGROUND, PINK OUTLINE OF THE UNITED STATES.

BEARER MAY NOT LIVE AND WORK IN THE U.S.
"BEIGE" I-186 "BORDER CROSSER"

FRONT  BEIGE BACKGROUND, RED SERIAL NUMBER AND GREEN WAVY LINES OVER THE PHOTOGRAPH

BACK  BEIGE BACKGROUND, BLACK TEXT AND RED BORDER. PRINTING DETAIL IN BORDER IS EXCELLENT QUALITY.

BEARER MAY NOT LIVE AND WORK IN THE U.S.
I-9 Compliance:

- What to do
- When to do it
- What not to do
# Lists of Acceptable Documents

## List A
Documents that Establish Identity and Employment Eligibility

1. U.S. Passport Card or passport
2. Certificate of Naturalization (Form N-400) or N-555
3. Certificate of Citizenship (Form N-401) or N-555
4. Unexpired foreign passport, with recent photograph affixed
5. U.S. or alien passport and Employment Authorization

## List B
Documents that Establish Identity

1. Driver's license or ID card issued by state or local government
2. A passport or other travel document that contains a photograph or information such as name, date of birth, gender, height, eye color, and address
3. Alien Registration Card (I-551)
4. U.S. Customs and Border Protection, Transportation Security Administration (TSA) card

## List C
Documents that Establish Employment Eligibility

1. U.S. or alien Social Security card issued by the Social Security Administration
2. Federal or state income tax return
3. Birth certificate

Instructions: at least two documents from List A, one from List B, and one from List C are required. Proof of identity and employment eligibility is required for all new hires and employees on or after April 3, 2006. Employees who do not present acceptable identity and employment eligibility documents may be subject to immediate termination.

**Exception:** If an employee already had a work authorization before April 3, 2006, no new documentation is required unless an additional Social Security card is needed. Employees who do not present acceptable identity and employment eligibility documents may be subject to immediate termination.

**Instructions:** To verify identity and employment eligibility, employees must present original documents. Non-original documents will not be accepted. Employees who do not present acceptable identity and employment eligibility documents may be subject to immediate termination.

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Documents Under Section A of I-9

1. U.S. Passport (unexpired or expired);
2. Certificate of U.S. Citizenship (form N-560 or N-561) - Forms issued by the INS to individuals who: 1. derived citizenship through parental naturalization; 2. acquired citizenship at birth abroad through a United States parent(s); or 3. acquired citizenship through application by United States citizen adoptive parent(s); and who have applied for a certificate of citizenship;
3. Certificate of Naturalization (form N-550 or N-570) - Issued by the INS to naturalized United States citizens;
Section A, Cont.

4. Unexpired foreign passport, with I-551 stamp or attached form I-94 indicating unexpired employment authorization - A form I-551 stamp is a stamp on an unexpired foreign passport received by the legal non-citizen upon entry into the United States. Form I-94 is an arrival-departure record issued by the INS to non-immigrant aliens;
Section A, Cont.

5. Permanent Resident Card or Alien Registration Receipt Card with photograph (form I-151 or I-551) – Forms issued by the INS to lawful permanent aliens;

6. Unexpired Temporary Resident Card (form I-688)- Issued by the INS to aliens who are granted temporary resident status under legalization or special agricultural work program;

7. Unexpired Employment Authorization Card (form I-688A) - Issued by the INS to applicants for temporary resident status after their interview for legalization or special agricultural worker status;
Section A, Cont.

8. Unexpired Reentry Permit (form I-327) - Issued by the INS to lawful permanent resident aliens before they leave the United States for a 1 to 2 year period;

9. Unexpired Refugee Travel Document (form I-571) - Issued by the INS to aliens who have been granted refugee status; or

Documents Under Section B of I-9

1. Driver’s License or I.D. card with photograph;
2. I.D. card issued by any state (including District of Columbia, Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands) or by local governments as long as it contains a photograph or other identifying information such as name, date of birth, sex, height, color of eyes, and address;
3. School I.D. card with a photograph;
4. Voter’s registration card;
5. U.S. Military card or draft record;
6. Military dependent’s I.D. card;
7. U.S. Coast Guard Merchant Mariner Card;
8. Native American tribal document; or
9. Driver’s License issued by a Canadian government authority.

For person’s under the age of 18 who are unable to present a document listed above:
10. School record or report card;
11. Clinic, doctor, or hospital record; or
12. Daycare or nursery school record.
Documents Under Section C of I-9

1. U.S. Social Security card issued by the Social Security Administration;
2. Certification of birth abroad issued by Department of State (form FS-545 or DS-1350) – Form FS-545 is issued by the U.S. Embassies and Consulates overseas to United States citizens born abroad. Form DS-1350 is issued by the U.S. Department of State to United States citizens born abroad;
Section C, Cont.

3. Original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of United States bearing an official seal;
4. Native American tribal document;
5. U.S. Citizen I.D. Card (form I-197) – Issued by the INS to United States citizens;
Section C, Cont.

6. I.D. card for use of resident in the United States (form I-179) – Issued by the INS to United States citizens who are residents of the United States; or

7. Unexpired employment authorization documents issued by DHS (other than those listed under List A).
Three Major Pitfalls:

“Green Card Only”

“Citizens Only”

“Document Abuse”
No Match Letters

• What to do if you receive a no-match letter from Social Security
  – Advise the employee
  – Monitor the employee’s attempts to correct
  – Follow-up with Employee
  – Make final decision after a reasonable time
The End
Dealing with Problem Employees

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Introduction

- No business succeeds while its people are failing

- Mediocre is a no-win reputation

- Problem employees aggravate both supervisors and their co-workers
Introduction

- Dealing with problem employees is an unpleasant responsibility!

- Ineffective handling of problem employees discourages best employees and reduces motivation.
Dealing effectively with problem employees:

1. Improves motivation
2. Reduces frustration
3. Improves morale
4. Makes firing rare
5. Reduces legal action
Types of Problem Employees

1. Rule breakers
2. Chronic under-performers
3. Buddies
4. Family
# Part 1 - Dealing with rule-breakers

- The basic challenge with rule-breakers is effective discipline
- May be highly productive and among the most valuable employees
- They may believe that they have earned the right to break rules
- May also be chronic underperformers, buddies or family members
Effective discipline

1. Take preventive action

2. Use effective discipline techniques

Important point → Can never eliminate need for discipline.
Taking preventive action

- Goal → Create an environment where disciplinary action is rarely needed
- How?
  - Hire and develop self-disciplined employees
  - Apply preventive steps
  - Be low-key about few problem employees
Eight steps in preventive action

1. Accept the challenge of disciplining well
2. Discipline behavior not the person
3. Develop a positive attitude
4. Know the law
Eight steps in preventive action (Continued)

5. Put rules in place
6. Train supervisors
7. Hire the “right” people
8. Include rules in orientation
Using good disciplinary techniques

1. Hot stove rule

2. Progressive discipline

3. Firing
Lessons about discipline from a hot stove

- Warning
- Consistent
- Immediate
- Impersonal
Progressive discipline

Four steps – each more severe than the previous step:

1. Verbal warning
2. Written reprimand
3. Suspension
4. Discharge

- Trying to change what employee is or isn't doing
- Akin to changing a bad habit

*(See Appendix I for an example that illustrates the four steps.)*
Gross misconduct

- Certain offenses so serious that they cause immediate firing without 2nd or 3rd chance
- Examples:
  - Intoxication at work
  - Sexual harassment
  - Drinking on job
  - Theft from employer
  - Fighting
  - False information on application form
  - Unexcused absence for four consecutive days
Firing

- There are no winners in a firing!!
- When a firing is best, attention turns to:
  - How do to do it fairly?
  - How to minimize negative impacts on other employees’ morale?
  - Minimizing chances of a wrongful discharge

(See Appendix II for firing guidelines)
Concluding comments about discipline

Discipline *can* become a human resource management strength.

The better it is done, the less it will be noticed.
Part 2 – Dealing with chronic under-performers

1. Importance of understanding the causes of under-performance
2. Fourteen most likely causes
3. Avoiding “too-good-to-be-true” solutions
4. A practical approach to the problem
Definition of Under-Performers

- Those people who chronically neither thrive in their work nor perform badly enough to be terminated
- Chronic means there is a history of years not months
- Actions that have failed: patience, impatience, self-correction, anger, threats
Causes before cures

- **Basic challenge** – Understanding the causes of under-performance
- **The reality** – Under-performers typically do not know or reveal causes of their problem
- **Fourteen causes** for managers, supervisors and workers to consider
1. Unclear needs in filling the job

- Positions considered unimportant and people in them generally receive little attention.
- What needs did business intend to meet by filling the position?
- Are all positions and all employees treated as important?
2. Poor job design

- **Goal of job design** – A job designed with important tasks that are challenging, satisfying, filled with opportunity for advancement and fun

- **Key question** – Is the job boring, unchallenging, repetitive and void of opportunity?
3. Wrong hire

- An applicant or family member may not fit a job
- Hiring a person for a position he or she does not fit leads to motivation and performance problems
- Superb labor management can not overcome a wrong hire
4. Ineffective orientation and training

- Few people like doing what they can not do well
- Effective orientation and training require planning, specific orientation & training goals, benchmarks for progress, plenty of time, and well-trained and enthusiastic trainers.
5. Problem work environment

- Tools, equipment, supplies, quality of work place and work place safety are important
- Some work places have inherent aggravations
- Has the employer been reasonable and attentive to physical surroundings?
6. Unsuitable organizational culture

- Aim is to have values and norms of behavior that are consistent with:
  - Strategic goals and strategy
  - The supervisor’s human resource practices
  - Values of workers
- Organizational culture is a choice made by top managers so it can be changed
7. Ineffective communication

- Barriers to open and two-way communication complicate relationship building
- Have barriers to communication been removed?
- Are communication aids being used?
8. Irritating social environment

- Gossiping, lazy, bossy and/or nasty co-workers and supervisors can spoil a work place
- Other things spoiling a work place: teasing; social isolation; sexual and physical harassment; religious, political, racial, age and gender undercurrents
- Managers can ask themselves if they have allowed a negative social environment to cause under-performance
- Employees can be asked to rate the social environment
9. Lack of discipline

- High performing workplace requires:
  - Employee self-discipline
  - Informal discipline
  - Formal progressive discipline
- Self-discipline is most powerful
- Lack of discipline allows under-performers to continue avoiding and changing rules
- Lack of discipline frustrates the best employees
10. Lack of motivating rewards

- Examples of motivating rewards: compliments, training, more responsibility and trust
- Absence of motivating rewards leaves a worker feeling unappreciated, unimportant, ignored and taken for granted
- Not good for employees to believe that rewards are unrelated to performance
11. Unfairness

- Unfairness results from misunderstood rules and inconsistency in enforcing them

- Fairness requires rules that are understood & consistently enforced
12. Insufficient performance feedback

- Two questions employees want answered:
  1. How well am I doing my job?
  2. How could I do my job better?

- No feedback about poor work leads to poorer and poorer performance
13. Souring of high-performers

- This year’s top-performer may become a chronic under-performer
- Getting to root causes of good performer gone sour is rarely easy
- Helping souring high performers requires aggressive supervisor action
14. Complicating non-work life

- Employer has little direct control over causes or solutions.
- Examples of non-work causes of under-performance include problems with: marriage, loneliness, social life, chronic criticism, illness and personal finances.
- May be little supervisor or co-workers can do to help.
The failure of simple solutions

Spontaneous, intuitive, easy and expected solutions that rarely work:

1. Patience
2. Anger
3. Threats
4. Pep talks
5. Money
Moving toward a practical solution for under-performers

Five Guidelines

1. Approach the under-performance problem worker by worker
   - Avoid generalizations about employees
   - Look for highly specific causes of the problem

2. Accept that some employees need to change jobs or employers
Moving toward a practical solution (Continued)

3. Focus on figuring out causes of under-performance
   - Use list of 14 possible causes
   - Consider all possible causes and weight each from 0-100 with weights totaling 100 across the 14
   - Work from largest to smallest weights to figure out what needs to be changed to help under-performers improve
Moving toward a practical solution (Continued)

4. Look for deficiencies in both supervisor and worker
   - Avoid putting entire blame on employee
   - Discourage employee from putting entire blame on others

5. Put in place a performance evaluation and feedback system
   - Encourage employee to use self-analysis as supplement to supervisor’s feedback
Concluding thought about under-performers

- Take home message:
  
  **Do something!**

- Refuse to allow the problem of an under-performer to fester
- Stop the negative effects on the business, the worker’s happiness and the worker’s livelihood
Part 3 – Dealing with buddies

- “Do I want to be my employees’ buddy or boss?”
- Employers have a choice
- Employees do not
- The challenge is clear; the decision is not
- Indecision, waffling and “it depends” confuses employees
The best guideline for most employers and supervisors

Be friendly and fair with all employees

Be a buddy of no employee
Expectations make the case for the recommended guideline

- What does an employee expect of an employer?
- What does an employer expect of an employee?
- What do buddies expect of each other?
Expectations of buddies that harm the employer-employee relationship

- Help
- Understanding
- Forgiveness
- Honesty (but only to a limited extent)
- Forgiveness
- Time
- Informality
Part 4 – Dealing with problem family employees

1. Can be outstanding workers or rule breakers, under-achievers or seekers of special treatment like buddies
2. Filling any position best treated as a business decision not family decision
3. Family relations need not be sacrificed to have good business relations
Some guidelines for employment of family members

1. Separate business headquarters from residences
2. Establish business relations separate from family relations
3. Build close family relations outside the business
4. Separate business and family communication
5. Be fair and consistent in dealing with “cousin” generation
6. Avoid depending solely on family for friends and buddies
7. Encourage each family employee to have three distinct roles: family, business and personal
Overcoming the informality of family relations

1. Conduct formal staff meetings and family business meetings
2. Provide feedback at least annually to both family and non family employees
3. Be consistent in policies, procedures, and family relations across all employees
Conclusion

- Lack of action is rarely the best way to deal with a problem employee
- Handling problem employees well means an employer/supervisor spends less and less time doing it
- Knowing how to deal with problem employees can become an important human resource management strength
Contacting Bernie Erven

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Appendix I – An example of progressive discipline

An employer’s rule:

- Employees are to call in before unexpected absence
- Not calling in 4 times in 24 months leads to automatic discharge
- One year probation after suspension during which employee will be discharged if fails to call in
- Each employee is allowed one freebee every 24 months
- First offense after freebee triggers discipline
Step 1 of progressive discipline – *Verbal Warning*

- Terry, an employee, was absent without calling in
- Had already used his freebee
- Bob, his supervisor, talked with Terry, explained the rule and confirmed that Terry understood
- Bob wrote a summary for file
Step 2 of progressive discipline – **Written warning**

- 7 months later, Terry again failed to call in
- Bob gave him written reprimand the following day
- Repeated discussion of rule and gave Terry chance to ask questions
- Bob asked Terry to sign statement that he had received written warning
Step 3 of progressive discipline - **Suspension**

- 14 months later, Terry again failed to call in
- Bob gave him letter explaining that he was suspended from work without pay the following day
- Letter made explicit that Terry was on probation for next 12 months – once more and automatically discharged
- Bob repeated explanation of rule and gave Terry chance to ask questions
- Bob asked Terry to sign statement that he had received suspension letter
Step 4 of progressive discipline – Discharge

- Terry went 12 months after suspension with no repeat of the problem
- Bob purged Terry’s file of verbal warning, written warning and suspension
- If Terry had failed to call in during 12 month suspension, would have been automatically discharged
Appendix II – Critical legal questions in a firing

1. Was the employment at-will?
2. Was it a wrongful discharge?
3. Was there just cause?
4. Was there due process?
5. Was there constructive discharge even though the employee resigned?
Legal and defensible firing

- Builds on actions taken before the firing
- Is documented with a paper trail
- Incorporates careful answers to 7 key questions
Seven key questions

1. Solid case?
2. Who will fire?
3. Where?
4. When?
5. Who will attend termination meeting?
6. Termination meeting content?
7. Immediately afterwards?
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The Texas A&M University System, U.S. Department of Agriculture, and the County Commissioners Courts of Texas Cooperating.

Lunch was provided by

*AgTexas Farm Credit Services*