It's important for you to find answers to your questions. We've gathered some of the most common initial questions to help you get some answers quickly and easily. If you don't find what you're looking for here feel free to give us a call at (317) 687-2222 or email us at litigation@betzadvocates.com.

Are there certain questions an employer may not ask during a job interview?

There are several types of questions that an employer is legally prohibited from asking in a job interview. For example, an employer may not seek medical information regarding an applicant, at least not before the applicant has received a conditional job offer. Questions that seek inappropriate medical information include: "Are you disabled?" "How many sick days did you take last year?" "Have you ever made a workers' compensation claim?" or "Will you require any form of physical accommodation for this job?" An employer may, however, describe the duties of a job to an applicant and ask if the applicant can perform those duties, either with or without reasonable accommodation. In addition, if the applicant clearly has a physical disability that would seem to prevent the applicant from performing the relevant job duties, the employer may ask how the employee proposes to perform them.

In addition to medical inquiries, an employer may not ask an applicant about his or her race, national origin or religion, or about his or her family status or plans, such as whether a female applicant has children or plans to do so.

State anti-discrimination laws also often prohibit an employer from inquiring about whether an applicant is in a protected class, such as whether he or she is over age forty or a minority group member.

An employer typically may ask an applicant if he or she has ever been convicted of a crime. Asking whether an applicant has been arrested, however, may violate anti-discrimination laws, because the Equal Employment Opportunity Commission has stated that minority group members tend to be disproportionately targeted for arrest, and whether someone has been arrested is not an indication that he or she has actually committed a crime. As a result, an employer who asks applicants whether they have been arrested, and then excludes those who have, may discriminate against minority applicants.

Finally, an employer is also prohibited from asking an applicant whether he or

she has participated in a strike in the past or performed union organization activities.

When may an employee be entitled to medical leave from work?

An employee who is injured or ill may not be limited to sick leave, vacation or personal leave if he or she needs time off. There are many other types of leave that an employer may be required to provide. For example, if the employee has a newborn or newly adopted child, or the employee or his or her family member has a serious health condition, the employee may be entitled to up to twelve weeks of unpaid leave per year under the Family and Medical Leave Act (FMLA). A serious health condition is an illness or injury requiring inpatient medical treatment or continuing outpatient treatment by a health care provider, or a chronic medical condition. Furthermore, many states have enacted their own family and medical leave statutes, some of which require employers to provide additional leave or paid leave.

Medical leave may also be an appropriate accommodation of a disability under the Americans with Disabilities Act. The ADA does not specify whether or what type of leave must be given to an employee who is "disabled" by an illness or injury, but courts have held that an employer may be required to provide leave beyond sick leave or personal leave if such leave would be a reasonable accommodation of a disability, as long as the leave is not unduly burdensome to an employer. A leave of one month might be unduly burdensome to a small employer who cannot hire a temporary worker to replace the disabled employee, but a leave of six months might not be unduly burdensome to a large employer who can hire a temporary replacement or reapportion duties. If the employer has allowed other employees to take long leaves for reasons that are not disability-related, such as sabbaticals for continuing education, a court may find that the employer is required to allow a disabled employee to take a similar leave.

An employee who suffers a work-related injury may be entitled to leave under the state's workers' compensation statute during the time when the employee is fully or partially disabled from performing his or her position. Such statutes often require the employer to offer the employee any available light duty position fitting the employee's physical restrictions, but if none is available, the employee is likely entitled to leave paid for by the employer's workers' compensation insurer.

Finally, an employer who includes a medical or personal leave provision in its employee handbook may be contractually bound to provide such leave to an employee who requests it.

Each of these types of leave may be taken concurrently; in other words, an employer may count an employee's workers' compensation or personal leave towards the employee's annual twelve weeks of FMLA leave. Just because the employee has exhausted his or her FMLA leave, however, does not automatically mean that he or she may be fired. The employee may then be entitled to additional leave, for example, under workers' compensation law or as an accommodation under the ADA.

How can an employee secure a "reasonable accommodation" of his or her disability by an employer?

Even when an employer knows that its employee is disabled, the employer is not automatically required to find out whether the employee requires an accommodation. Instead, the burden is on the employee to make an initial request for an accommodation. The employee need not use the term "accommodation," but need only inform the employer of the disability and that he or she needs some assistance in performing job duties. Once he or she has done so, the employer is required to engage in an "interactive process" with the employee, to determine whether an accommodation is actually needed, and if so, what accommodation might be appropriate. Both parties have a responsibility to cooperate in finding a reasonable accommodation. For example, if the employee refuses to provide any medical evidence of his or her disability or specifically notify the employer of the essential job functions that he or she is having difficulty performing, the employer cannot then be held liable for failing to provide an appropriate accommodation. Likewise, the employer cannot make a single offer of an inadequate accommodation and, if the employee refuses it, decline to search for other alternatives.

An employer may also be required to make reasonable accommodations if necessary for a job applicant to participate in the application process. An applicant who believes that he or she may need an accommodation must, like an employee, inform the employer of the need for accommodation, and then work with the employer to find an effective accommodation, if one exists. An example might be moving a typing test to a room that the applicant can reach or allowing the applicant to bring adaptive equipment to the interview, such a special keyboards. An applicant with hearing or visual impairments may be accommodated by allowing an interpreter to accompany the applicant to the interview. An employer who responds to a request for accommodation by telling the applicant that if he or she cannot participate in the interview process because he or she obviously can't perform the job may be violating the law.

How may an employer monitor employees in the

workplace?

In most states, citizens have a right to some privacy in their persons and affairs, and this right extends into the workplace to protect employees from over-intrusive monitoring by employers. For example, employees have a limited right, created by federal and state wiretapping laws, to privacy in their telephone conversations and voice mail messages. An employer who wishes to monitor telephone calls or voice mail messages must warn employees that it is doing so, and establish that the monitoring is undertaken in the "ordinary course of business," such as to monitor performance or to coach employees. An employer may also monitor communications if it has reason to believe that an employee is using the telephone or voice mail to commit theft or somehow damage the company, but again, only if the employer warns the employee that it plans to monitor. An employer who monitors phone calls or voice mail messages for any reason must stop monitoring as soon as it determines that a call or message is private.

E-mail messages using the employer's network and Internet access from the employer's computer are generally not protected. Many employers monitor employee Internet use and e-mail messages. Monitoring is often done to ensure employees are not disseminating materials which would themselves violate employment laws (i.e., sexually explicit websites or racially harassing e-mails). Employees should assume their e-mail messages and Internet activities at work are not private.

Employers have monitored employees by placing video cameras around the workplace, as well. However, video surveillance of employees has been controversial. An employer who places a camera in the lunchroom or on a loading dock does not violate the law, but employers have been held liable for invasion of privacy, and sometimes for sexual harassment, after placing hidden cameras in bathrooms or in the ceilings of employees' offices.

When is harassment illegal?

Contrary to popular belief, it is not illegal for a supervisor to harass an employee simply because he or she doesn't like the employee's work or doesn't like the employee as an individual. Harassment is illegal only if it is based on some protected characteristic of the employee, such as his or her age, race, national origin, sex, religion or disability.

In addition, harassment must be "severe and pervasive" in order to violate the law. Courts have held that the government cannot make American workplaces pristine, but may ensure only that they are not "hostile and abusive" to an employee because the employee is a member of a protected class. Therefore, isolated or occasional use of racial or ethnic slurs, or sporadic dirty jokes, while

offensive, will not violate the law. On the other hand, one incident of harassment, if it is severe enough, may be enough to violate the law. An example might be a sexual assault or a beating by coworkers. Likewise, harassment which is continual or which pervades the work environment is actionable. Such behavior includes constant dirty jokes or comments, repeated unwelcome passes or a workplace decorated with pornographic posters.

Finally, the harassing behavior must be offensive to the reasonable person and to the employee. Behavior which offends a highly sensitive employee, but which would not offend a reasonable person in the same situation, would not violate the law. Likewise, behavior that might offend a reasonable person, but that clearly did not offend the employee, will not create a right for damages. Some courts define a "reasonable" person as an average employee in same the protected category as the employee, for example, a reasonable female employee or a reasonable Hispanic employee; other courts consider the reaction of a generic reasonable person. In determining whether the employee was offended personally, a court or jury will consider whether the employee willingly participated in the conduct, and whether he or she used reasonably available avenues of complaint to protest the conduct.