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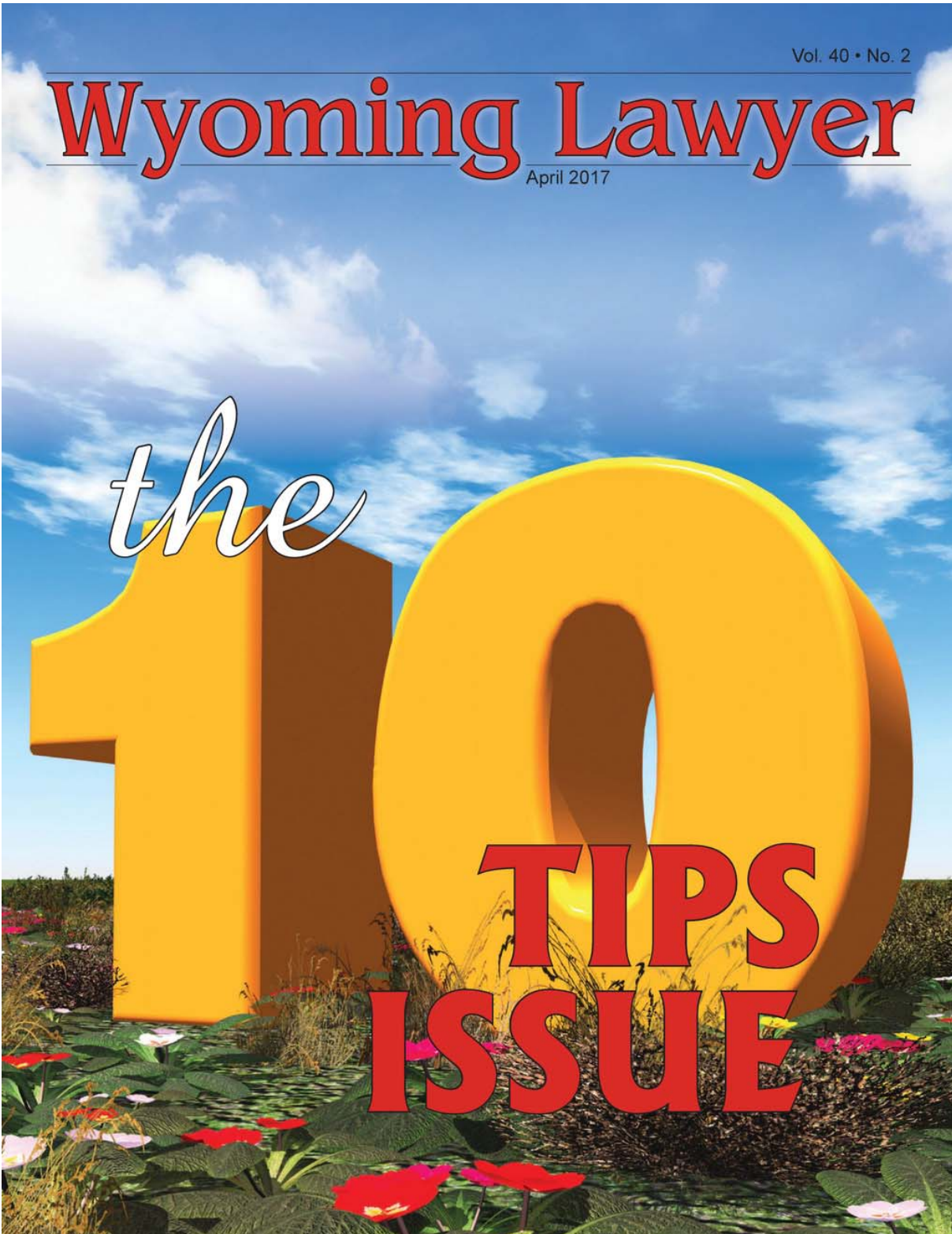
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**TIPS  
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# Top Ten List of Risky Employment Practices



by Bradley T. Cave

It's a risky world for employers! Employment laws create a variety of ways that employers can unwittingly increase the potential for employment lawsuits, and make those lawsuits harder to defend. My top ten list waves the red flag around some of the more frequent risky practices my firm sees from Wyoming employers.

## 1. Dangerous Questions on Job Applications and In Interviews

Questions on a job application or in an interview that tread into protected areas can stir up a charge alleging discriminatory hiring practices. Examples of dangerous questions include:

- Are you a U.S. Citizen?
- When did you graduate from high school?
- Marital status
- What is your primary language?
- Where were you born?
- How many days of work did you miss last year due to illness or injury?

Each of these questions seek information that is illegal to use as part of hiring decisions. Even if you have other good reasons for your decision, asking questions about characteristics protected by federal or state law will create risk if your decision is challenged.

Employers also should be careful when asking about criminal convictions and arrests. The use of criminal history records in hiring decisions has been under scrutiny in recent years. Although Wyoming has not yet banned criminal history questions on job applications, the U.S. Equal Employment Opportunity Commission (EEOC) has targeted employers who have a blanket “no hire” policy based on criminal history.

## 2. Overtime Exempt Status Misclassifications

Before you decide that some employees are not entitled to overtime pay, you need to know the detailed rules about the overtime exemptions. Certain employees may be treated as exempt from overtime pay if they are paid on a salary basis of at least \$455 per week and meet the duties requirements under the executive, administrative, professional exemptions, among other exemptions. (Note: the salary threshold was due to increase on December 1, 2016, but a federal court issued a nationwide injunction halting it. The case is currently on appeal with the Fifth Circuit.) Employers who misclassify employees as exempt face significant liability for two or three years of unpaid overtime pay, liquidated (double) damages, and attorneys’ fees and costs. Misclassification often leads to class actions because employers treat all employees in a specific job category as exempt. Don’t guess about overtime exemptions!

## 3. Improper Pay Deductions

Deducting sums from an employee’s wages can get employers in trouble. Wyoming wage offset rules set out specific requirements for a variety of deductions. For example, Wyoming employers may not deduct from wages for damages due to an

employee’s negligence unless the negligence was determined by a judicial proceeding. Also, improper deductions from the salary of an exempt employee can result in the loss of exempt status, meaning the employer can be liable for the unpaid overtime. Before you deduct, know the rules!

## 4. Independent Contractor Misclassifications

Calling someone an independent contractor doesn’t make it so. Independent contractor status depends on several factors, including whether the contractor is economically dependent on the employer for work or is under the employer’s direct control. In recent years, the U.S. Department of Labor (DOL) has focused on independent contractor misclassifications, leading to increased audits and lawsuits. Also, Wyoming’s unemployment and workers’ compensation statutes share a very narrow independent contractor definition. Employers who misclassify employees as independent contractors face potential liability for overtime pay, payroll taxes, benefits, penalties, attorneys’ fees and costs, as well as liability for any injuries incurred on the job.

## 5. Pre-employment Medical Inquiries

The Americans with Disabilities Act (ADA) forbids employers from asking about a candidate's medical conditions or disabilities prior to making a conditional job offer, including questions that might lead to information about disabilities. Similarly, pre-employment physical exams, including drug tests, must be conducted only after a job offer is made. Talking about sick days or workers' comp injuries is always dangerous.

## 6. Vacation Pay at Termination

Wyoming employers can avoid paying out unused, accrued vacation time upon separation of employment only if they have a written policy that states that accrued vacation will be forfeited upon termination

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and the written policy is acknowledged in writing by the employee. Absent these two conditions, employers must pay out an employee's vacation balance upon termination.

## 7. Changing Time Sheets

Employers have the final responsibility to maintain accurate time records, but all changes to an employee's time sheet must be carefully documented. Supervisors must not change time sheets to limit overtime pay, because an employee was not as productive as she should have been, or any other reason unrelated to whether the employee was actually at work.

## 8. Automatic Pay Deductions for Meal Breaks

Automatic reductions for meal periods can create payroll and overtime liability. For example, an employer may assume every employee takes a 30-minute meal period and deduct 2.5 hours from hours worked for every five-day workweek. But, if the employee does not have a full 30 consecutive minutes of uninterrupted meal time, the entire meal period is considered working time. Even if the employer does not know about the lost meal periods, automatic time deductions can create substantial liability.

## 9. 100% Healed Policy for Return to Work

Policies that prohibit any physical work restrictions or require that an employee

be 100% healed from an illness or injury can be risky. Under the ADA, employers have an obligation to reasonably accommodate qualified employees with an impairment that substantially limits one or

more major life activities. An employee who returns to work with work restrictions, or who is not yet 100% healed, may be entitled to a reasonable accommodation. Employers must engage in an interactive process with the employee to determine how best to respond to the need for accommodation. A blanket 100% healed policy will raise immediate red flags of an ADA violation.

## 10. Talking to an Employee's Doctor

Supervisors or safety managers may want to verify an employee's illness, work restrictions, or appointments, but standing

in the exam room or calling the doctor is not the way to do it. Generally, employers may ask for written documentation that the employee obtains from his or her doctor to support the need for time off, but employers should not contact the employee's doctor directly. If the employee has a serious medical condition under the Family and Medical Leave Act (FMLA), employers may contact a healthcare provider only under certain circumstances and such contact may never be made by the employee's supervisor. Wyoming workers' compensation permits the employer to obtain doctors' written reports about the injury, but does not authorize attending doctor's appointments or talking with the doctor.

## Conclusion

These ten risky employment practices lead to lawsuits, penalties, and liability. Employers can manage risk by carefully considering their practices in these areas. *WL*



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