

**ARE YOU READY
FOR THE RIDE?**

**HUMAN RESOURCES
IN 2010 AND BEYOND**

April 28, 2010

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Wood Crapo LLC**

COULD YOU USE A TUNE UP?

I. Hiring.	Yes	No
A. Advertisements.		
1. Advertisements should avoid all references to race, color, religion, sex, national origin, age, if the individual is 40 or over, or disability, unless based upon a bona fide occupational qualification or required by the government for security reasons. See Utah Code Ann. §34-35-6.	<input type="checkbox"/>	<input type="checkbox"/>
2. Subtle references - requesting "college students" or "recent college graduates" may be seen as discriminating against older persons.	<input type="checkbox"/>	<input type="checkbox"/>
3. Advertisements should indicate that the employer is an equal opportunity employer.	<input type="checkbox"/>	<input type="checkbox"/>
4. Where you advertise is important; advertisements should be placed in a newspaper directed to the whole community.	<input type="checkbox"/>	<input type="checkbox"/>
5. "Word of mouth" advertising may be circumstantial evidence helping to establish a reasonable inference of discriminatory treatment of a particular class.	<input type="checkbox"/>	<input type="checkbox"/>
B. Employment Applications.		
1. Employers should preserve the right to discharge employees "at will."	<input type="checkbox"/>	<input type="checkbox"/>
2. Some questions on an application form are seen as devices to screen out certain protected groups.		
a. Do not ask about sex, race, height or weight.	<input type="checkbox"/>	<input type="checkbox"/>
b. Do not ask applicants to submit a photograph or physical description of themselves.	<input type="checkbox"/>	<input type="checkbox"/>
c. The application form should contain a statement of the employer's policy of complying with all anti-discrimination laws.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
d. The application form should include a certification by the applicant that all information is true and accurate as well as a warning that falsification is grounds for disqualification for consideration of the job or for discharge from the job.	<input type="checkbox"/>	<input type="checkbox"/>
e. The employer should obtain authorization from the applicant for prior employers to provide information about the application, and the application form should include a statement releasing all persons from liability relating to disclosure of such information.	<input type="checkbox"/>	<input type="checkbox"/>
f. The application form should include a statement that the applicant recognizes his/her employment can be termination at any time, with or without cause, at either his/her option or at the option of the employer.	<input type="checkbox"/>	<input type="checkbox"/>
g. The application form should include an acknowledgment by the applicant that only specific officers of the employer have authority to enter into employment contracts	<input type="checkbox"/>	<input type="checkbox"/>
3. Pre-Employment Inquiries.		
a. Interviewers and supervisors should be trained.	<input type="checkbox"/>	<input type="checkbox"/>
(1) Provide a list of do's and don'ts - makes the interviewer's job easier.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Spell out in writing the authority interviewers and supervisors have.	<input type="checkbox"/>	<input type="checkbox"/>
b. Subjects to be avoided.	<input type="checkbox"/>	<input type="checkbox"/>
(1) Sex, marital status, child rearing, child bearing.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Race.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(3) Medical examinations and inquiries are governed by the ADA. Accommodations should be made for all qualified applicants with disabilities.	<input type="checkbox"/>	<input type="checkbox"/>
(a) No pre-employment medical screening.	<input type="checkbox"/>	<input type="checkbox"/>
(b) Post-employment-appropriate to determine if employee can perform job with or without accommodation.	<input type="checkbox"/>	<input type="checkbox"/>
(4) Criminal convictions and arrests.		
(a) Convictions can only be a bar if a direct relationship to the requirements of the job.	<input type="checkbox"/>	<input type="checkbox"/>
(b) Arrests are an improper inquiry.	<input type="checkbox"/>	<input type="checkbox"/>
(5) Citizenship or birthplace - you must ask for necessary documentation to work in the United States and complete appropriate forms.	<input type="checkbox"/>	<input type="checkbox"/>
(6) Union affiliation.	<input type="checkbox"/>	<input type="checkbox"/>
(7) Religion.	<input type="checkbox"/>	<input type="checkbox"/>
(8) Political Party.	<input type="checkbox"/>	<input type="checkbox"/>
c. Employers should maintain, to extent feasible and desirable, at-will employee status by being careful about the statements that could be construed as creating long-term employment.	<input type="checkbox"/>	<input type="checkbox"/>
d. Educational requirements, tests or other job qualifications must be demonstrably related to successful performance.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
e. Employers cannot discriminate based upon conflicting military duties (i.e., Desert Storm)(Veterans Reemployment Rights Act).	<input type="checkbox"/>	<input type="checkbox"/>
C. Establishing the terms and conditions of employment.		
1. All positions should have current job descriptions that specifically identify the essential functions of the job.	<input type="checkbox"/>	<input type="checkbox"/>
2. Employers should avoid expressing salary in annual terms because of the inference that the employee is entitled to one year of guaranteed employment.	<input type="checkbox"/>	<input type="checkbox"/>
3. If an employment agreement contains a covenant not to compete, the covenant must be carefully drawn to protect only the legitimate interests of the employer.	<input type="checkbox"/>	<input type="checkbox"/>
a. The reasonableness of the covenant depends on several facts, including its geographical extent, the duration of the limitation; the nature of the employee's duties; and the nature of the interest which the employer seeks to protect, such as trade secrets, the goodwill of the business, or an extraordinary investment in the training or education of the employee.	<input type="checkbox"/>	<input type="checkbox"/>
b. Covenants which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable.	<input type="checkbox"/>	<input type="checkbox"/>
4. Employee Handbooks.		
a. Pros - best way to communicate policies and regulations.		
b. Cons - committing in writing to policies and procedures that may be legally binding.		

	Yes	No
c. The handbook should include a prominent disclaimer, preferably in bold type, that the handbook is not a contract; nevertheless, despite disclaimers, some courts have held that oral promises to the contrary can negate the disclaimer's effect.	<input type="checkbox"/>	<input type="checkbox"/>
d. The handbook should include a discussion on work rules.	<input type="checkbox"/>	<input type="checkbox"/>
(1) Do not state that an employee can only be terminated for just cause.	<input type="checkbox"/>	<input type="checkbox"/>
(2) State the list of rules is not all inclusive.	<input type="checkbox"/>	<input type="checkbox"/>
e. The handbook should contain a section on procedures for the handling of employee complaints.	<input type="checkbox"/>	<input type="checkbox"/>
f. The handbook should avoid describing formalized "probationary periods" because completion of these periods may infer some form of job security or tenure.	<input type="checkbox"/>	<input type="checkbox"/>
g. Union solicitation should only be forbidden during "working time" in "work areas."	<input type="checkbox"/>	<input type="checkbox"/>
h. The handbook should have a detachable receipt form acknowledging that the employee has received the handbook, has read it and will comply with its terms.	<input type="checkbox"/>	<input type="checkbox"/>
i. The handbook should be reviewed periodically by legal counsel to be updated.	<input type="checkbox"/>	<input type="checkbox"/>
j. A statement should be included that "the employer reserves the right to alter this document in the future at any time in the employer's sole discretion."	<input type="checkbox"/>	<input type="checkbox"/>
k. The handbook could include a merger clause to negate any contrary oral or written representations not contained in the handbook.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
l. If you have a handbook, it must contain your FMLA policies.	<input type="checkbox"/>	<input type="checkbox"/>
m. Your handbook should clearly state your policy against discrimination and harassment, notify employees where to complain, and assure them that they will not be retaliated against.	<input type="checkbox"/>	<input type="checkbox"/>
5. Personnel Policy and Supervisor Manuals.		
a. If supervisory or management personnel are provided with policy manuals and oral guidelines to assist in hiring, disciplining and terminating employees, care should be taken that the employer complies with those guidelines.	<input type="checkbox"/>	<input type="checkbox"/>
b. If the procedures are not followed, the policies and procedures could be used against an employer in litigation.		
6. Performance Evaluations.		
a. Inaccurate or mismanaged performance appraisals are one of the most common causes of unjust dismissal and discrimination lawsuits.		
b. The system should be as objective as possible.	<input type="checkbox"/>	<input type="checkbox"/>
c. Employees, and if possible two supervisors, should be required to sign the evaluation form, attesting that they have read it.	<input type="checkbox"/>	<input type="checkbox"/>
d. Evaluators must be accurate in evaluations.	<input type="checkbox"/>	<input type="checkbox"/>
(1) Do not give better evaluations than what is deserved.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Make clear that discipline and discharge can result from poor performance.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(3) Be sure to document all evaluations positive and negative	<input type="checkbox"/>	<input type="checkbox"/>
e. Statements either on the evaluation form or orally that could be construed to create a long-term contract of employment should be avoided.	<input type="checkbox"/>	<input type="checkbox"/>
f. Salary increases should be consistent.	<input type="checkbox"/>	<input type="checkbox"/>
7. Consistency, nondiscrimination and equal opportunity are essential.	<input type="checkbox"/>	<input type="checkbox"/>
8. Criteria for promotion should be established.	<input type="checkbox"/>	<input type="checkbox"/>
a. An employer may impartially base promotion or upgrading decision on factors in addition to a worker's relative ability of merit, such as seniority.	<input type="checkbox"/>	<input type="checkbox"/>
b. An employer is not expected to promote a worker who has been the source of disciplinary problems or who offers little promise of continued employment, but problems must be documented.	<input type="checkbox"/>	<input type="checkbox"/>
9. Procedures for promotion should be established.	<input type="checkbox"/>	<input type="checkbox"/>
10. Customer preferences are not determinative or relevant except in limited instances.	<input type="checkbox"/>	<input type="checkbox"/>
D. Disciplining		
1. Discipline does not necessarily lead to termination.	<input type="checkbox"/>	<input type="checkbox"/>
2. Employers should be prepared to demonstrate that discipline was merited under the circumstances.	<input type="checkbox"/>	<input type="checkbox"/>
3. A progressive documented discipline program is recommended, but employers should make clear that often immediate discipline is always an option.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
4. Employment practices should be periodically reviewed to determine that objective standards for decision making exist and that these standards are consistently applied so that similarly situated employees are dealt with in the same way.	<input type="checkbox"/>	<input type="checkbox"/>
5. Gender-differentiated codes of conduct are impermissible.	<input type="checkbox"/>	<input type="checkbox"/>
6. Examples of legitimate/non-discriminatory reasons for discipline.		
a. Inadequate performance. Were the expectations reasonable and communicated to the employee?		
b. Work rule violations.		
c. Insubordination.		
d. Personality, attitude, fighting, attendance.		
e. Illegal/dishonest conduct.		
f. Health and safety concerns.		
g. Elimination of job		
7. Employers should document factors considered in reaching decisions when handling discipline actions on a case-by-case basis.	<input type="checkbox"/>	<input type="checkbox"/>
8. Investigations of employee misconduct.		
a. Employee Polygraph Protection Act ("EPPA").		
(1) The EPPA restricts employers' rights to use lie detector tests to screen job applicants or to test current employees unless they reasonably suspect the employee of theft in the workplace or causing economic loss or injury to the employer's business.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(2) The EPPA exempts private security firms, drug companies and federal, state, and local governmental employees.	<input type="checkbox"/>	<input type="checkbox"/>
(3) Governmental employers may administer polygraph tests to private consultants and experts.	<input type="checkbox"/>	<input type="checkbox"/>
(4) The EPPA also:		
(a) Prohibits disciplining, discriminating, discharging or refusing to promote current employees based solely on results of a polygraph examination;		
(b) Authorizes civil suits and gives federal courts power to award legal (damages) or equitable (injunctions) relief;		
(c) Prescribes detailed testing procedures; and		
(d) Does not pre-empt state or local law which prohibits polygraph testing altogether or is more restrictive than the federal law.		
(5) The EPPA permits employers to require certain employees to submit to polygraph testing in conjunction with the investigation of theft in the workplace or other economic hard.		
(a) Employees who can be tested must have access to the property under investigation.		
(b) The employer must reasonably suspect the employee and must provide her/ him with a written statement setting forth the employer's reasons for testing particular employees.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(6) Employers violate the EPPA if they use instruments as a means of threatening employees even if no actual tests are made.	<input type="checkbox"/>	<input type="checkbox"/>
b. Drug and alcohol testing is permissible as a condition of hiring or continued employment and is not prohibited by the ADA.	<input type="checkbox"/>	<input type="checkbox"/>
(1) If tests are instituted, employers and management must submit to the testing themselves on a periodic basis. See Utah Code Ann. § 34-38-3.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Any testing is deemed work time for purposes of compensation and benefits for current employees.	<input type="checkbox"/>	<input type="checkbox"/>
(3) The employer must pay all costs of testing. See Utah Code Ann. § 34-38-5.	<input type="checkbox"/>	<input type="checkbox"/>
(4) A positive test result or refusal to submit to a test may be used by an employer as a basis for disciplinary or rehabilitative actions. See Utah Code Ann. § 34-38-8.	<input type="checkbox"/>	<input type="checkbox"/>
c. Employers who search employees to investigate possible misconduct may subject themselves to liability on one or more of the following theories: assault, battery, false arrest, false imprisonment, intentional infliction of emotional distress, trespassing, defamation and invasion of privacy.		
(1) If searches are conducted, the search must be reasonable and should not humiliate the employee.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Releases for searches should be obtained, and the search policy should be explained in the employee handbook.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
d. Any method used to investigate employee misconduct, such as fingerprinting, physical or electronic surveillance, employee interviews, etc., must not be directed towards specific groups; all employees in similar situations must be treated alike to avoid charges of unlawful discrimination.	<input type="checkbox"/>	<input type="checkbox"/>
E. Discharging.		
1. Employers tend to lose wrongful discharge cases when there has been inadequate documentation of the reasons for termination, inconsistent application of rules or performance standards, or absence of prior warnings.		
2. Someone other than line supervisor should approve all discharges.	<input type="checkbox"/>	<input type="checkbox"/>
a. Progressive discipline should be used where appropriate.	<input type="checkbox"/>	<input type="checkbox"/>
b. The employer should give written warnings and have the employee acknowledge in writing receipt of the warnings, and afford opportunities for employee rehabilitation.	<input type="checkbox"/>	<input type="checkbox"/>
3. The employer should consider the option of less severe discipline.	<input type="checkbox"/>	<input type="checkbox"/>
4. Similarly situated employees should be treated the same in similar circumstances.	<input type="checkbox"/>	<input type="checkbox"/>
5. There are public policy exceptions to discharge; an employee cannot be fired for "whistle blowing," refusing to commit perjury, filing a worker's compensation claim or testifying before a grand jury.	<input type="checkbox"/>	<input type="checkbox"/>
6. If the decision is to discharge, the discharge should be done as concisely and courteously as possible.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
a. At least two management persons should be present as witnesses.	<input type="checkbox"/>	<input type="checkbox"/>
b. The employee should be treated with dignity and respect.	<input type="checkbox"/>	<input type="checkbox"/>
c. Nothing should be said in the hopes of sparing the employee's feelings that the employee could later use against the employer.	<input type="checkbox"/>	<input type="checkbox"/>
7. The employer could consider extra severance pay in consideration of the employee signing a release agreeing to forego any causes of action arising out of employment.	<input type="checkbox"/>	<input type="checkbox"/>
a. Any release will be construed strictly against the employer.	<input type="checkbox"/>	<input type="checkbox"/>
b. Factors a court would undoubtedly consider in assessing whether the release was executed in a "knowing and voluntary" fashion are	<input type="checkbox"/>	<input type="checkbox"/>
(1) The clarity and specificity of the release.	<input type="checkbox"/>	<input type="checkbox"/>
(2) The employee's knowledge of his rights upon execution of the release.	<input type="checkbox"/>	<input type="checkbox"/>
(3) Whether the employee had the benefit of counsel.	<input type="checkbox"/>	<input type="checkbox"/>
(4) The opportunity for negotiation.	<input type="checkbox"/>	<input type="checkbox"/>
(5) The employee's acceptance of the offered consideration	<input type="checkbox"/>	<input type="checkbox"/>
8. Even though an employer should do all that is possible to retain his rights to terminate an employee at will, an employer should be prepared to meet a "just cause" standard for every adverse employee action taken.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
9. If the employee is quitting, the employer should conduct an exit interview at which time the employee should be required to specify the reason for leaving.	<input type="checkbox"/>	<input type="checkbox"/>
10. The reasons for a discharge should be well documented.	<input type="checkbox"/>	<input type="checkbox"/>
11. An employer should consider protesting an employee's unemployment compensation claim if the employee was discharged because of misconduct.	<input type="checkbox"/>	<input type="checkbox"/>
12. Employers need to be careful about what is said to others about a discharged employee.	<input type="checkbox"/>	<input type="checkbox"/>
a. Remarks that impugn the professional competence of the employee may be deemed defamatory; allegations that an employee was fired because he "wasn't doing as good job" and because he "spent too much time on the telephone" were slanderous as a matter of law.		
b. Defamation is an oral (slander) or written (libel) statement that tends to harm a persons' reputation.		
(1) Elements.		
(a) Publication or communication of defamatory words to a person other than the one defamed.		
(b) The statement is false.		
(c) The statement causes injury to reputation.		
(2) Intra-company communications, at least on a "need to know" basis, may be immune from liability as "privileged," but privilege can be lost if the speaker acts with malice.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(3) Matters of dishonesty, drug or alcohol abuse, or AIDS require particular care.	<input type="checkbox"/>	<input type="checkbox"/>
c. Truth is an absolute defense.		
(1) Only accurate information should be disseminated: deal in facts, not opinions or judgments, i.e., the quality of the employee's work.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Information that might be disseminated, especially the contents of personnel files should be controlled.	<input type="checkbox"/>	<input type="checkbox"/>
d. Eliminate or control publication.		
(1) In-house - need to know.	<input type="checkbox"/>	<input type="checkbox"/>
(2) External - none, or subject to specific limitations as to consent.	<input type="checkbox"/>	<input type="checkbox"/>
(3) Centralize all responses to requests for information.	<input type="checkbox"/>	<input type="checkbox"/>
e. Some courts have recognized self defamation as a tort.		
(1) The Colorado Supreme Court held that a terminated employee could sue her former employer for defamation, if the employer gave the employee a defamatory reason for termination, and it was foreseeable to the employer that the employee would be under "a strong compulsion to disclose the contents of the defamatory statement to a third person," presumably a prospective employer.		
(2) However, the employer's communication would be privileged, requiring malice on the part of the employer.		
f. Remedial measures.		

	Yes	No
(1) Truth.		
(2) Secure a waiver of future claims from the employer as a condition of providing the employee with the reason for termination.	<input type="checkbox"/>	<input type="checkbox"/>
(3) Negotiate with the employee an agreed upon reason for termination, or a resignation "for personal reasons," in lieu of termination.	<input type="checkbox"/>	<input type="checkbox"/>
(4) Frame the reason for termination as an opinion, not a fact, ("suspicion of dishonesty").	<input type="checkbox"/>	<input type="checkbox"/>
g. Wages.		
(1) The Fair Labor Standards Act requires an employer to set a uniform work week commencing on one day and ending seven days later.	<input type="checkbox"/>	<input type="checkbox"/>
(2) Employees who are not exempt from the overtime requirements of the Fair Labor Standards Act must be paid time and a half for overtime.	<input type="checkbox"/>	<input type="checkbox"/>
(3) Special overtime arrangements, such as flexible workweek arrangements must be documented and signed by both the employer and the employee.	<input type="checkbox"/>	<input type="checkbox"/>
(4) You must pay the minimum wage for all hours worked, including breaks, which are less than half an hour and lunch breaks if an employee is not completely relieved from duties.	<input type="checkbox"/>	<input type="checkbox"/>
(5) If you are a federal or state contractor or the recipient of federal funds, you may have different minimum wage or overtime requirements other than those under the Fair Labor Standards Act.	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(6) An individual analysis should be done of each non-exempt position to make sure that the position qualifies as exempt under the Fair Labor Standards Act, including meeting all salary requirements to be paid on a salaried basis.	<input type="checkbox"/>	<input type="checkbox"/>
(7) If you choose to substitute compensatory time off in lieu of overtime pay for employees, the compensatory time off must be taken within the work week that the overtime was worked.	<input type="checkbox"/>	<input type="checkbox"/>
(8) Have a written policy for what deductions can be taken from an employee's paycheck?	<input type="checkbox"/>	<input type="checkbox"/>
(9) Have written authorizations from employees in their personnel file to permit you to take deductions for the employee's share of the cost of benefits?	<input type="checkbox"/>	<input type="checkbox"/>
(10) Have a written policy and signed agreement covering any other deductions that you take from an employee's final paycheck?	<input type="checkbox"/>	<input type="checkbox"/>
h. Benefit issues upon termination.		
(1) Explain in writing an employee's rights under COBRA, the Health Insurance Portability and Accounting Act and other materials related to the continuation of benefits after termination, such as 401K rollover rights?	<input type="checkbox"/>	<input type="checkbox"/>
(2) Have a procedure to make sure that an employee is issued their last paycheck within 24 hours for an involuntary termination or at the next regularly scheduled period for voluntary terminations?	<input type="checkbox"/>	<input type="checkbox"/>

	Yes	No
(3) Have a consistent policy for paying out unused paid time off?	<input type="checkbox"/>	<input type="checkbox"/>
i. Recordkeeping.		
(1) Do you maintain all payroll records as required by the Fair Labor Standards Act?	<input type="checkbox"/>	<input type="checkbox"/>
(2) Do you have a policy for maintaining other employment records?	<input type="checkbox"/>	<input type="checkbox"/>

**TOTO, I'VE A FEELING WE'RE NOT IN KANSAS ANY MORE:
EMPLOYEE BENEFITS AFTER OBAMACARE**

1. Extensions and subsidies for COBRA
2. New required notices.
3. Amendments to the FLSA to accommodate nursing mothers.
4. Diminishing tax deductions for retiree prescriptions coverage