

***Pennsylvania Association of Nurse Anesthetists  
2014 Fall Symposium***

**DuaneMorris**

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# Surgeon Concerns Regarding CRNA Supervision: Sinking the Captain of the Ship Argument



The goal of the Captain of the Ship argument is to create anxiety for surgeons that they will face increased liability working with CRNAs.

## IT IS NOT TRUE

With a better understanding of the law behind the concept of vicarious liability and the facts surrounding utilization of CRNAs, you will be better positioned to debunk the myth surrounding the Captain of the Ship.

## Objectives of this Presentation

- Understand the Captain of the Ship argument;
- Understand what is vicarious liability;
- Learn how to respond when someone raises this argument against CRNAs.

## Captain of the Ship Argument

Ironically - -

This was originally designed as a means of lawyers figuring out how to punish doctors.

Now - -

It is being corrupted by a specific set of doctors to be used to their advantage.

## What it really was...

This was a strategic lawyer  
playing off of a surgeon's arrogance.

It all started with a single question...

Who is in charge of the surgery?

## Doctors (just like lawyers) are trained...

...to be a bit arrogant  
(Sssshhhhhh!!!! Don't tell anyone!)

They are the smartest person in the room...  
Just ask them.

Why? No one ever taught them how to say  
“I don't know.”

## As you will learn...

Liability turns on control.

So when surgeons admitted they were  
“in control”  
of everything, they were creating  
for themselves liability that did not exist  
(or at least might not have).



If everyone would just calm down...

...This wouldn't be such an issue...

By claiming control over everything that occurs in the operating room, surgeons risk exposing themselves to potential liability for ***any negligence*** that takes place.

## What It Became

This was a marketing strategy.... And it worked.

It was designed to scare surgeons away from working with CRNAs.

The false premise was presented that working with a nurse anesthetist rather than a physician anesthesiologist would cause the surgeon to be liable for any anesthesia mishap.

## To quote Gene Blumenreich...

Regarding the idea that a physician faces greater liability by working with CRNAs...

“This was untrue 30 years ago,  
it was untrue 20 years ago,  
it is untrue today,  
and tomorrow it will still be untrue.”

## What is Vicarious Liability?

In its simplest form:

“Vicarious Liability” is a legal theory allowing one person to be held liable for the negligent act of someone else.

## How does it work?

### Liability turns on control

What does that mean?

A surgeon's risk of being held liable due to the negligence of an anesthetist will turn on what control s/he exerted over the anesthetist in the performance of the anesthetist's duties.

## Degree of control is the controlling factor...

- Consider the difference between liability for an employee versus liability for an independent contractor.
- An employer can often be held liable for the negligence of an employee. For an independent contractor – to incur liability you must not only control the job to be done, but **the way in which the job is done.**

## Question?

Is the surgeon any more likely to direct HOW an anesthetic is administered or to control WHICH anesthetic is utilized when working with a CRNA than with a physician anesthesiologist?

If so, the surgeon is creating his/her own problem and it has nothing to do with the selection of anesthesia provider.

## Original premise of the Captain of the Ship

It presumed that the surgeons controlled everything that went on during the course of any particular surgery, including the administration of anesthesia, and therefore were liable for everything that went wrong.

Therefore, surgeons were not allowed to present evidence to contradict what they did and did not control.

Ironic anesthesiologists are reintroducing this.



What does it NOT mean?

**SUPERVISION**

**≠**

**CONTROL**

## There are an abundance of cases...

Some cases where surgeons have been found **not liable** for working with CRNAs.

Some cases where surgeons have been sued when they were working with anesthesiologists.

How do I not get sued is the wrong question...

What is the right question?

How do I not get sued  
Successfully?

## I Cannot Say This Enough...

Merely supervising a CRNA does not yield liability, and the decision to work with a CRNA does not increase the risk of liability.

**Finally, we are equal....**

**The potential for liability  
will be the same whether a surgeon  
is working with a CRNA or  
a physician anesthesiologist.**

Why has this worked???

Because it is rooted in  
fear and fear is an  
effective motivator...

## What should we do?

Misinformation and insufficient information allow people to exploit fear.



## How can we reframe the issue?

### First:

#### **Educate Doctors**

(If they only knew what they didn't know)

### Second:

#### **Start Asking the Right Questions**

### Finally:

#### **Keep the Focus on Quality of Care**



## What is the solution?

Work with qualified providers of anesthesia.

Let the providers of anesthesia with whom you work be the trained professionals they are. They will not tell you which blade or retractor to use – because that is not their learned skill... and you do not tell them how to do their job, as that is not your learned skill.

## Will this really work?

Below are three factors that can notably affect your likelihood of getting sued...

Adverse Outcomes;

Poor Communication;

Increased Costs.

If you can avoid getting sued, that is great.

But...

If you are going to be sued... you should make the decisions beforehand that most reduce your risk of that lawsuit being successful.

Working with CRNAs  
does nothing to increase  
your risk of being successfully sued!

# Employment Issues Affecting CRNA Practice

- The purpose is to discuss the most prevalent employment issues facing CNRAs so as to help attendees understand various circumstances and factors that may have an impact on their work environment and explain various legal issues that should be taken into consideration when dealing with an employment situation.
- Objectives:
  - Obtain a basic understanding of factors in determining (1) the exempt versus non-exempt; and (2) employee versus independent contractor;
  - Considerations in negotiating an employment contract (including non-compete clauses);
  - Learn about some basic HR/employment issues often facing CRNAs.

## Lawyers LOVE disclaimers!

The goal for this program is for Mark J. Silberman, AANA's General Counsel, to discuss some of the most prevalent employment issues facing CRNAs and provide basic knowledge that will let you know the types of questions you should ask, factors you should consider, and concerns you should have in addressing (or coordinating with counsel to address) various employment situations.

## Most Common Mistakes....

Employment matters are governed both by Federal, State, (even local) laws.

Almost every answer is  
**intensively fact-sensitive.**

People often take “a little” knowledge or grasp on to one particular fact, factor, or detail to guide themselves to a predetermined result.

Do not make this mistake!

## If it were easy....

We wouldn't need this presentation, now would we?

Therefore,  
please realize,  
my presentation  
is to provide  
general information  
and does not  
constitute a full  
legal analysis  
of the matters  
presented or any  
particular circumstance.

They should not be construed as  
or relied upon as legal advice  
or legal opinion on any specific facts or circumstances.



**What do I do if I'm really not sure?!?!**

Consult with an attorney you trust....



(it can be any attorney ... really!)

## OVERVIEW

Am I an employee or  
an independent contractor?

Am I exempt or non-exempt?

Do I really want what I think I want?

# Employee v. Independent Contractor

## What is an employee?

Per the IRS and under common-law rules:

Anyone who performs services for you is your employee *if you can control not only what will be done but how, where, and when it will be done*. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.

## What is an independent contractor?

- It can be difficult to define – the answer comes from the common law, the Fair Labor Standards Act, the Internal Revenue Code, and the Courts.

Just so you know...

The VAST majority of the time  
you are an employee.

## It often turns on control...

- The IRS and the common law focus on what level of control an employer has over a service or product or person.
- Does the employer define what is being done and how it will be accomplished?

## Factors to consider...

- If the worker supplies his or her own equipment, materials and tools;
- If all necessary materials are not supplied by the employer;
- If the worker can be discharged at any time and can choose whether or not to come to work without fear of losing employment;
- If the worker controls the hours, time, place, and work;
- Whether the work is temporary or permanent;
- The manner in which the work is compensated.

## Keep in mind...

- If the work is considered integral to the business, you are more likely than not going to be considered an employee.
- You may also encounter the “economic realities test.”

## Economic Realities Test

- How dependent is this worker to the business?
- If a substantial portion of your income is derived from this source, it is more likely you will be considered an employee.
- Considers things like:
  - Level of skill required;
  - How integral the work is to the business;
  - Intent of the parties;
  - Payment of social security taxes and benefits.



## Factors Suggesting Independent Contractor

- Not relying on the business as the sole source of income;
- Regularly performing similar work for others;
- Having an appropriate business established;
- Working at your own pace as defined by an agreement;
- Being ineligible for employer provided benefits;
- Retaining control and independence over your assignments and your schedule.

## Why does anyone care?

### TAXES!

#### For the Employer:

For proper independent contractors, you do not incur payroll taxes, social security, workers' compensation insurance, etc.

You can control other expenses (pay per project, day rates, consulting fees, can avoid wage/hour minimum pay or overtime issues) and liability is different.

## Why should I care?

For the Employee:

You receive a 1099 instead of a W-2

You are responsible for paying self-employment taxes (consult with an accountant!)

You are losing certain benefits:

- social security
- unemployment/workers' comp. insurance
- minimum wage / overtime (maybe)

**Which do I want to be?**

What you want **may be**  
(both technically and legally)  
irrelevant.

The real question is:  
Which is legally proper?

## Ok... So which am I?

100% fact-specific.

The IRS now uses a 3-category, multi-factor test, and the balancing leans towards your being deemed an employee.

WHY?

So the government gets its dues....

## Behavioral Control

### *Instructions the business gives the worker.*

- An employee is generally subject to the business' instructions about when, where, and how to work. Examples of types of instructions include:
  - When and where to do the work
  - What tools or equipment to use
  - What workers to hire or to assist with the work
  - Where to purchase supplies and services
  - What work must be performed by a specified individual
  - What order or sequence to follow

### *Training the business gives the worker.*

- An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

# Financial Control

## ***The extent to which the worker has unreimbursed business expenses.***

- Independent contractors are more likely to have unreimbursed expenses than are employees (employees may also incur unreimbursed expenses). But fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important .

## ***The extent of the worker's investment.***

- An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities (significant investment is not necessary).

## ***The extent to which the worker makes services available to the relevant market.***

- An independent contractor is generally free to seek out business opportunities and often advertise, maintain a visible business location, and are available to work in the relevant market.

## ***How the business pays the worker.***

- An employee is generally guaranteed a regular wage (hourly, weekly, etc.) This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job (it is common in some professions to pay independent contractors hourly, e.g., lawyers)

## ***The extent to which the worker can realize a profit or loss.***

- Employees generally do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss given the expense they incur in providing their 'tools of the trade'

# Type of Relationship

## ***Written contracts describing the relationship the parties intended to create.***

- Probably the least important of the criteria, since what really matters is the nature of the work relationship, not what the parties choose to call it (it can matter in close cases).

## ***Whether the business provides the worker with employee-type benefits (insurance, a pension plan, vacation pay, or sick pay).***

- The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.

## ***The permanency of the relationship.***

- If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.

## ***The extent to which services performed by the worker are a key aspect of the regular business of the company.***

- If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities.



## Conclusion

- Independent contractors are their own bosses. Their work is often defined by contracts (oral or written) and defines certain requirements.
- Employees rely on the business for steady income, give up an element of control and independence in exchange (often) for certain benefits and (hopefully) stability.

## Exempt v. Non-Exempt

- This is a very complicated topic.
- It is hotly regulated by the federal government and the states.
- It is among the highest growing areas of plaintiffs' class action lawsuits.

Why? Because it contains  
a provision for attorney's fees!

This is an area in which it is easy to make mistakes even if you have a big HR department.

**What does it really mean?**

**At the end of the day....**

**Am I entitled  
to be paid  
for “overtime”?**

**(1.5 times your regular rate for hours in excess of 40  
within a week or as otherwise provided by State law)**

## A few quick points...

- Whether or not you are “salaried” does not determine whether you are correctly classified as exempt or non-exempt; however, you **must** be paid on a salaried basis to be exempt.
- Registered nurses and CRNAs can be exempt or non-exempt.
- You cannot change back and forth, but if you have been misclassified, it can be corrected going forward (with notice).

## Nurses have their own U.S. Department of Labor Fact Sheet!! (#17N)

For a nurse to qualify as the learned professional employee exemption, these tests must be met:

- Compensated on salary or fee basis of no less than \$455/week;
- Primary duty must include the performance of work requiring advance knowledge (predominantly intellectual in character and which requires consistent exercise of discretion and judgment);
- The advanced knowledge is in science or learning;
- Must be customarily acquired by a prolonged course of specialized intellectual instruction.

## Default Rule under the FLSA

Unless your position falls into one of the specific exempt categories, you are non-exempt.

- Professional
- Administrative
- Executive
- Computer Professional
- Outside Sales

(not discussing computer professionals or outside sales employees here)

# Professional Employees under the FLSA

The “professional” employee exemption from the required payment of overtime under the FLSA applies to an employee:

- Who is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities;
- Whose primary duty is the performance of work:
  - **Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction (“learned professional”); or**
  - **Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (“creative professional”).**

## Most commonly applied to “learned professions”

- Traditionally includes:
  - Lawyers
  - Dentists
  - Teachers
  - Architects
  - Doctors
  - Registered nurses (but not LPNs)
  - Accountants (but not bookkeepers)
  - Scientists (but not technicians)



## Executive Employees under the FLSA

The “Executive” employee exemption from the required payment of overtime under the FLSA, applies to an employee who:

- Is compensated on a salary basis (not less than \$455/week, exclusive of board, lodging or other facilities);
- Primary duty is the management of the enterprise in which the employee is employed (or recognized department/subdivision);
- Customarily and regularly directs the work of **two or more full-time equivalents**; and
- 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.

## Executive Points

Supervision means what it implies – you must regularly supervise two or more other employees as a regular part of the job

(Supervision does not include sitting in the lounge having coffee waiting for a CRNA to tell you they've finished the procedure)

## Management duties could include...

- Interviewing, selecting, training employees;
- Setting rates of pay and hours of work;
- Appraising productivity and work performance;
- Disciplining employees;
- Apportioning work among employees;
- Planning budgets;
- Monitoring for legal or regulatory compliance and many, many more....

# Administrative Employees under the FLSA

The “administrative” employee exemption from the required payment of overtime under the FLSA, applies to an employee:

- Who is compensated on a salary or fee basis at a rate of not less than \$455 per week, exclusive of board, lodging or other facilities;
- Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and
- Whose **primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.**

## Administrative Specifics

- This is the most elusive and difficult to interpret of the categories.
- This is really designed for relatively high-level employees whose main job is to “keep the business running.”
- Administrative staff providing daily administrative clerical support are not likely to be administratively exempt (confusing, huh?).

## Questions to ask re: Administrative

- Does the employee have the authority to formulate or interpret policies?
- How major are the employee's assignments in the scope of the overall business' operation (buy paperclips versus buy a fleet of vehicles)?
- Can the employee commit the business to matters of significant financial impact?
- Can the employee deviate from policy without prior approval?

**I meet all the tests! What did I win!?!**

**You are not entitled to  
overtime**

## What if I get it wrong?

From the business side:

Could be subjected to fines, fees, litigation, and penalties.

For the employee:

Could be losing out of benefits to which you may be entitled under the law.



## There is also a salary level test

- Employees who are paid less than \$23,660 per year, even if paid on a salary basis, are nonexempt.
- Employees who earn more than \$100,000 per year are frequently exempt.

## But remember!!!

- The FLSA allows the states to adopt more stringent requirements for exemptions under state overtime laws. Many states have adopted more stringent (or just different) standards. Therefore, in order to avoid potential state law liability, employers need to analyze whether potentially exempt jobs meet the exemption requirements of the overtime law in the state in which an employee works, as well as under the FLSA.

# What Are My Rights Versus What Do I REALLY Want

Be careful what you ask for...  
you might just get it.

## Consider the source of your information...

Employment matters are  
**intensively fact-sensitive.**

Changing one fact can alter the outcome.

The “answer” to your question can be governed  
by Federal laws;  
by State laws;  
even by Local laws.

## OVERVIEW

- What should I be thinking about when my practice is sold or the hospital hires a new anesthesia group?
- Non-compete clauses (restrictive covenants).
- Negotiating an employment contract.
- Basic workplace / HR issues.

## Are CRNAs professional athletes?

CRNAs don't often get to wake up to read the paper and find out they've been traded to another city's anesthesia team...

But finding out your employer sold you (it really is the business that was sold, but let's be honest... it feels personal) can create a whole lot of stress.

## What are my rights?

Unfortunately....

There are more questions than answers...

- What state are you in?
- Are you an employee at-will?
- Do you have a contract?
- Is that contract assignable?
- Does it being assigned require your consent?
- What conditions are being changed?
- Do you have a good lawyer?

**Brace yourselves... this might not be pleasant**

If the new employer is doing it the right way...

Your choices are:

1. Accept the changes;
2. Negotiate changes;
3. Move on.



## Do not assume they are doing it right...

- Get documentation of what changes are being imposed;
- Consult with an attorney who specializes in employment matters in your area;
- Identify what your priorities are;
- If they are doing it the wrong way, there is always option 4.....

# LITIGATION

## Litigation

- It is uncommon for there to be individual litigation over individual work circumstances (outside of discrimination issues which will be briefly addressed in our HR portion).
- The reason is because it tends to be cost-prohibitive.
- Litigation is expensive, it involves risk, it strains both financial and emotional reserves.

## Non-Compete Clauses

- We could do three day-long presentations on this subject alone.
- Every state has its own regulations.
- Volumes have been written (and continue to be written) on the subject.

## Biggest Misconception?

- People enter into non-complete clauses or other restrictive covenants believing they are not enforceable.

That is not always (or necessarily often) the case.

- Some states do not allow them – others limit them – some are very liberal.

## What is a non-compete clause?

- It restricts an employee from working:
  - in a particular field;
  - for a certain period of time;
  - within a certain geographic area.

Generally – when they are allowed – they will be upheld if they are reasonable in their scope – their time – their area.

## What about Pennsylvania?

Pennsylvania courts have made it clear that non-competition agreements between an employer and an employee are generally enforceable. Requirements of enforceability, however, contain additional conditions: the contract which contains the covenant must be supported by adequate consideration rendered at the time it is entered into, and the covenant must be reasonably limited in both geographical distance and length of time.

## Recent Case – May 2014 in Superior Court

Held that a non-compete agreement stating only that the parties "intend to be legally bound, " but providing no new benefit of value or change in job status, is unenforceable against an existing employee for lack of consideration.

Ok.... So what is consideration?

## What if I violate a covenant not to compete?

- If the employer cares, you will get sued.
  - Could seek an injunction;
  - Could seek monetary damages;
  - Could seek their attorneys' fees if they win;
  - Certainly will have to hire a lawyer to defend you.
- An analysis of whether the covenant was reasonable will be performed by the Court.

**ADVICE:** Consult with a lawyer **before** you decide it is OK to violate.



## What do I do when my employer asks me to sign one?

- Existing Employer / New Owner
  - READ IT. UNDERSTAND IT.
  - CONSIDER ITS IMPACT.
  - CONSULT WITH AN ATTORNEY.
  - CAN IT BE LIMITED / MODIFIED?
  - CONSIDER THE CONSEQUENCES (YES AND NO)
  - IS IT A POTENTIAL NEGOTIATING TOOL?  
(but please see the note above).
  - IF YOU HAVE NO INTENTION OF ABIDING BY IT – THINK VERY LONG AND HARD BEFORE SIGNING (OR JUST DON'T).

# What do I do when a new job wants me to sign a non-compete clause?

Perform the same analysis as before as part of your process in.....

## NEGOTIATING YOUR EMPLOYMENT CONTRACT

## UNDERSTAND THE DIFFERENCE

### Between a Job description v. Employment contract

A job description outlines your job duties, your payment structure, your role in the business, etc.

An employment contract creates legally binding duties and benefits for each side of the negotiation and should protect both parties.

## What should I do first?

Prepare!

What do you want?

What do you need?

What do THEY want?

What is reasonable?

What is negotiable?

Answering these questions takes research.

## What are my priorities?

- Do not approach a negotiation without knowing what is important to you versus what would be nice.
- 8 weeks of paid vacation is great until it is tied to a specific number of hours that cannot be performed if you use it.
- There is little value to a company car if your salary is set so low you cannot pay for the gas.

## What should a CRNA be thinking about?

- Compensation
  - Salary, bonus, overtime, incentives, etc.
- Benefits
  - Health, dental, life, family coverage (cost?);
  - Vacation, sick time, holidays;
  - Continuing education, Professional memberships (including Webinars by AANA's General Counsel), Licensure (certification / recertification), reimbursement for costs (e.g., travel, materials).

## Additional issues

- Length of contract (longer is not always better)
- End of business relationship
  - Non-compete clauses;
  - Severance packages;
  - Vacation/sick time accrual and payment?
- Working environment
  - Hours; Safety; Quality of Care; Training; Duties.
  - Evaluation (method and consequences).
  - Who owns your records? Who submits bills?

What is non-negotiable?

**NOTHING**

(EXCEPT THAT WHICH IS ILLEGAL)

(SORRY, I'M A LAWYER)



## Negotiating an Employment Contract

- Contract basics.
- Offer – acceptance – consideration (day 1 of law school).
- Two Types: Oral and Written.
- For lots of reasons, written is preferable (some types of contracts need to be in writing).
- Oftentimes a court will not consider the “oral agreements” that accompanied a written contract (parole evidence rule).

## What is the purpose of a contract?

- To define the rights and responsibilities of the parties to each other.
- No one ever writes, reviews, or enters into a contract expecting it to be necessary.
- When most people are negotiating an employment contract, they are in a good mood – they are excited about a new job – they like the people they are working for.

## When the Honeymoon is over...

- That is when contracts come into play.
- A good contract can protect your “value.”
  - It can limit your liability;
  - It can define your rights;
  - It will outline your responsibilities.
- A bad contract:
  - Is VERY expensive.

## Remedies if employment contract is breached?

- Specific performance (not easy for a CRNA – no one can make you administer anesthesia).
- Money damages (most common and painful).
- Liquidated damages (agree beforehand what the damages will be and set that amount).
- General damages (those arising from the breach).

## Things to consider

- Parties have a duty to mitigate their damages. That means you have to do what you can to reduce the amount of damage you suffer (a new job can mitigate your losses and limit your damages to the economic loss you suffer).
- Do you want to agree to arbitrate or mediate any disputes?

**VERY COMMON TODAY BECAUSE  
LITIGATION IS VERY EXPENSIVE!**

- There is no need to have a contract – many people do not – in employee at-will states.
- Employment at-will means so long as the reason for discharging you is not improper – e.g. discriminatory – you can be let go for any reason.
- You should know your state's default rule before you seek or negotiate an employment contract because an employer's willingness to negotiate various points will be affected by their rights.

## Ambiguity is Bad

- If it is not clear – it can result in an argument.
- If it is not clear – it gives a lawyer a point to argue over.
- If it is not clear – it can end up costing more to clarify it than it is worth to you.
- If it is not clear – how can someone from the outside know that is what you agreed to?

## Examples of ambiguity:

- CRNA will perform duties in a quality manner.
- Does that mean:
  - Compliance with regulations?
  - Not criminally negligent?
  - To the satisfaction of the employer?
  - Without complaint from the patient?
  - Assures positive outcomes?
- If what it means is important to you—  
make sure it is clear within the contract.



## Examples of a common mistake

Contract provides the CRNA will abide by all policies and procedures of the business:

- Did you read the policies and procedures?
  - Before you signed?
  - What if you disagree with them?
  - What if they do not reflect the law?
  - What if they do not get updated?
  - What if they jeopardize patient safety?

## Important Points to Consider

- You do not have to agree to a term you are not comfortable with;
- You do not have to sign something you do not understand;
- You do not have to take anyone's word that something is understood;
- They do not have to hire you if they don't like your conditions.

## What Should Your Goal Be?

- My opinion – fairness should be your goal.
- Employers will almost always have an upper hand. Believing you are irreplaceable (even if you are) can create problems.
- Protect yourself – get what you need and as much of what you want as you can.
- People often incorrectly think it is about winning.

## It is a balancing act...

- You don't want to start off on the wrong foot.
- You don't want to undervalue yourself.
- You don't want to agree to a "bad deal."
- You don't want to leave value on the table.
- You don't want to negotiate yourself out of a great opportunity.

If it were easy... we wouldn't be discussing it.

## MOST IMPORTANT MESSAGES

Read your contract!

You would be **AMAZED**  
what is actually included in some contracts!

If it is important to you....

Put it in writing!

I know it's not everyone's favorite activity...

Coordinate with a lawyer.

## Basic HR Issues

You have a right to be free from discrimination in the decision:

- to hire you;
- to promote you (or not);
- in your work assignment;
- in being compensated;
- in being terminated.

## You have the right...

Not to be harassed in the workplace.

This includes a wide range of potential behavior of an offensive nature.

Most common harassment complained of is sexual harassment.

## Sexual Harassment

Includes:

Requests for sexual favors, sexual advances or other sexual conduct when:

- submission is either explicitly or implicitly a condition affecting employment decisions;
- the behavior is sufficiently severe or pervasive as to create an intimidating, hostile or repugnant environment; or
- the behavior persists despite objection by the person to whom the conduct is directed.



## Two types of sexual harassment

“QUID PRO QUO”

HOSTILE ENVIRONMENT

## Quid Pro Quo

Includes:

Unwelcomed sexual advances;  
Requests for sexual favors; and  
Other verbal or physical conduct  
of a sexual nature.

## WHEN....

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's status as an employee; or
- Submission to or rejection of such conduct by an individual is used as the basis for an employment decisions affecting such individual.

## Quid Pro Quo harassment may occur

- When an individual is led to believe that he or she must submit to unwelcomed sexual conduct in order to obtain some benefit or avoid a consequence; or
- When a supervisor or another person in a position to affect a person's employment causes the employee to believe that they, the supervisor or other person in position of authority, will make an employment decision based on whether or not the employee submits to unwelcomed sexual conduct.

## Hostile Environment

Includes:

- Unwelcome sexual advances;
- Requests for sexual favors; and
- Other conduct of a sexual nature.

Includes verbal or physical conduct.

## Hostile Environment occurs when conduct:

- Has the purpose or effect of unreasonably interfering with an individual's work; or
- Creates an intimidating, hostile, or offensive working environment;
- Unwelcomed sexually harassing conduct is so severe, persistent or pervasive that it affects a person's ability to participate in or benefit from Association activities; or
- Creates an intimidating, threatening or abusive environment.

## Who can be a harasser?

- Does not have to be in a particular position vis-à-vis the person being harassed for the conduct to create a hostile environment.

### A harasser can be:

- a peer;
- a person who has power over the person being harassed (*e.g.*, a supervisor);
- a person who does not have power over the person being harassed (colleague or subordinate); or
- a visitor (*e.g.*, a contractor).

## Conduct to avoid

- *Unwanted sexual statements:*
  - Sexual or “dirty” jokes;
  - Comments on physical attributes;
  - Spreading rumors about or rating others as to sexual activity or performance;
  - Talking about one’s sexual activity in front of others; and/or
  - Displaying or distributing sexually explicit drawings, pictures and/or written material.



## Technology and Social Media

Unwanted sexual statements can be made in person, in writing, electronically, via email, instant messaging, text messages, blogs, web pages, photographs, and any other way you could envision.

But it was from my personal email...

Think  
Before  
You Hit  
Send

## Conduct to Avoid

- *Unwanted personal attention:*  
Letters, telephone calls, visits, pressure for sexual favors, pressure for unnecessary personal interaction, and pressure for dates where a sexual/romantic intent appears evident but remains unwanted.
- *Unwanted physical or sexual advances:*  
Touching, hugging, kissing, fondling, touching oneself sexually for others to view, sexual assault, intercourse, or other sexual activity.

## Retaliation is PROHIBITED!

Concerns can and should be raised without any fear of reprisal or retaliation. If you ever feel that you have been subjected to retaliation for reporting an act of harassment you should report that conduct in the same manner that you would have reported the original harassment.

**We need to be prepared for the future!**



To be fair....



# What To Do If You Run Into Problems Or Have Questions?



## About Duane Morris

*Duane Morris is a full-service law firm with:*

- Core strengths in health law, labor and employment, corporate, employee benefits, litigation, and e-commerce
- The #1 growth record of all major law firms in the U.S. through non-merger activities
- Twenty-four offices and over 750 attorneys in the U.S., London, Singapore and Vietnam and Sri Lanka