



## Ethical & Legal Aspects of Supervision

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**Emmet Ore** All right, hello everyone. Welcome to part two of our May Wednesday Webinar Series. My name is Emmet. I'm a digital specialist over here at Vensure and I will be your host for the next hour.

Today, we'll be talking about some ethical and legal aspects of supervision. As is tradition, there will be a Q&A session at the end. And just as a reminder, this is being recorded and we'll share that recording, along with the slide deck, with all of you after we're done here today.

And this webinar is brought to you, as always, by Vensure Employer Services. Vensure is the leader of 20-plus PEO partners with clients in all 50 states.

So today, Robin will be digging deep into two main topics: employees' rights and employees' responsibilities, and we will of course be having our Q&A session at the end. So if you hear a question or a topic you need more clarity on, feel free to submit a question to us in the Q&A box that I will show you the instructions for here right now. So when you logged in, you should have seen the control panel open. There's a drop down section in there for questions; it's labeled questions. Just type your questions or comments into that section and hit enter. If you're a client, please put "client" in your questions so we can track that. Questions and comments are private, so you won't see the questions or comments of others. And we'll try to get to all the questions in the time we have. But if we don't, we'll answer yours later or please con-tact us at [webinarhrhelp@vensure.com](mailto:webinarhrhelp@vensure.com). And I'm not sure if anyone was counting how many times I said questions there, but there was quite a few. So, extra credit, if you can tell me how many times I said question there.

We're thrilled to have Robin Paggi joining us as our panelist today. She's a human resource practitioner who specializes in training on topics such as harassment prevention, communication, team building, and supervisory skills. So I will hand it over to Robin.

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**Robin Paggi** Thanks, Emmet. A supervisor sent an employee to me for individual coaching because the employee said something inappropriate that offended a coworker. And that's a form of punishment for employees is having to spend an hour talking to me. After the coaching, I sent the invoice to supervisor who said that there was a misunderstanding. The company wasn't going to pay for the mandatory coaching. The supervisor was making the employee pay for the coaching. After all, the employee was the one who caused the problem, the supervisor told me. So I sent information to the supervisor letting him know that when he sends employees to mandatory training, the company has to pay for it. And the supervisor said he didn't think that was fair. And I explained that fair and legal don't necessarily go hand-in-hand. So this is an example of why we're talking about employees' legal rights and their responsibility. So if you're in a supervisory position, you don't make the same kind of mistake that the supervisor made. If I had not have caught this wrong decision on his part, it could have cost his company money. And when you make decisions that cost your company money, sometimes the company gets rid of you as a result of that. And we don't want that. So let's go to our next slide, and see what kind of rights employees have.

Now these are some of them, and a lot of times employees think they have way more rights than they actual-ly do. And so it's a good idea to let them know of what their rights are on occasion. But first of all, and probably the most important, employees have the right to get paid properly per state and federal law, including proper overtime. And this sounds really simple, but lots of employers get this wrong and they get sued for it. So let's take a deeper dive into getting paid properly.

First of all, what federal law... Oh, no, no, no, go back. What federal law are we talking about when we're saying they get paid properly according to federal law? If you guessed the Fair Labor Standards Act, or the FLSA, then you get a point for that. The FLSA guarantees a number of rights, primarily aimed at ensuring that workers get paid fairly for the time they work for the kind of work that they do. And so there are some things that go along with getting paid properly that I want to point out to you right quick.

First of all, the form of pay, how you pay employees. Well, usually we just send 'em a check or put it into their automatic account. But pay must be in the form of cash, or check, or something that can be converted into cash or check. And it can also include food and lodging because those have a monetary value as well. What employers can't do is pay employees with a coupon or a token that can be spent at the company store run by the employer. And why would the FLSA have to tell employers you can't pay employees that way? Because some employers use to pay employees that way. And so, that's why they have to not allow it. So that's the form of pay.

Now paying for time off. And that's one of the things a lot of employers give paid time off. They give sick leave, vacation leave, PTO, those types of things. You might be surprised to find that in most cases, employers are not re-quired to provide that time off and they're not required to pay employees for it. So, the FLSA does not require employers to pay employees for time off. And, each, even though a lot of employers do pay for this time, once again, it's not mandatory in most cases. So that is something that I like to tell employees when I am giving presentations or workshops on this topic. They get a whole lot of things that employers are not required to provide them.

Now, one of the things that I am going to talk about next week is, though, employees have the rights to have a lot of time off work, even though employers are not required to pay them for that. So tune in next week and you'll get to hear all the reasons that employers get time off work unpaid, such as for voting or family medical leave. And again, there are some states that do require paid sick days, but there are not a lot of them. And so, those are things that you need to understand when it's talking about get paid properly per state law. Of course, all the different states are going to have their

own laws on what needs to be paid, what days need to be given, all of those types of things. So, because we're broadcasting to the entire nation, it's important for you to know what your state laws are.

Other things about getting paid properly include if any of your employees receive tips or commissions. And so, that then muddies the waters a little bit about how people are supposed to be paid.

But one thing, as far as paying overtime, that is really critical, the FLSA does require that hourly employees who work more than 40 hours per week must get paid overtime, which is time and a half. However, some states, overtime differs. For example, I'm in California, and employees here get paid anything over eight hours a day in most industries, not all. And so it's 40 hours per week or eight hours per day. And we did have a client once upon a time who thought that employers had the choice. I will either pay them for over eight hours a day or I will pay them for 40 hours a week. That employer did not understand you've got to do both. And so, found out the hard way about that. And again, we're talking about hourly employees. Those of us who are exempt, we don't get any overtime.

And one final thing before we go on is equal pay for equal work. And this law went into effect in 1963, the Equal Pay Act, that said employers cannot pay men more than women for doing the same job. And that's been extended to include other classes of people, by some states. Now, here's one of the things, though, before you start thinking that it's unfair that a man got paid more than a woman for doing the same job, here are some things to consider. Does the company have a seniority system? If they do, you can pay the person who has worked there longer. Do they have a merit system? For example, if you do more work, you get more pay. Are there any other factor besides sex that you're making your decisions on? For example, is one employee more qualified than the other, when they're doing the same job? So those things can be taken into consideration and people can be paid differently for doing the same job.

So all of these things are important for you to know because paying employees properly is very important to them, and it's easy to mess it up. Now you might not be in charge of payroll, so you might be thinking, none of this pertains to me, I don't need to worry about these things. This is what you do need to be concerned about. If an employee has questions or concerns about their pay or their deductions, then promptly respond, even by just telling them to talk to HR, or who they're supposed to talk to in pay, payroll, or what have you. You don't ever want to mess with people's pay, or appear that you are unconcerned about it, or holding things up. And so if they bring things to your attention, promptly respond to them or put them in the right direction.

Now, our second goal point here, employees have the right to receive mandatory meals and rest breaks. Now, the Fair Labor Standards Act does not require employers to provide meal breaks or rest breaks to employees. However, when employers choose to do it, then the FLSA places restrictions on what they can do, and when they need to be paid, and that type of thing. So, for example, when employers provide employees rest breaks that last fewer than 20 minutes, the law says that those breaks have to be paid. Additionally, the time must be used to determine if any overtime needs to be paid. But meal breaks that last 30 minutes or more are not required to be paid as long as the employee is not doing any work.

So here's something that is interesting, I'll throw some statistics and studies at you. And a study by Right Management, 39% of employees admitted to eating lunch at their desk, more often than not, while 28% admit to rarely taking any breaks at all. Now, if you're an exempt employee like me, then that's fine. Eat your lunch at your desk, I frequently do. And don't take any rest breaks, I frequently don't. That's fine for exempt employees. Hourly employees, it's not fine. So, if you have hourly employees who are supposed to be taking their breaks, you might need to make sure they take

their breaks. So them not taking breaks is problematic for employers, especially if your time and attendance automatically clocks employees out for lunch and they're working during lunch, that's a lawsuit waiting to happen.

And one of the things, that happens, too, is that you allow employees to eat lunch at their desk and they're intending to not do any work, but then somebody comes by and asks a question that's work-related, and now they've had an interrupted meal period, which means it doesn't count, and there are penalties involved in that in some states. So, not tracking breaks or lunch properly is a common off-the-clock work violation, and it can be very costly in some states. And you can get all sorts of penalties for it.

And the other thing is that the reason that breaks are put into the system is so that employees can rest for a moment and then go back to work refreshed. So it is a good idea for exempt employees like me who don't have to take those breaks to get up and walk around and take those breaks. We actually are more efficient and more effective when we build in those rest periods. So, that's some advice for those of you who don't do that.

One of the things in some states like California where I am, it, there is a requirement for meal and rest breaks, a lot of meal and rest breaks, and it becomes extremely expensive for employers who do not follow those. And class-action lawsuits for missed meal periods and rest periods are huge in California and can actually drive employers out of business. So it's really critical that, you know, again, what the laws are in your state and that you're staying on top of it to make sure that employees are taking their breaks.

So, next bullet point is that employees have the right to complain about unlawful acts without suffering retaliation, discrimination, or harassment. A lot of people don't know what retaliation means. So, it means getting back at employees for making complaints. And it's really easy to do because when an employee makes a complaint about you, your natural inclination is to go into self-defense mode. And, when you go into self-defense mode, it is, I'm going to make whoever is threatening me suffer. You really can't do that when you're in a supervisory position. So let me tell you what retaliation looks like.

Reprimanding the employee or giving a performance evaluation that is lower than it should be after they made a complaint. Transferring the employee to a less desirable position after they made a complaint. All right, so you're just going to put in after they made a complaint after each one of these. Engaging in verbal or physical abuse. Threatening to make, or actually making reports to authorities, such as reporting immigration status or contacting the police. Increasing scrutiny of their work. Spreading false rumors. Treating a family member negatively, for example, canceling a contract with the person's spouse. Or making the person's work more difficult, for example, punishing an employee by purposefully changing their work schedule to conflict with family responsibilities.

Now, employers, supervisors, coworkers, third-party people retaliate against people who make complaints all the time. As a matter of fact, the Equal Employment Opportunity Commission collects complaints about retaliation and then sometimes sues supervisors for it. A retaliation is the biggest area of complaints that employees make. And so, it happens all the time. And again, it's difficult for people not to retaliate against someone when they feel threatened by that person. So you really got to stop that natural instinct and don't allow yourself to do it.

So, this ability to complain not only applies to employees but applicants as well, because applicants can complain about discrimination, that they were not hired because of the employer making decisions about them because of being in a protected class, and harassment. Now, one of the things about discrimination and harassment, in most states, there is no requirement that anyone receive training on discrimination or harassment. And in a lot of states, the employers

who have to receive the training are federal employees. And so many, many, many, many supervisors out there do not know what discrimination and harassment mean.

Now, I conducted harassment training for employees yesterday, and I go through several times in the training that harassment is conduct directed at someone or about someone because of being in a protected class. And in California, we have 17 of them. Discrimination means making employment decisions about people because of their protected class status, whether it's applicants or employees. And still, I had a participant come up after training to tell me that she was being harassed by her supervisor. And I said, "What protected class status is she harassing you because of being into?" Well, the question confused her. And I said, "Is it because of your race? Is she acting this way because of your race?" "No." "Because of your color?" "No." "Because of your sexual orientation?" "No." "Because your religion?" "No." Okay, so no, she was not being mean to her because of being in a protected class. I explained again, then that's not harassment.

So. It's really important when you're in a supervisory position to understand what these legal terms mean, and also to understand what your company policy says about these terms, because those are even more important than the legal terms. Employers are allowed to have policies that far exceed what the state and federal government says is harassment. And if somebody does something that violates the policy, then that's a problem, even if what they've done does not violate a law. So I encourage you to find that information.

And finally, on this slide, employers must protect confidential information of employees and that usually falls to supervisors and HR people. So, what kind of confidential information are we talking about? Well, there's a lot of things on employment applications, benefit forms, performance evaluations, disciplinary documentation, contact information, but especially medical records. That's the big one. Because the FLSA doesn't have any requirements about a lot of the documents that I just mentioned, but when it comes to medical information, there's a whole lot of laws that pertain to that. The biggest is Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, which is called GINA for short, and HIPAA, Health Insurance Portability and Accountability Act. So those are the big three, all having laws pertaining to medical information and the fact that employers have to keep it private.

So, the biggest reason for that is because employees sometimes have decisions made about them by their supervisor or another supervisor because of their medical information. Say an employee wants to transfer to a different department, and the supervisor in that department who's going to decide whether the employee gets transferred or not, has information about their medical records and decides that they're not going to allow the employee to transfer into their department, because they know that the employee took a lot of sick leave because of medical conditions, or had family members that they had to take off for. So, all of that is the reason behind keeping this information so confidential.

Now, keeping it confidential means also keeping it separate. Under the ADA, medical records and information must be kept in a separate file from the employee's personnel file. Not only a separate file but in a separate cabinet under lock and key. So only a few select people are supposed to see this information. And if an employer, HR personnel, or supervisor don't follow these rules, and the confidentiality of an employee's medical information is compromised, the employee can sue for a violation of ADA. Now I want to give you a court case to illustrate this point.

Court case is Ignat vs. Yum! Brands, Inc. And Melissa Ignat worked in the real estate title department of the company and she suffered from bipolar disorder. And while absent from work because of the disorder, Ignat's supervisor told her coworkers about her illness. I'm not sure exactly why. One of the things that happens sometimes, people, is employees will say, "Hey, Melissa hasn't been at work for a while, what's going on with her?" And supervisor says, "Oh, well,

she had to be hospitalized for bipolar disorder.” I don’t know if that was the case or exactly why the supervisor revealed why she was off work. So after, the super, or the employees found out about this, Ignat said that her coworkers avoided and shunned her. One of them asked her supervisor if Ignat was going to “go postal” at work. And, the bipolar disorder interfered with Ignat’s ability to do her job, and so she was terminated, and then she sued. But she didn’t sue for wrongful termination. She sued for invasion of privacy. And, so, she won. And that’s one of the things that you’ve got to be so careful about the information that you reveal to people. So if employees do ask you, “Hey, why is so-and-so off work?” The answer is, “I can’t disclose that information.” If the employee wants to tell people their medical information, that’s fine; they can talk about it all they want, but people in supervisory positions cannot. All right, so let’s go on to our next slide and talk about more rights that employees have.

So medical leave. And one that everybody should be familiar with, because it’s federal law, is Family Medical Leave Act or FMLA. Now this applies to public agencies, and education, and also to private sector employers who have 50 or more employees. So if you have 50 or more employees, you should really know about FMLA and what it allows. Basically, what it allows is qualified employees to take up to 12 weeks off of work every year, that is unpaid, although their health benefits continue, and they have the right to come back to an equivalent job or their same job at the end of their leave. And so leave rights really allow the right for people to come back to work and not be punished for taking that leave. So that’s federal.

But one of the things is that a lot of states have their own medical leave laws, and so you need to know what they are, too. And while the threshold, employee threshold for federal is 50 employees, state laws might allow for fewer employees. Now, why would a supervisor need to know information about medical leave laws? Well again, if you have an employee who asked for time off work and you say, “No, I’m not giving you 12 weeks off of work.”, then you might violate that law. And if you violate the law, again it can be very costly in the form of lawsuits. So you want to have enough information, at least enough information to tell employees to go talk to HR or whoever handles that. And by the way, one of the things that happens quite a bit is that employees are off work and the supervisor knows about it, but they don’t tell HR about it. And then HR has to keep track of all the time they’re off work and then they don’t know about it. And so, there’s got to be a lot of communication between supervisors and HR, so that things are being recorded properly.

All right. Employees have the right to be reasonably accommodated for their disabilities. Now the Americans with Disabilities Act, is also called the ADA, prohibits employment discrimination on the basis of a disability. Applicants, this protects applicants and employees also. So, if someone is disabled and they apply for a job, an employer can’t automatically say, “No, you’re disabled. I’m not going to give you that job.” Employer has to try to accommodate the employee if it’s reasonable and does not provide an undue hardship for the employer. Now, I’m in agriculture country and I had somebody, a client, a supervisor of a client, tell me that someone had applied for a job as a picker, somebody who’s picking fruit, and this person only had one arm. And so, the supervisor told me, “So I told them, no, you can’t work with only one arm.” And I said, “Well, so you just sent them away and said, no?” and he said, “Yeah.” And I explained to him, Americans with Disabilities Act says that you can’t do that, that you have to try to accommodate him. Now he might not have been able to accommodate him, but he needs to try. And one of the things I also pointed out is there are several major league football and baseball players who only have one hand and they made it to the major leagues. So, people with disabilities usually figure out how to work around them. And you don’t want to discount people immediately. And the ADA says so.

So, one of the examples of accommodations, because this is what people ask me quite a bit, is what does an accommodation look like? And it might be, for example, hiring a reader or an interpreter to assist an employee. Providing temporary workplace specialists to assist in training. Transferring an employee to another location. In a situation that

a client brought to me, the employee was going blind and needed a special lamp by his desk in order to be able to see what he needed to see. And, it, it, lamp cost less than a hundred dollars. Is that reasonable? Yeah. And so that's one of the things, a lot of times people think, well, it's going to be really costly for me to try to accommodate people. And according to ergonomic and job accommodation experts, for the most part, accommodations really don't cost that much. According to them, 31% of accommodations cost nothing, it's just kind of moving things around a little bit. 50% of accommodations cost less than \$50. 88% percent cost less than \$1,000. So how do you determine what is a reasonable accommodation, is pretty much how big your company is, and how much money the company makes, and how much the accommodation is going to require.

Now, here's just a couple of examples of accommodations. The problem was that the employee had an eye disorder and the glare on the employee's computer screen caused fatigue. And so, what is the solution to that? An anti-glare screen for \$39. All right. So these are just some of the things that you need to be creative about in order to help employees, who are disabled but qualified for their jobs, if they just have it at reasonable accommodation. These are things that you need to work with them on, or better yet, tell the employee to talk to HR, who hopefully has been fully trained on the interactive process and how to accommodate.

All right, next bullet point. Employees have the right to discuss the conditions of employment with other employees and other people. Now, you might not be familiar with the National Labor Relations Act, and it kind of sounds just by its title that it pertains only to union organizations, that is not true. That is a mistake that employers make sometimes. Section seven of the National Labor Relations Act allows for all employees to discuss their wages and other terms of conditions of employment with coworkers and non-employees without being retaliated against. Well, why would an employer retaliate against a worker for discussing the terms and conditions of their employment? Well, sometimes when employees are talking about those things, they're talking about how stupid their supervisor is, and how unfair policies are, and things like that. And that is pretty much protected activity. So you've got to be really careful that you don't retaliate against people for saying that you're stupid when you're their supervisor because it could be protected activity.

Now, let me give you an example of an employee who engaged in protected activity and was fired by her employer, and then her employer was taken to task with the National Labor Relations Board. So here's the situation. The employee was told she was going to be transferred to another division within the company, and she felt that the transfer would have a negative impact on her ability to earn bonuses. So she posted a message on Facebook using curse words and stating that her employer had messed up and she was done with being a good employee. I don't know why people post these things on Facebook, but they do. So, coworkers and former employees who are Facebook friends posted supportive comments on her page, and there was back and forth and back and forth about all of this. This, my friends, this is concerted activity. This back and forth about how unfair the employer is, and how they're making a mistake, and on and on and on, is all protected, because it might lead to unionizing. And that's what it's all about, is these discussions hopefully will lead to better working conditions, but also lead to unionization. So when the employee returned to work, the employer did what it should not do and showed her a copy of her Facebook post and then fired her for making them, and said that was the reason why she was being fired. So, she went to the National Labor Relations Board, filed a complaint, and they ruled that this employer unlawfully terminated the employee in retaliation for her protected future concerted activity. Furthermore, they said the employee's initial Facebook statement, and the discussion it generated, clearly involved complaints about working conditions and the employer's treatment of its employees and clearly fell within the board's definition of concerted activity, which encompasses employee initiation of group action through the discussion of complaints with fellow employees. Now that all sounds very legalese, and that's the problem to a certain degree, is that you might think that employees bashing their employer and talking about being unfair, and they're cursing while they're doing that, you might not think that that is a legally protected activity. And if you take action against someone for doing so, especially

when you tell them this is why we're taking action against you, then that can cause some lawsuits. Lots and lots of lawsuits have taken place over employees being fired for their Facebook posts or other social media. And sometimes courts rule in favor of employers, but more than often, they rule in favor of employees. And then the employer ends up having to give the employee some money, and let them return to their job, and pay their attorneys, and all sorts of things. So these little mistakes can end up costing a lot of money.

All right, and then finally, unionize. And so I talked about unionizing there, Section seven of the National Labor Relations Act, as I just mentioned, that protects all of this activity, gives employees the right to unionize, to organize, to form, join or assist any union, to bargain collectively, to act together for other mutual aid, and to choose not to unionize. Now, one of the things that happens sometimes is employers get sued because supervisors start punishing people for en-gaging in all of the things that I just mentioned. And then, the other thing is that they try to prevent employees from union-izing and you just can't do that. And so, if you don't want employees to unionize, then you should treat them well, because one of the reasons that they do unionize is because they feel they're being unfairly treated. All right. Let's go on to the next slide.

So more employees' rights. All right. So, they have the right to be absent from work for a variety of reasons. And, as I said, next week I'll tell you about lots and lots of reasons. In addition to Family Medical Leave Act, Americans with Disabilities Act, there's the Pregnancy Discrimination Act, USERRA, which is Uniformed Services Employment and Reemployment Act, so that involves military folks, Civil Rights Act, because of the right to be off work because of religion, and state and local family medical leave laws. And once again, I'm in California. We've got many, many, many, many laws that pertain to employees' right to be off work.

All right. Next bullet point, they have the right to view their personnel file and make copies of anything they've signed or disciplinary action. Now, no federal law grants employees the right to inspect their personnel file. However, many states do give employees those rights, and they also spell out the terms under which an employee can look at their file. So, for example, in California it says that employees can look at their personal, personnel file in reasonable intervals. Now, what is a reasonable interval? Well, it depends upon how large your company is, how many HR people you have available, that type of thing. Because, that's one of the things, employees may have the right to look at their personnel file, but employers have the right to have somebody sitting there with them while they're looking through it. And employers also have the right to remove certain things from personnel files, such as who they contacted before the employee was hired and the information that those contacts provided. So the employee doesn't get to look at everything in their file. And so, it takes some work and takes some coordinating. And employees don't just get to pop into HR and say, I want to look at my file any time they want to and be granted access. So, state laws usually go into a little bit more detail about what is permissible and what's not. Even if your state has a law giving former employees the right to access their personal files, no law says that the employer has to send them the complete file. And, the, individual, a former employee, or current employee, would be allowed to view the file on the company's premises and to make copies of documents of disciplinary action that they signed, or that was used against them, at the employee's expense. So employers don't have to pay for it. So there is that.

Next, employees have the right to work in an environment free of discrimination. So, I talked about discrimination a little bit. And, so what that means is that employment decisions cannot be made about applicants or employees based upon their protected class status. And so, again, you need to find out what the federal-protected classes are and what your state-protected classes are, because they might differ from the federal.

And then finally, employees have the right to refuse to sign unlawful agreements. Many years ago, I was re-quired to sign a non-compete agreement. So when I first went to work as a trainer for an organization, and this was maybe 25 years ago, I signed a non-compete agreement. And what that meant was, if you are fired or you leave us voluntarily, you cannot get a job as a trainer in town or in the county for a year. And so basically that agreement was saying that I can't compete against them for any other company, or even on my own, for at least a year after I left. Well, those agreements are now not legal. And so, they might be legal in your state, though. That's something to look at. But you can't force an em-ployee to sign an unlawful agreement and you can't retaliate against them for refusing to sign an unlawful agreement. So, those are some employee rights. Let's go on and see what some employee responsibilities are.

All right. First, employees have to show up for work, and on time. And so, that might be something that is news to some employees. One of the biggest pet peeves of employers is chronic tardiness, according to CareerBuilder. com. And this is not surprising since one in six employees in a CareerBuilder.com survey said they were late to work once a week or more. So, what do tardy employees attribute their tardiness to? Traffic, lack of sleep, kids, bad weather. Another reason that I would add is they attribute their tardiness, or could, because they're not held accountable for being late. And, there was an article written that talked about this issue. Employees are more likely to be late when employers don't notice tardiness, don't take action against it, or fail to follow through with threats of disciplinary action. One of my favorite phrases is "silence equals permission". If an employee is late and you say nothing about it, you've just given that employee permis-sion to be late. And, so that's a problem. And it's especially a problem when you've allowed them to be late for a long time and then all of a sudden you try to fire them for being late. And so, let me tell you about a court case.

This court case is McMillan vs. City of New York. And McMillan took medication for schizophrenia that made him feel drowsy and sluggish in the morning, and as a result, he was often late for work. And, nobody said anything about it for 10 years. And then his supervisor determined one day she wouldn't be a good supervisor if she continued to allow this to happen. And so, she stopped approving his absences or his tardiness and she started disciplining him for them. And so, he, McMillan, requested a later start time as an accommodation to his disability, which was denied because there was no supervisor on duty when McMillan finished his later shift. And after subsequent late arrivals, he was fined eight days pay, charged with misconduct and or incompetence, and suspended for 30 days without pay, all pretty harsh. And so he sued, alleging violations of the ADA, they refused to accommodate his disability. Now, the District Court ruled in the company's favor, because the court said, arriving to work within a certain time period is an essential job duty, and McMil-lan failed to perform that essential job duty. However, the Court of Appeals overturned the lower court's ruling because supervisor's approval of his late arrivals for 10 years indicated that arriving to work at a specific time was not really an essential job duty.

So, when an employer continuously bends the rules, the employer may be precluded from citing that rule as the reason an ADA accommodation can't be provided. So one of the things that's really important for supervisors to do, you don't have to know everything about ADA, or accommodations, or undue hardships, or enact process, or any of that stuff. What you do need to do is follow your company policies, and ensure employees are following their company policy. And when they don't, then you need to reach out to HR or whomever to get assistance on how to handle it. Because if you don't handle it correctly, for example, you let employees violate policies, and then all of a sudden you come down hard on them, that could end up being a lawsuit that causes problems for you and your employees.

All right. What else do employees need to do? They need to accurately report time worked. And I talked about this, allowing them to work through rest periods, or meal periods, or things like that, and the time clock says that they actually took their breaks, that's a big problem. And so, employees need to speak up when they did not receive their meal period or their rest period, because if they don't, then that could end up being a class-action lawsuit. They need to

perform the essential duties of their job with or without an accommodation. And I've mentioned, I mentioned essential job duties several times, and those should be listed on the job description. Employees have to be able to perform these duties in order to be able to do the job. However, the ADA does add with or without an accommodation. If they cannot perform those essential duties, supervisors should do something about it.

And so I was involved in a situation, a mediation of sorts, when it was determined that the employees really can't perform their essential duties, even though they've been doing the job for a while. New supervisor came in and discovered that former supervisors were just allowing the employees to get along and not doing anything about the fact that they can't do their jobs. They don't have the knowledge, skills, or abilities to do their jobs. And while it might seem unfair to the employees, action is going to be taken against them because they can't perform the essential duties, even though previous supervisors have gotten, allowed them to get away with that for a long time. Employees also need to perform tasks as requested by their supervisors, and one of those tasks might be working overtime. And so, if the supervisor requests that an employee work overtime and the employee refuses to work overtime, in many cases the employee can be disciplined for it. Employees must follow generally applicable employer workplace policies. And so, frequently we have employee handbooks, and we've got all of our policies spelled out and they apply to everyone, and employees have to follow those policies, whether they agree with them or they don't agree with them. And respect the legal rights of their coworkers. And the biggest legal right their coworkers have that they need to respect is to work in an environment free of harassment. And so, that's one of the reasons it's really important to let employees know, whether it's required by your state or not, this is what harassing behavior is. It will not be allowed. This is what can happen to you if you engage in it and then you actually follow up on that. And so, it's the employee's responsibility to not harass people, but it's ultimately the supervisor's responsibility to make sure employees are not harassing each other. And so, ensure you know what you're supposed to do if those situations occur at work. All right. And we've got one more slide to talk about.

Employees have the responsibility to perform their duties in the best interest of their employer. And so, what is not in the best interest of their employer? Well, one of the things that employees do sometimes is sleep on the job. That's not in the best interest of their employer. Sometimes they do another job while they're on the job. That's not in the best interest. Sometimes they are harassing their coworkers. That's not in the employer's best interest. And so, I think you get the drift of where I'm going with this. Employers are supposed, or employees are supposed to perform to the best of their ability for their employer. And when they're not doing so, and when they're actively choosing not to do so, then it is the supervisor's responsibility to get them on the right track.

Employees must keep employer trade secrets confidential. Now trade secrets sounds awfully James Bond-ish. What kind of trade secrets are we talking about? Client list, vendor list, how much they pay for certain things. So, all sorts of things that the employer does-- processes, standard operating procedures. There's a commercial on TV right now that's kind of cute where people are sitting around a conference room table and an employee inadvertently mentions the secret sauce, and so everybody has to break their phone because that information just got out. That's a trade secret. And so, it's very important for supervisors to not reveal this information, but also to ensure that employees are not revealing information that they should not, and to make sure that if something happens if employees reveal the recipe for the secret sauce.

Employees need to protect employer equipment entrusted to them. And they need to make sure that they're treating it correctly, that they're not hurting the employer equipment in any way. And so, supervisors often need to monitor what employees are doing with the equipment, to make sure that they are not misusing them.

Employees are required to work safely. And we've got all sorts of safety laws. We have OSHA. In some states, you've got your own form of OSHA on top of that. And supervisors need to make sure that employees are working safely, and reporting if anything happens. Now, one of the things that happened yesterday, I started our conversation today by telling you that an employee was sent to me because he said something that he shouldn't have said at work. And I told the employee, "When you come into our workplace, you must wear a mask. And, so once we get into a situation where we can be at least six feet apart, then we can remove our masks. But coming into the building, you must wear the mask and all of that." And the employee said, "Well, I've been vaccinated." And I said, "I have, too, but this is our safety protocol and we have to follow our safety protocol, regardless of whether we've been vaccinated or not." So the employee arrived with the mask around his neck. It was not over his face or mouth, as masks are supposed to be worn. And so, I said to him, "I guess I should have been more specific in my instructions." So sometimes you got to do that. What the employee told me was, "I don't agree with this." It doesn't matter if you agree with it or not. It is our safety protocol and we have to follow our safety protocol. And so that's one of the things that supervisors sometimes have to really watch with employees is to make sure they're working safely, even when it's in their best interest, and to reprimand employees when they don't. And also, if they do not report accidents or injuries, or other safety problems, then it is important to discipline for, discipline them for that as well. And one of the reasons for that is that sometimes employees don't want to report those things because they know they'll be put on light duty if they do report them and they don't want to be put on light duty. So they continue to work while they're injured, and then they get even more injured, and then it becomes a big workers' comp problem. And so, that's the reason that it's important if employees do not report accidents, or injuries, or safety problems, that they are held accountable for not doing so.

So, there are a lot of legal things that go along with supervising employees. What are the ethical things that go along with it? Well, the ethical thing is to make sure when you're in a supervisory position, that you know what the laws are that pertain to employment, you know what your responsibilities are for ensuring that employees are following policies, that you are following them as well, and that you are turning to HR or other resources when you need help. You can't have all the answers because there's just too much information to have all the answers about. And so, when you need help, please turn to your resources so that you make the right decisions for you and for your employer. All right, that's all the news I've got for you. What questions do you have for me?

**Emmet Ori** Excellent, thanks, Robin. Here's our first question. What is the interest or penalty if an employer missed paying an employee for one pay period in California? The employee was not terminated.

**Robin Paggi** In California for not paying the employee on time. I don't have the specific information for that, I thought you were going for if they missed a meal period, which I do have the answer for. So that's what I'm going to turn the question into. If an employer misses a meal period for the employee, the penalty is one hour of pay for the employee per day per missed meal period. So, missing an entire paycheck? We do know, I'll give you the information that I think I have, but definitely look it up and don't follow this as legal advice. I think that we have the grace period, that if an employer accidentally misses a pay period, that they do have a certain grace period in which they can make it up. And I think that's called the Safe Harbor Act. So, start there to look that up. But, yeah, definitely do make sure that you do it correctly, because, again, in California, things get very costly very quickly.

**Emmet Ore** Can a legally blind person apply for a job as a bus driver? A previous employer had this lawsuit.

**Robin Paggi** Well, I guess the person could apply for the job. One of the things that happens, when a person with a disability applies for a job, or an employee becomes disabled, what the employer has to do is try to accommodate the disability. Now, I'm assuming that a person who is legally blind could not drive a bus. However, where employers often get

sued is that they just turn away the applicant without engaging in the interactive process. It's like the example that I gave with the guy who said he applied for a job as a picker and they only had one arm. And I told him, go away, you can't do it. That's where employers get in trouble, is not engaging in the interactive process. And so, what that involves is just looking at the essential job duties, looking at the restrictions that the applicant or employee has because of the disability, and seeing if there might be an accommodation. Now, the employer doesn't have to come up with the accommodation, the applicant or employee has to do that. And the employer does not have to accept whatever accommodation the applicant or employee comes up with. And, but there does need to be this conversation that is documented. And failure to do that is where employers make their biggest mistakes.

**Emmet Ore** Got it. Okay, can an employer terminate an employee for insubordination and using profanity directly towards their manager during a discussion?

**Robin Paggi** Well, so much of that depends upon stuff. And so, and that's one of the first things that I learned with working with attorneys, is that the answer to everything is, it depends. So what does it depend upon? Well, depends upon policies that you have in place. And so if you have a policy that says that insubordination can result in disciplinary action. If you include cursing as a form of insubordination. And so, it depends upon what policies you have in place, it depends upon the workplace setting, all of those types of things. It depends upon if you're at-will. Most states in this country are at-will. And theoretically, you can fire people for any reason. And so, all of those things go into it. But, I have learned to be very reluctant to provide yes or no answers when given just a little bit of information because there's always the devil in the details and more to the story. But in general, it depends upon those things that I said.

**Emmet Ore** This one is related to one of the last slides when you were talking about workplace safety. What can we do if the employer does not notify us of an accident in the workplace? I'm assuming this is from an employee's perspective.

**Robin Paggi** Right, and the employer doesn't notify the employee about an accident. Well, more information would really be helpful, but I am just shooting from the hip here thinking that you can go to OSHA, and you can seek their help in determining if the employer was responsible for providing you with that information, how they were supposed to provide you with that information, those types of things. So, again, it's hard to give yes or no answers when there's not more information.

**Emmet Ore** Can an employer legally fire a salaried employee for not working 40 hours, or working more than 40 hours a week?

**Robin Paggi** For not working more than 40 hours a week?

**Emmet Ore** Yeah.

**Robin Paggi** Yes. Yeah, and that's one of the things, salaried or exempt employees are not paid for the hours that they work, they're paid for the work that they do. However, employers are allowed to tell them that they must work at least 40 hours, or even more, in order to be paid. And if they don't do that and that is a stipulation of the employment, then sure... That was to be the answer.

**Emmet Ore** Awesome. Okay, let me see, I'm deciphering this one. If I place a complaint to my supervisor about the bad job that I have, am I in trouble?

**Robin Paggi** No, but it's always how you place your complaint. And so, this goes back to all of our communication training, is that we communicate to get a desired response from our audience. And so, think about the response that you want from your supervisor when you're going to say how unhappy you are with your job, and then tailor your message to try to get that response. And so frequently, if you are going to bring up complaints, it's a good idea to bring up solutions and ideas that you have. And it's a good idea to not blame the supervisor, but to, to state it in a way that lessens the defensiveness of people, and is more of, "Let's collaborate to come up with some ideas to make the situation better." And when you do it that way, you usually get a better response.

**Emmet Ore** Excellent. Okay, well, that will do it for today. Thank you all for tuning in. I hope you'll join us next week for managing absenteeism. Same time, same place. And if you're registered for this one, if you're here today, it means you're automatically registered for next week's as well. So, thanks again. Thanks, Robin. And we will see you next time.