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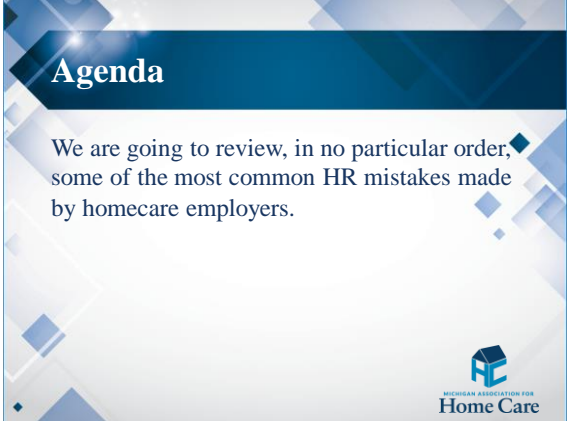
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## Fair Labor Standards Act

- ◆ The Federal Law governing minimum wage and overtime is known as the Fair Labor Standards Act or FLSA.
- ◆ It sets certain basic requirements.
- ◆ Creates a number of “exemptions.”



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## Fair Labor Standards Act

Basic Rules:

- ◆ **Minimum Wage:** All covered employees must be paid a minimum wage for hours worked (can vary by state).
- ◆ **Overtime Pay:** All covered employees must be paid one-and-one-half times the employee’s regular rate for all hours worked in excess of 40 hours in a workweek.
- ◆ **Important Concepts:** The workweek; hours worked; the regular rate.



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# HOLDING PAYCHECKS



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**Holding Paycheck Due to Lack of Clinical Documentation**

- ◆ Employee fails to bring documentation, including time sheets into office on Friday as required. Employer holds paycheck until documentation received.



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**Holding Paycheck Due to Lack of Clinical Documentation**

- ◆ Employer, incorrectly, believes that they can do this, because “I don’t know what they worked” or “I don’t get paid, so they don’t get paid.”
- ◆ The FLSA prohibits this.



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**Holding Paycheck Due to Lack of Clinical Documentation or Timesheet**

◆ **IMPORTANT:**  
**YOU CANNOT HOLD THE EMPLOYEE’S PAYCHECK**



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**“But Without the Timesheet, I Don’t Know What to Pay!”**

- ◆ DOL assumes employer knows hours the employee worked.
  - ◆ Schedule for week?
  - ◆ Complaints? Missed visits?



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**Correct Way to Handle Both Issues**

- ◆ Pay the employee.
- ◆ Discipline the employee.

DOCUMENT. DOCUMENT. DOCUMENT.



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**Correct Way to Handle Both Issues**

- ◆ If you have reason to believe employee **did** **not actually work** as scheduled, then you may be in a position to not pay them.
- ◆ Employers do not have to pay employees for not working.

WHEN CONSIDERING HOLDING THE PAYCHECK—SEEK COUNSEL.



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**Not Considering Drive/Travel Time**

- ◆ Failing to capture and compensate travel time can lead to overtime violations. If hourly rate is sufficiently low and amount of travel time is sufficiently high, may lead to minimum wage violations.



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**Not Considering Drive/Travel Time**

**Travel from home to work**

- ◆ Normal travel between home and first patient or from last patient to home is not “work time,” and is not compensable. This is considered the employee’s commute.



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**Not Considering Drive/Travel Time**

- ◆ Employee time spent traveling that is considered to be “part of [the employee’s] principal activity” is considered to be part of employee’s hours worked.
- ◆ Any period “during which an employee is completely relieved from duty and which [is] long enough to enable him to use the time effectively for his own purposes are not hours worked.”

29 C.F.R. § 785.16(a).



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## Travel Time

- ◆ DOL has stated, “[w]orkers who travel to more than one worksite for an employer during the workday must be paid for travel time between each worksite; if the travel is not direct because the employee is relieved from duty long enough to engage in purely personal pursuits, only the time necessary to make the trip must be paid.” Question 40, <https://www.dol.gov/whd/homecare/faq.htm#travel>
- ◆ Contradicts the regulation!!!



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## Travel Time

- ◆ Need to have a system to capture travel time. Most of your systems are designed to capture what goes on in the home.
- ◆ Scheduling: Can you schedule employee with large gaps in the day? Sufficient time between visits to “use time effectively for their own purposes?”



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## Mileage/Expenses

- ◆ FLSA requires employee’s compensation to be “paid finally and unconditionally” or “free and clear.”
- ◆ An employee’s wages are not considered “free and clear” if “the employee [pays] directly or indirectly to the employer...the whole or part of the wage delivered to the employee.” 29 C.F.R. § 531.35



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## Mileage/Expenses

- ◆ Mileage (wear on automobile, cost of gas, etc.) is an expense the employee incurs on your behalf. Can lead to minimum wage issues.
- ◆ Need to consider reimbursement. DOL does not require you to pay IRS mileage rate.
- ◆ In DOL Audits, DOL looks to see if some mechanism to reimburse expenses.



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## Misclassifying Workers

- ◆ Misclassifying employees is a common mistake.
- ◆ Often a result of doing what other providers are doing.
- ◆ Contractors are not entitled to overtime.
- ◆ Classification has been an area of DOL and IRS focus for several years.



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## Misclassifying Workers

- ◆ DOL recently sued a home health agency for misclassifying employees as independent contractors.
  - ◆ Successful Aging Care Net, Inc. (PA): Ordered to pay \$4.4 Million in back wages and liquidated damages for failing to pay overtime. DOL alleged employer had misclassified home health aides and other employees as independent contractors.
- ◆ DOL has a website dedicated to misclassification. <https://www.dol.gov/agencies/whd/flsa/misclassification>



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## Misclassifying Workers

- ◆ Employee misclassification is an area of significant DOL focus.
- ◆ Misclassification impacts more than just employee wages.
  - ◆ Creates a significant tax issue as well.
- ◆ Issue can come to DOL's attention through unemployment hearings. When unemployment hearing determines a "contractor" they may report this to the local DOL office.



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## Misclassifying Employees

- ◆ For homecare employers, the worker is usually an employee.
- ◆ Existence of a contract is not determinative. DOL looks at the "economic realities."
- ◆ Facts of the relationship, not what you call the employee is what controls.



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## Misclassifying Employees

- ◆ **YOUR WORKERS ARE FAR MORE LIKELY EMPLOYEES THAN CONTRACTORS.**
- ◆ Seek advice of counsel if you think a worker is a contractor and not an employee.



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## Thinking Salary=Exempt

- ◆ Some employers pay their aides, LPNs and RNs a salary, because they believe that eliminates the need to pay overtime.
- ◆ Paying an employee a salary, by itself, does not make the employee exempt.



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## Thinking Salary=Exempt

- ◆ *Salary basis of payment* is **one** element of the “white collar” exemptions. Employee must meet the job duties requirement **and** employee must be paid on the salary basis payment.
- ◆ Paying a salary to an employee whose job duties do not meet the test does not make the employee exempt.



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## Failing to Aggregate Hours

- ◆ Company owns two agencies. They are held in different legal entities and have different EINs, but share many HR and administrative functions.
- ◆ Employee works 40 hours each week for both (80 total), but receives no overtime.



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## Failing to Aggregate Hours

- ◆ Creating two companies and allowing employees to work in both does not necessarily avoid overtime.
- ◆ Need to consider joint employment.



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## Failing to Aggregate Hours

- ◆ Joint employment addressed in 29 CFR part 791.
- ◆ Regulation updated in 2020. DOL published a final rule repealing it in its entirety on July 30, 2021.
- ◆ Currently, no regulation on joint employment.



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## Failing to Aggregate Hours

- ◆ “The focus of a horizontal joint employment analysis will continue to be the degree of association between the potential joint employers...”
- ◆ Factors upon which DOL has relied in the past:
  - ◆ Arrangement between employers to share employee.
  - ◆ One employer is acting in the interests of the other.
  - ◆ [O]ne employer controls, is controlled by, or is under common control with the other employer.”
- ◆ The last factor is often the most important.



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## Aggregating Hours

- ◆ Related Companies. Many homecare employers own two or more companies. Question: When do hours worked at companies need to be aggregated?
  - ◆ All facilities under common control of parent company
  - ◆ Entities share common President and BOD
  - ◆ HR Department "at times" provides administrative support to related entity HR staff.
  - ◆ VP of HR and several executives/managers have responsibility for more than one entity.



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## Aggregating Hours

- ◆ Related Companies. Many homecare employer own two or more companies. Question: When do hours worked at companies need to be aggregated?
  - ◆ Some personnel policies are the same (FMLA, workplace harassment, anti-nepotism)
  - ◆ Non-union employees throughout entity have common health care plan
  - ◆ Related entity job vacancies are posted within entity before publicly advertised



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## Aggregating Hours

- ◆ Need to very carefully consider how you handle employment in jointly owned entities.
- ◆ May be joint employers who must aggregate hours and pay overtime.
- ◆ Need to assess this on your own. DOL will review in an audit.



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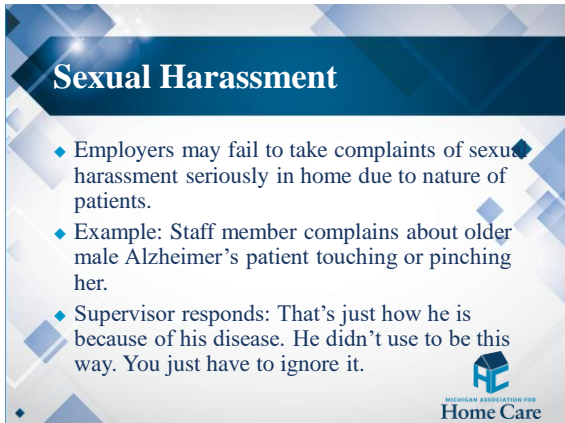
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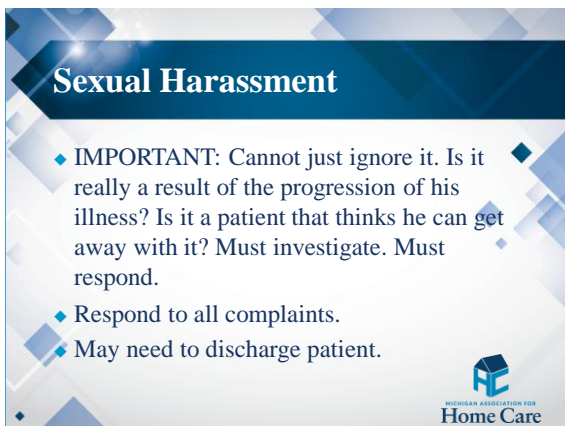
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## Sexual Harassment

*Hostile Work Environment*

1. Because of Sex
2. Unwelcome
3. Severe or Pervasive
  1. Offensive to the "Reasonable Person"
  2. SCOTUS: "Social context" should always be considered, laws don't establish a "general civility code"

Affirmative Defense Employer Liability: Employer was reasonable in prevention & correction, and employee was not.



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## Sexual Harassment

*Hostile Work Environment*

- ◆ Affirmative Defense Employer Liability: Employer was reasonable in prevention & correction, and employee was not.
- ◆ This is where having a clearly worded policy and procedure that is communicated to employees is important.
- ◆ The employee's failure to follow your policy and procedure creates a defense for the employer.



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## Sexual Harassment

- ◆ Another common mistake: Overlooking importance of training.
- ◆ Employers need to train staff regarding sexual harassment. Not just what it is or what is not, but on policies, procedures, appropriate responses.
- ◆ **Staff need to know they can come forward with complaints.** Managers need to know to treat all complaints seriously and respond accordingly.



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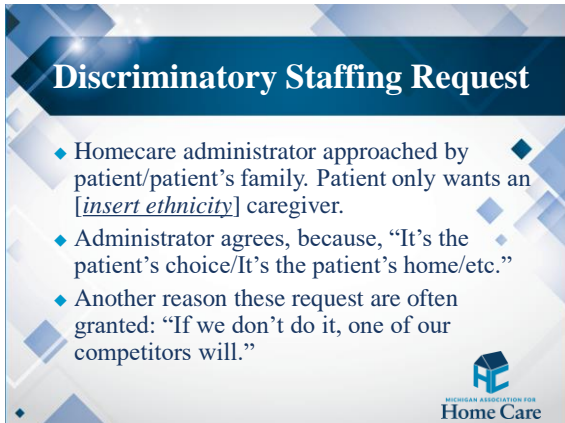
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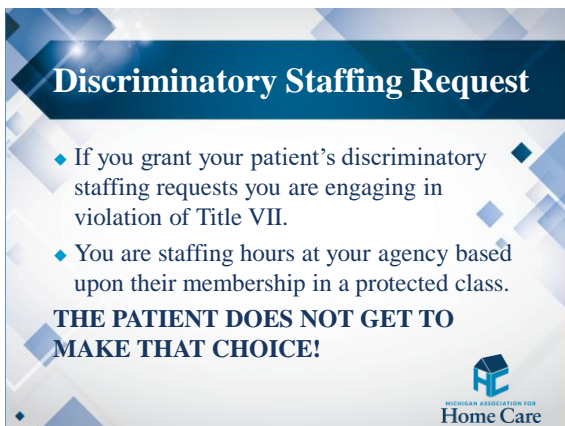
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## Discriminatory Staffing Request

- ◆ A patient can request a staff member who speaks a particular language.
- ◆ Language request cannot be a proxy for ethnicity.
- ◆ Client must accept any caregiver of any ethnicity who meets the requested language requirement.



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## Discriminatory Staffing Request

- ◆ EEOC has sued home health agencies, nursing homes and other health care providers for this type of discrimination.
- ◆ EEOC has won these lawsuits and the providers have paid large judgments.



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## Discriminatory Staffing Request

- ◆ **You must decline such a request.**
- ◆ You can attempt to educate the patient/patient's family.
- ◆ Need to be clear and unequivocal.
- ◆ Does not matter that competitors do it.
- ◆ If patient won't change request, decline to admit or discharge.



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**Harassment by Patients and/or Other In Home**

- ◆ Employee complains of discrimination by patient and/or patient’s family.
- ◆ Agency takes no action because “the patient’s home is his castle.”



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**Harassment by Patients and/or Others in Home**

- ◆ Patient’s/Family/other’s actions in the home can create a “hostile work environment.” Must investigate allegation in the same manner as if the alleged perpetrator was an employee.
- ◆ Patients and/or their families and friends may be free to act as they want in their home, but they are not free to harass your staff.



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**Harassment by Patients and/or Others in Home**

- ◆ You must also take action if your investigation concludes discrimination occurred.\*
  - ◆ Written Plan for Patient/Offender behavior going forward.
  - ◆ Failure to follow plan=IMMEDIATE DISCHARGE
- ◆ \*These steps apply to sexual harassment as well.



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## Harassment by Patients and/or Others in Home

- ◆ Discharge requires clear documentation and notice.
- ◆ Provide advance written notice to patient of discharge and basis for discharge.
- ◆ CoPs—include this in your discharge for cause policies.



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## Overlooking ADA

- ◆ Employee injured on job. As a result, employee is limited to lifting no more than 5 pounds. Agency terminates employee, because they “cannot do the job.”



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## Overlooking ADA

- ◆ Employer performing competency evaluations on employees. Employee having extreme difficulty performing BP check, due to sight and/or hearing. Employee says, “If I had one of those digital BP cuffs, I could do this.”



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## Overlooking ADA

- ◆ Need to be careful, because of the ADA. Termination may be appropriate, but must engage in a more formal process.
- ◆ EEOC directs employers to not spend time on existence of disability. Focus on question of accommodation.



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## Overlooking ADA

Issues

- ◆ Essential Functions?
- ◆ Reasonable accommodation?



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## ADA and Job Descriptions

- ◆ One of the factors considered in determining essential functions is that **the agency determined a particular function was essential.**
- ◆ You determine this in your written policies and job descriptions.
- ◆ Every job description must have a list of essential functions.
- ◆ Examples: driving, physical requirements (lifting, pushing, pulling, standing, etc.)



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## Inadequately Trained Managers

- ◆ Your managers/supervisors/leadership need to be well trained to recognize issues of harassment and discrimination and requests for accommodations.
- ◆ EEOC has stated in written guidance, “an individual does not need to mention the ADA or use the phrase ‘reasonable accommodation’” when seeking an accommodation under the ADA.



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## Inadequately Trained Managers

- ◆ EEOC has provided the same guidance regarding Title VII. The employee does not need to say they are seeking a religious accommodation or mention Title VII.
- ◆ Managers/supervisors/leaders need to be aware of the requirements of the ADA and Title VII so that they can recognize when an employee may be seeking an accommodation.



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# DISCIPLINE AND DISCHARGE



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## Failing to Document Discipline

- ◆ Employee fired for performance issues. Sues provider for discrimination. Provider's file has no record of any prior discipline. When asked, employer says, "She was a single mom and we didn't want to be too hard on her."



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## Failing to Document Discipline

- ◆ If discipline is not documented, hard to argue misconduct or poor performance as a basis for discharge.
- ◆ EEOC and/or plaintiff's attorneys will not give employer the benefit of the doubt.



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## Failing to Document Discipline

- ◆ Generally three *documented* steps. Example.
  1. Written warning
  2. Written plan of improvement/suspension/etc.
  3. Discharge



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## Failing to Document Discipline

- ◆ Documentation should be clear:
  - ◆ Why is employee being disciplined?  
Rule/performance standard, facts of violation
  - ◆ What are the consequences for a reoccurrence or future problem?
  - ◆ What is the expected outcome?
  - ◆ When used, clear, objective Performance Improvement Plan.



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## Failing to Document Discipline

- ◆ When meeting with employee regarding discipline—always have two individuals present (not counting the individual who is the subject of discipline).
- ◆ Having two people present for discipline provides another witness.
- ◆ Report employee to regulatory body?



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# FMLA ERRORS



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### Not Following FMLA Policy

- Employee requests to take PTO over the holidays. Request is denied due to other, more senior, employees having already requested time off. Employee schedules medical necessary surgery and requests FMLA. Although surgery was medically necessary, it could have been scheduled long before or after Christmas. It was not urgent.



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### Not Following FMLA Policies

- Provider denies request, because the employee clearly scheduled the surgery to get time off that had been denied. Employer does not consult or follow its FMLA policies.
- Employer should not have just cavalierly denied request.



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### Not Following FMLA Policies

- Employee required to provide 30 days' notice for foreseeable leave.
- Employee expected to consult with the employer and make a reasonable effort to schedule leave in a manner that does not unduly disrupt the employer's operations.
- This is important for leave for surgery or other healthcare that is flexible on scheduling.



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## Not Following FMLA Policies

- ◆ If: (i) agency is subject to FMLA;
- (ii) employee qualifies for FMLA;
- (iii) employee is making a request for FMLA

you need to carefully consider the request. If you deny, must do so in compliance with FMLA.

Also need to be careful with employee upon return to avoid retaliation claim.



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## Not Following FMLA Policies

- ◆ Throughout process, follow your FMLA policies. Make sure that you follow, and require the employee to follow, each required step. Document each step as you proceed.
- ◆ Documentation is very important in intermittent leave cases.
- ◆ Clear documentation needed to prove you followed the requirements of the FMLA and your policies.



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## Not Training Management

- ◆ Management should be trained on FMLA and agencies policies and procedures.
- ◆ Management must understand the importance of responding to requests appropriately.
- ◆ Must understand documentation requirements, etc.
- ◆ Must understand no retaliation.



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### Not Properly Designating FMLA Leave

- ◆ Provide employee notice designating leave. Required to issue notice designating leave as FMLA within five (5) business days of when employer has enough information to make decision.
- ◆ Failure to issue notice can be the basis for action.
- ◆ Failure to properly and timely designate leave as FMLA may also lead to employee being entitled to additional leave.



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### Not Tracking FMLA Leave Taken

- ◆ This is especially important in intermittent leave situations.
- ◆ Need to know how much time employee has taken and how much still available. **NEED TO KNOW WHEN ALL FMLA LEAVE HAS BEEN USED.**
- ◆ When all leave used, FMLA no longer applies.



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### Not Considering ADA With FMLA

- ◆ EEOC considers leave to be a reasonable accommodation. This may mean that when an employee's FMLA has been exhausted and they ask for more leave to allow them to recover, you need to consider whether continuing leave would be a reasonable accommodation.
- ◆ A number of courts have adopted the EEOC's position on leave as a reasonable accommodation. This extends FMLA.



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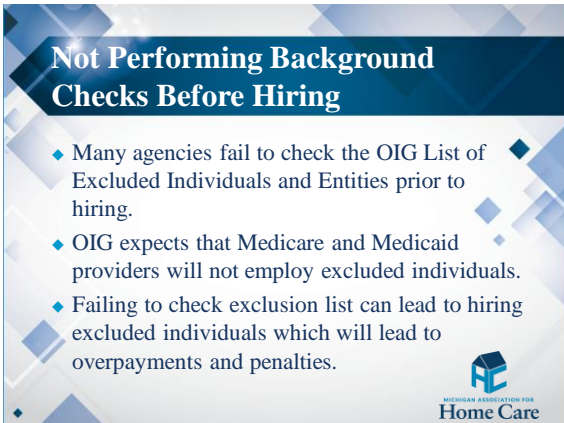
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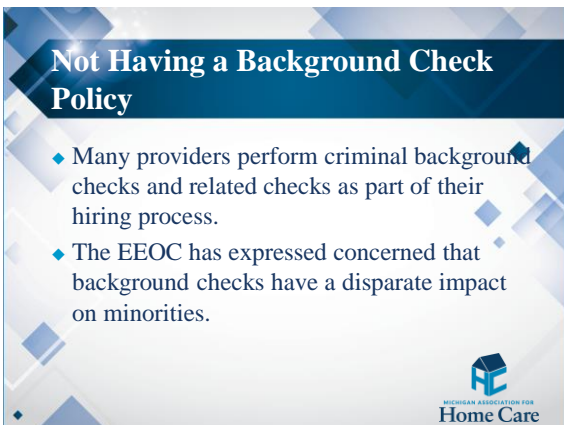
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## Not Having a Background Check Policy

- ◆ Providers should have a background check policy.
  - ◆ Policy should explain your “business rationale.”
  - ◆ Disqualify based upon convictions, not arrests.
  - ◆ List disqualifies convictions.
  - ◆ Follow policy as written.
  - ◆ Only exceptions are those provided in the policy.
  - ◆ No Ad Hoc decisions.



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## Failing to Follow Personnel Policies

- ◆ Failing to follow your policies can be a significant issue. Your policies make it clear you knew what you were supposed to do, but you failed to do so.

**Always follow the policy as written. No exceptions.**

If a situation makes you realize policy is no longer appropriate, change the policy.



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# The End



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