

# Calling HR

Melissa Lucas JD, DNP, MBA, CRNA

# What is HR

- HR, or Human Resources, is the department within a company responsible for managing its workforce, from recruiting and hiring to training, compensating, and developing employees. HR departments handle administrative tasks like payroll and benefits, enforce company policies, ensure legal compliance with employment laws, and foster a positive workplace culture by addressing conflicts and promoting employee well-being.

# HR Core Functions

- The responsibilities of a human resources department can be broken down into several key functions:
- Recruitment and staffing
- Compensation and benefits
- Training and development
- Employee relations Performance management:
- Compliance and policy enforcement: (ask for the policy)
- Have you read the policy book?

# Evolution of HR

- Historically, HR was a more administrative, "personnel" department focused on compliance and paperwork. However, modern HR is much more strategic, acting as a business partner to align workforce goals with the company's overall mission. This shift has been driven by technology, data analytics, and the recognition that a company's success is directly tied to the engagement and productivity of its employees.
- Strategic human capital

# Why is HR important

- An effective HR department is critical for several reasons:
- Maximizes productivity: By hiring the right people and ensuring they have the tools and training to succeed, HR helps optimize performance and efficiency.
- Reduces risk: HR protects the company from legal issues and financial penalties by ensuring compliance with all employment laws.
- Fosters positive culture: HR initiatives related to wellness, diversity, and conflict resolution help create a work environment that boosts morale and retention. (unless going to a Coldplay concert)
- Aids in growth: For growing companies, HR is essential for managing the increasing volume of personnel tasks and attracting the talent needed to scale the business

# Legal issues and HR

- Many legal issues in the workplace interface with human resources.
- **The symbiotic relationship:**
- HR creates and implements policies and procedures that govern employee relations.
- Legal provides the framework of employment laws and regulations that HR must follow.
- A strong partnership protects the company from costly litigation, regulatory fines, and reputational damage.
- It fosters a fair, ethical, and well-managed workforce.

# Facebook

- I posted on Facebook questions CRNAs wanted addressed with HR.
- I learned many people confuse HR and Legal.
- Not unusual
- There is a bit of overlap, but differences also.
- Let's review the differences and then look at some issues presented.

- Human Resources (HR): Focuses on the "people" side of the business.
  - Manages the employee lifecycle, from recruitment and development to offboarding.
  - Creates and nurtures a positive, productive company culture.
- The Legal Department: Focuses on the "company" side, specifically on protecting the business's interests.
  - Ensures legal compliance and navigates potential legal risks.
  - Acts as legal counsel and represents the organization in legal matters.

# HR focus

- A proactive, employee-centric approach
- Employee Relations: Fosters a positive work environment, addresses employee concerns, and manages conflict.
- Culture and Engagement: Designs initiatives to improve employee morale, satisfaction, and retention.
- Strategic Growth: Develops talent acquisition, training, and performance management strategies to support business objectives.

# Legal focus

- Legal: A reactive, risk-averse approach
- Risk Mitigation: Identifies and minimizes legal risks related to employment practices.
- Compliance: Interprets and applies employment law to ensure the company adheres to federal, state, and local regulations.
- Representation: Defends the company in legal disputes and litigation, such as discrimination or wrongful termination lawsuits.

# HR Main Objectives

- HR objectives
- Maximize employee productivity and engagement.
- Ensure fair and consistent application of company policies.
- Build a strong, ethical, and productive workforce.

# Legal Main Objectives

- Legal objectives
- Minimize legal and financial liability for the company.
- Ensure compliance with all applicable laws and regulations.
- Protect the company's reputation and intellectual property.

# Areas of collaboration

- Necessary and healthy partnership
- Policy Creation: HR develops policies (e.g., employee handbooks, remote work) while Legal reviews them for compliance and legal risk.
- Workplace Investigations: HR conducts internal investigations into employee misconduct, while Legal offers guidance to ensure fairness and reduce liability.
- Termination Decisions: Both departments collaborate to ensure terminations are legally defensible and consistent with company policy.
- Training: HR develops and implements training programs on topics like harassment and ethics, which Legal reviews for accuracy and relevance.

# When HR calls legal:

- Specific situations requiring legal counsel
- Complex terminations: Any firing that could be perceived as retaliatory or discriminatory.
- Employee lawsuits: A current or former employee files a formal complaint with an administrative agency or court.
- Changes in law: When new regulations at the federal, state, or local level impact employment practices.
- High-risk decisions: Matters involving executive compensation, major reorganizations, or collective bargaining.
- Interpretation of contracts: Reviewing employment contracts, severance agreements, and non-compete clauses.

- Let's look at some of the specific questions asked by our colleagues:

- What constitutes assault?

Yikes! If your job is the reason you are asking this question, perhaps it is time for a new job??

Many people confuse assault and battery.

Important note: Assault and battery can be a tort or a crime. They can result in a civil or a criminal case.

# Assault

- A threat or use of force against another person so as to instill in such person a reasonable fear of imminent harm.

# Battery

- (1) an act, done by the defendant,
- which is (2) intended to and does bring about
- (3) physical contact with the plaintiff, which is either harmful or offensive.

  

- Everything in the law has elements that must be satisfied

# Intent

- With intentional torts, intent is the mental element of the tort. What it means is that the defendant must act with intent to bring about a set of circumstances that, under the law, meets one or more of the other physical elements of the tort.
- This is almost always proven and tied to the objective physical evidence.

# Transferred intent

- Surgeon throws an object meaning to scare but not hit someone. You can transfer the assault intent to battery
- Surgeon throws something and hits Mary instead of John. Can transfer the intent for the battery of John to Mary

# papier-mâché plaintiff

- If the intent was a black eye, but the result was a cracked skull, liability still exists. The intent speaks to the action, not the result.

# Next Question: Hostile Work Environment

- Hostile work environment for 1099
- Do mda authored op eds constitute hostile work environment?
- Instrument throwing and screaming hostile work environment?

# Hostile Work Environment

- A hostile work environment is created by unwelcome, discriminatory conduct that is severe or pervasive enough to make the workplace intimidating, abusive, or offensive to a reasonable person. For a workplace to be legally considered "hostile," the harassment must be based on a protected characteristic, such as race, sex, age, disability, or religion.

# Conduct must be:

- Based on a protected characteristic: The harassment must be discriminatory and target a person's membership in a protected class, including:
  - Race, color, or national origin
  - Religion
  - Sex (including pregnancy, sexual orientation, and gender identity)
  - Age (40 and older)
  - Disability
  - Genetic information
- Severe or pervasive: The behavior must be serious or frequent enough to create an abusive atmosphere. While isolated incidents are generally not enough, a single, extremely serious event can qualify. The law does not protect employees from general rudeness or isolated annoyances.
- Objectively offensive: The environment must be one that a "reasonable person" in the victim's position would find hostile or abusive.
- Affects employment terms or performance: The behavior must interfere with an employee's work performance or create an intimidating environment.
- Employer responsibility: The employer knew or should have known about the harassment and failed to take effective, corrective action

# Hostile conduct can come from supervisor or coworker and includes:

- Verbal harassment: Offensive jokes, slurs, or demeaning comments targeting a person's protected characteristic.
- Sexual harassment: Unwelcome sexual advances, unwanted touching, or sexually suggestive comments or materials.
- Bullying and intimidation: Threats of violence, ridiculing, or repeatedly insulting an employee.
- Displaying offensive materials: Sharing or displaying images, symbols, or cartoons that are offensive to a particular protected group.
- Sabotage or exclusion: Deliberately interfering with someone's work, excluding them from important meetings, or ostracizing them because of a protected characteristic.
- Retaliation: Punishing an employee for reporting discrimination or harassment.

# Hostile vs toxic work environment

- A toxic work environment involves negative factors that affect morale and productivity, such as gossip, poor communication, or general favoritism. While unpleasant, these actions are not illegal unless they are tied to a protected characteristic.
- A hostile work environment is an illegal form of harassment that specifically targets an employee based on a protected trait and is severe or pervasive enough to create an abusive atmosphere.

# Next question

- Who is above Hospital Administration?
- Question is a bit cryptic, but we can assume they want to take a complaint higher perhaps?
- Hospital chain of command
- Administration is typically DON, COO, CFO, CEO
- Above administration would be Board of Directors:

# Board of Directors

- primary responsibility is governance
- Made up of community leaders, with representation from doctors and nurses as well as the private sector and government offices,
- Tasked with making decisions about the long-term goals of the facility and strategic planning, but also hires and sets the salary for the CEO and other executives.
- They rely on data and reports from hospital executives to make their decisions, so they are in frequent dialogue with representatives from administrative, medical, and regulatory leaders.

# Not all Hospitals have a BOD

- nonprofit hospitals are required by law to have a board of directors
- many for-profit hospitals do not, as their structure and ownership may not necessitate one.
- The requirement for a board is tied to the hospital's tax-exempt status and its commitment to serving community interests rather than private ones.

# Contact the Board of Directors?

- Hospital website
- Governance section
- Probably email
- Consider the reason you are contacting them:
  - Have documentation
  - Is it behavioral?
  - Is it fraud?
  - Consider other routes also: Board of Nursing, Board of Medicine

# Refusing FMLA

- Most laws have elements that must be met. FMLA is not an exception. The question was: Can my employer refuse FMLA?
- FMLA:

the Family and Medical Leave Act, is a federal law that provides eligible employees with up to 12 workweeks of unpaid, job-protected leave each year for certain family and medical reasons. This leave is for qualifying events like the birth or adoption of a child, the serious health condition of the employee or a family member, or military family leave. The FMLA requires employers to maintain an employee's health benefits during the leave and allows the employee to return to the same or an equivalent.

# FMLA

- Not everyone is required to offer FMLA and not everyone gets FMLA:
- Required Elements:
- You may not be eligible for FMLA leave if you have not worked for the employer for at least 12 months, or have not worked at least 1,250 hours in the 12 months prior to your leave
- Your employer must have 50 or more employees within a 75-mile radius to be subject to FMLA

# FMLA Denials

- **Lack of Proper Notice:**

- You must provide your employer with proper notice for the need for FMLA leave. An employer may delay or deny leave if you don't give timely or sufficient notice, unless you have a reasonable excuse.

- **Insufficient Documentation:**

- Your employer can deny FMLA leave if you fail to provide a complete and sufficient certification from a healthcare provider to support your serious health condition.

- **Leave Exhaustion:**

- You cannot be granted FMLA leave if you have already used your full 12 weeks of leave within the current 12-month period.

- **Not a Qualifying Reason:**

- FMLA leave is for qualifying reasons, such as a serious health condition. If the reason for your leave does not meet the FMLA criteria, the leave can be denied.

# What is proper notice?

- For Foreseeable Leave
  - **30 Days' Notice:**
  - If you know in advance that you will need FMLA leave, you must provide your employer with at least 30 days' advance notice.
  - **Example:** If you are planning surgery, notify your employer at least 30 days before your surgery date.
- **Less than 30 Days' Notice:**
  - If you cannot give 30 days' notice, you must inform your employer as soon as you can, typically the same day you learn of the need for leave or the next business day.
  - For Unforeseeable Leave
  - **As Soon as Practicable:** If you need FMLA leave for an unexpected reason (like a family member's accident or a chronic condition flare-up), you must inform your employer as soon as it is possible and practical to do so.

# Qualifying reasons

- For the employee or their family:
  - **Birth and care of a newborn:** For the birth of a son or daughter and to care for the child.
  - **Placement for adoption or foster care:** To care for the newly placed child.
  - **Care for a family member with a serious health condition:** To care for a spouse, son, daughter, or parent.
  - **Employee's own serious health condition:** When a serious health condition makes the employee unable to perform their job functions.

# If denied, you could:

- **Submit Complete Documentation:**
  - Ensure that the medical certification provided by your healthcare professional is complete and sufficient to support your request.
- **Communicate with Your Employer:**
  - Keep your employer informed about the need for leave and the status of your certification.
- **File a Complaint:**
  - If your employer unlawfully denies your leave request or retaliates against you for exercising your FMLA rights, you can file a complaint with the US Dept of Labor.

# At Will Employee

- **Employment at Will**
- The traditional rule of at-will employment is that an employer may fire an employee at any time and for any reason, or for no reason at all. At-will employment remains the default rule today, although the rule can be limited by contract or by specific antidiscrimination statutes.

# Contracted Employee

- Written Contracts
- A written contract can overcome the at-will rule and limit an employer's ability to terminate an employee. Typically, a written contract will specify the duration of the employment, limit the grounds for termination, or both.
- If the contract includes a fixed duration, the employer is obligated to retain the employee for the length of the contract.
- A contract might limit the grounds for termination by specifying the reasons why the employee could be fired, for example, for failing to meet sales quotas. But sometimes a contract will simply say the employee may be terminated for good cause, without specifying what good cause means.

# Contracted employee

- Courts generally interpret good cause to mean significant misconduct or poor job performance. In either case, the problems must be substantial enough to interfere with the employer's business. Occasional, minor issues usually don't equal good cause.
- if a written contract specifies the duration of the employment, but doesn't address the grounds for termination, most courts will infer that the employee may only be terminated for good cause.

# Implied Contract

- No written or oral contract?
- You may have an implied contract in the employee handbook
- In most states, language in an employee handbook can form an implied contract of employment. The handbook language must be sufficiently definite to constitute an offer with accompanying job security, and in most states the employee must read the offer and accept it by entering or continuing employment.
- Typically, the handbook will say termination for good cause

# Employee vs Independent Contractor

- The difference between employees and independent contractors is one of the fundamental distinctions in employment law.
- Court Tests to determine:
  - The Control test
  - The Economic realties test

# The Control Test

- This test focuses on the degree of control that the principal may exercise over the work. If the principal can control both the result of the work and the manner and means of accomplishing it, then the worker is probably an employee. On the other hand, if the principal can direct the result but not the manner and means, then the worker is more likely an independent contractor.
- Courts might consider many factors in applying the control test. Some of the most important are:
  - whether the principal provides the worker's training or tools,
  - whether the worker has his own business,
  - whether the relationship between the principal and the worker is for a single job or for an indefinite time, and
  - whether the work is part of the principal's regular business.

# The Economic-Realities Test

- This test asks whether the worker is in business for himself or whether he relies on the principal for the opportunity to work. The test uses some of the same factors as the control test, but it emphasizes finances more than control. Some of the most important factors include:
  - whether the worker's opportunity for profit or loss depends on the principal's decisions or the worker's business skill,
  - the worker's and the principal's relative investments in tools or materials, and
  - whether the working relationship is temporary or **indefinite**

# IRS tests to decide:

- **Behavioral control**
- **Employee:** The company controls what the worker does and how they do it. This includes providing instructions, training, and setting work hours and location.
- **Independent Contractor:** The worker has greater control over their schedule and methods. The client can only control the final result of the work.

# IRS tests to decide

- **Financial control**
- **Employee:** The business controls financial aspects like how the worker is paid, whether expenses are reimbursed, and who provides tools and supplies.
- **Independent Contractor:** The worker has a financial investment in their business. They may have unreimbursed expenses, advertise their services, and have the potential for profit or loss.

# IRS test to decide

- **Relationship of the parties**
- **Employee:** This is often a permanent, long-term relationship, and the work is integral to the business's core function.
- **Independent Contractor:** The relationship is usually for a specific, project-based period and is not central to the client's day-to-day operations.

# Is it just w2 vs 1099?

- No.
- Review: w2 taxes out, 1099 no
- Also, not just what the contract says

# Why does it matter?

- Misclassification can lead to significant legal and financial consequences, including fines and back taxes.

# The benefits of being an employee

- **Stability and Security:** A regular, predictable income and indefinite employment.
- **Benefits:** Access to health insurance, retirement plans, and paid time off.
- **Simpler Taxes:** No need to manage and pay estimated quarterly taxes; the employer handles withholding.
- **Legal Protections:** Coverage under federal and state labor laws, including minimum wage, overtime, and anti-discrimination laws.

# The benefits of being an independent contractor

- **Autonomy and Flexibility:** Control over your schedule, work location, and business methods.
- **Higher Earning Potential:** Can set your own rates and take on multiple clients to increase income.
- **Tax Deductions:** Can deduct business-related expenses to lower taxable income.
- **Work Variety:** Can choose which projects and clients to work with, allowing for a more diverse range of experience.

# The risk of misclassification

- **For the business:** Misclassifying employees as independent contractors to avoid paying taxes and benefits can result in significant penalties from the IRS and Department of Labor. This includes back taxes, fines, and legal fees.
- **For the worker:** A misclassified employee misses out on crucial benefits and legal protections, such as minimum wage, overtime pay, and workers' compensation.

# Key Points

- Your classification as an employee or independent contractor has major implications for your financial security, legal rights, and overall work-life balance.
- The relationship is not determined by a simple contract but by the reality of the working arrangement, with factors like control and permanency being key indicators.
- **For workers:** Understand your status and know your rights. If you believe you are misclassified, you can file a Form SS-8 with the IRS.
- **For businesses:** Be proactive in correctly classifying your workers to avoid costly penalties and ensure legal compliance.

# Isn't OT mandatory?

- The basic rule for overtime is that an employer must pay one and one-half times the employee's regular hourly rate for all hours worked over 40 in a week.
- A salaried employee's regular hourly rate is her salary divided by the number of hours the salary is intended to cover. For example, a salary of \$1,200 for a 40-hour week equals a regular hourly rate of \$30 per hour.
- But.....

# What is compensable time?

- A frequent issue in wage-hour law is figuring out what time is compensable, that is, what time or activities should count as working hours. This calculation can influence an employee's total earnings, as well as her hourly and overtime rates.

- In general, an employee is entitled to compensation for a continuous workday, which is the time between the start and the end of the employee's principal activities for the day. Any activities that are integral and indispensable to a principal activity are themselves treated as principal activities.

- Under a Fair Labor Standards Act, or FLSA, provision called the Portal-to-Portal Act, an employee's principal activities don't include time spent traveling to and from the place where the principal activities are performed. Compensable time also excludes preliminary or postliminary activities that are merely incidental to the employee's job.
- (1099 considerations here)

# What is considered incidental?

- For example, one United States Supreme Court case involved workers who cut meat in a processing plant. The workers needed sharp knives to do their jobs. Therefore, time the workers spent sharpening their knives was compensable time, because it was indispensable to their principal activity of cutting meat.

- But in another case, from another meat-packing plant, the Court held that time waiting to put on protective gear in the morning wasn't compensable. The workers had to wear protective gear to perform their principal duties of cutting meat. Time spent putting on the gear was indispensable to their duties and therefore compensable.
- But time spent waiting to put the gear on was different. Waiting was sometimes necessary and sometimes not, depending on the employee and the situation. But unlike putting on the gear, waiting wasn't integral to the employees' work on the production line. In fact, as the Court pointed out, waiting was two steps removed from the primary job of cutting meat. Thus, waiting was a preliminary activity, not a compensable principal activity.

# What is an exempt vs nonexempt worker

- The FLSA exempts certain employees from its provisions. Some employees are exempt from both the minimum-wage and overtime rules, while others are only exempt from overtime. Some of these exemptions are industry specific, ranging from maple-syrup processors to professional baseball players.
- But usually when people talk about exempt employees they're referring to the largest FLSA exemption, which says that bona fide executive, administrative, and professional employees are exempt from both the minimum-wage and overtime requirements.

# Exempt Employee

- To fall under this exemption, an employee generally must meet two criteria. First, the employee must earn a salary of at least \$684 per week, or just over \$35,000 per year.
- Second, the employee's primary duties must qualify as executive, administrative, or professional. These characterizations can be fact intensive and challenging, but there are some useful general principles.

- professional employees can be either learned professionals or creative professionals. Learned professionals are those whose primary duties require advanced knowledge in a field of science or learning. This knowledge can be gained through experience or through formal education, but it must be knowledge that can't be acquired at a high-school level.

- another way to identify exempt employees is through the highly compensated employee rule. This rule says an employee is exempt if, one, he earns at least \$107,432 per year; two, his primary duties consist of office or nonmanual work; and three, he regularly performs duties that would qualify as executive, administrative, or professional. The combination of nonmanual work and a high salary makes it unnecessary to inquire too specifically into whether the employee's work falls in the executive, administrative, or professional category.

- We are exempt employees
- However, can we still get OT.
- Recall the contract lecture! Anything can be put in

# Can OT be mandated

- Can my employer make me stay to finish a case?
- employers can generally require exempt employees to work mandatory overtime hours without additional pay under the Fair Labor Standards Act (FLSA)
- Some states have their own laws in addition
- For example, Pa

# PA Act 102

- the Prohibition of Excessive Overtime in Health Care Act. This law prohibits forcing employees in healthcare to work beyond their agreed-upon, regularly scheduled daily shifts, with exceptions only for
  - unforeseen emergencies
  - unforeseen staffing shortages
  - or when a patient care procedure is still in progress.

# Holding back vacation time due to shortages

- An employer can refuse a vacation request due to shortages or other legitimate business reasons.
- Legitimate Business reason is insufficient staffing,
- There is no federal law requiring employers to provide vacation time.
- The right to vacation and the conditions under which it is granted are primarily determined by:
  - company policy, employment contracts, or collective bargaining agreements. Employees should review their company's PTO policy, communicate with their manager or HR, and understand that denial is possible if it seriously disrupts business operations

- Understand that in most at-will employment situations, employers can deny requests for operational reasons, but they should apply policies consistently to all employees.
- Takeaways:
- *must have a legitimate, documented business reason and apply company policies consistently to all employees.*
- *Insufficient staffing, overlapping requests, and PTO blackout periods are valid reasons for denial.*

# Can I leave during lunch

- When asking questions like this, consider things such as:
- Laws: Federal & State
- Policy

# Can I leave during lunch? Fed law

- Federal Regulations (FLSA)
- The FLSA does not mandate that employers permit employees to leave the premises during a meal break.
- An employer is not required to pay for meal periods that are at least 30 minutes long, but only if the employee is completely relieved of all duties.

# State Laws

- State Laws
- **If allowed to leave:**
  - The employee is generally free to leave the premises, and the break is unpaid.
- **If restricted from leaving:**
  - If an employee is forced to stay on the employer's premises and remain on-call or available for work during their meal break, that time is generally considered "work time" and must be paid.

# Policy

- **Hospital policies vary:**
- Some hospitals explicitly prohibit staff from leaving the facility during lunch to ensure availability for patient care.
- **"On-call" status:**
- Healthcare employees are often considered "on-call" due to the urgent nature of patient care.
- **Patient abandonment:**
- Leaving the hospital premises during a shift could be considered patient abandonment if there is no one to cover for the employee.

# Let's talk about loyalty

- We touched on this in contracts with tortious interference
- You have a duty of loyalty to your employer

# Common Scenario

- You work for anesthesia group A
- You decide to put in your resignation and plan to work for group b
- During your remaining time you do the following:
  - Tell your co workers about additional openings with group b
  - Entice them with additional salary and benefits
  - Try to get co workers from group A to go with you to group B
  - THIS IS A BREACH OF THE DUTY OF LOYALTY

- Even if no one goes with you – it is still a breach
- Group A could withhold your pay for the time period when you tried to persuade others to go with you.

# Do I get pumping breaks

- Yes
- Even exempt employees are covered
- PUMP Act
- Federal law
- Private area
- Break time
- No retaliation

# Immunocompromised - working conditions

Hard to answer without knowing the issues

ADA covers disabilities

Reasonable working accommodations

Employers also have rights here if accommodations can't be made etc.