

# National Association of Dealers Counsel

## Dealer 101: Employment Issues

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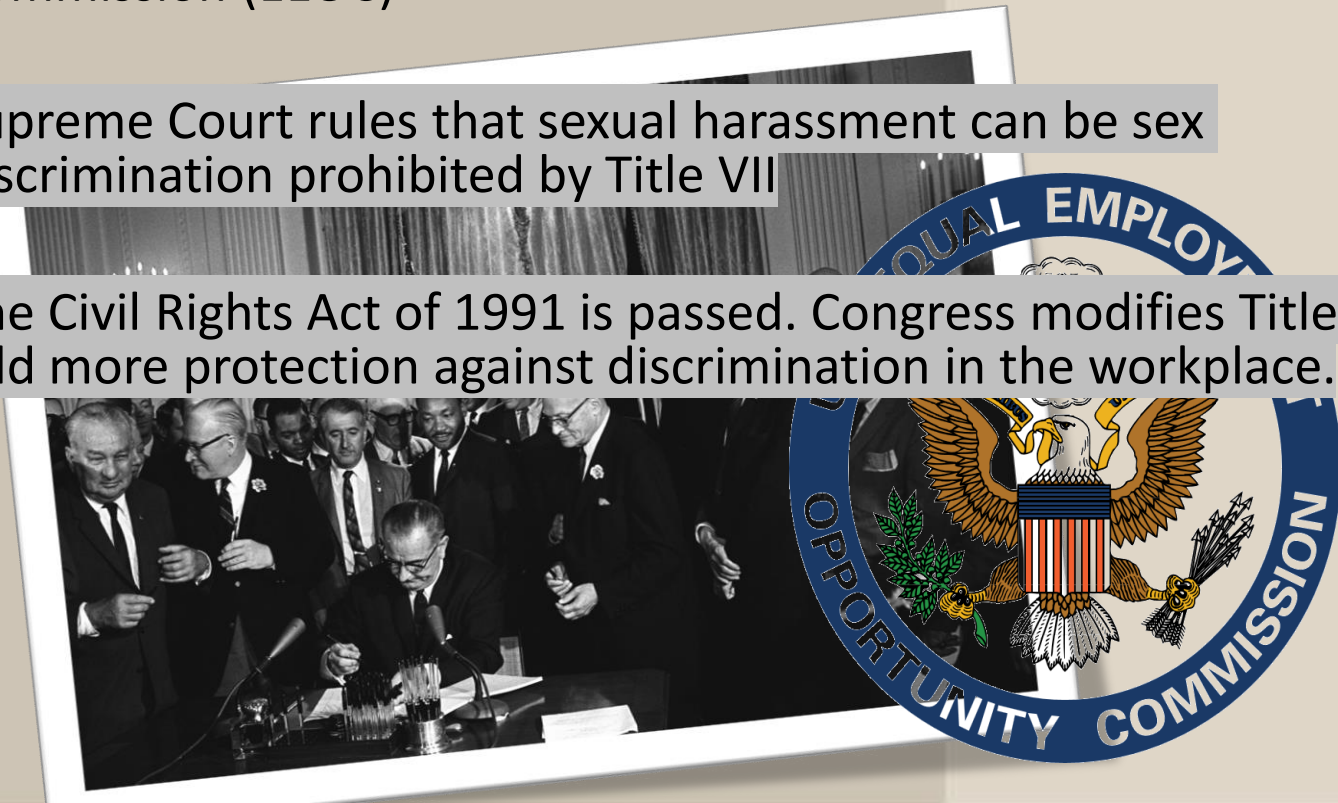


# Handouts provided

- Sample Handbook
- Social media policy
- Pay plan examples
- PIP/Corrective Action/Feedback forms
- Job description examples
- Confidential Information Definition
- Non-solicitation provisions.

# History

- 1964
  - The Civil Rights Act of 1964 is passed which prohibits employment discrimination based on race, color, sex, religion, or national origin.
- 1965
  - Congress establishes the Equal Employment Opportunity Commission (EEOC)
- 1980
  - Supreme Court rules that sexual harassment can be sex discrimination prohibited by Title VII
- 1991
  - The Civil Rights Act of 1991 is passed. Congress modifies Title VII to add more protection against discrimination in the workplace.



# Discrimination

## Definition:

- treatment or consideration of, or making a distinction in favor of or against a person or thing based on the group, class, or category to which that person or thing belongs rather than on individual merit
- Work decisions should be based on work performance

# Discrimination

- Race
- Color
- Religion
- Sex
- Sexual Orientation
- Age
- Disability
- Familial Status
- Citizenship Status
- National Origin
- Veteran Status
- Genetic Information

# Employment Opportunities

Employment opportunities include the opportunity to:

- Become hired
- Receive benefits
- Keep a job
- Receive training
- Receive a promotion or a certain job assignment
- Receive compensation
- Receive the same conditions and opportunities in the workplace that others receive



# Impact of Discrimination

- Unlawful discrimination in your workplace can cause losses of your organization's valuable money, time, energy, and employees
  - Disempowers employees
  - Fosters poor morale
  - Lowers productivity
  - Exposes your organization to costly litigation losses



# SEXUAL HARASSMENT





# Sexual Harassment Prevalence

- The EEOC dealt with over 21,000 sexual harassment/discrimination charges in 2020 (31.7% of total claims)
- A leading national news publication reported that ***seven out of ten*** human resource managers dealt with a sexual harassment complaint in the past year



# Sexual Harassment Prevalence

The National Sexual Violence Resource Center reports that

- Up to 60% of women have experienced some form of sexual harassment
- 14+% of men have experienced some form of sexual harassment
- 79% of victims were women
- 70% of sexual harassment goes unreported
- 1 in 7 women and 1 in 17 men have sought a new job assignment, changed jobs, or quit a job because of sexual harassment
- Many employees are not aware that they had a policy
- Many people are not aware of who to approach with a complaint



# Definition

## Sexual Harassment

- Commonly referred to in 2 categories
  - Quid Pro Quo
  - Hostile Work Environment

# Quid Pro Quo

- “This for That” or an exchange of one thing for another
- Sexual favors demanded in return for a job benefit
- Acceptance or rejection of sexual advances is used as a basis for employment decisions
- It can be explicit (clearly stated or expressed) or implicit (implied or understood without expressing)
- Example:
  - A manager tells his employee that he will give her a raise if she goes on a date with him



# Hostile Work Environment

- Environment where unwelcome sexual conduct is so severe or pervasive that it unreasonably interferes with an individual's work performance
- Sexual conduct creates an intimidating or offensive working environment.
- Very Board-Protect the work environment from any source.
- Example:
  - Consistently touching a coworker who has asked you to stop

# What Constitutes Harassment?

- Must be ***unwelcome*** and either ***severe*** or ***pervasive***
  - According to federal guidelines, conduct must be ***unwelcome*** — “in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as ***undesirable*** or ***offensive***.”
  - ***Severe*** enough to alter an employee's workplace experience even though the conduct occurred just once or rarely; or
  - ***Pervasive*** enough to be more than merely an accidental or isolated event and thus becoming a defining condition of the workplace, even if no single act, viewed by itself, would be harassment.



# What constitutes Sexual Harassment?

- Whether the conduct was physically threatening or humiliating as opposed to a mere offensive utterance;
- How frequently it was repeated;
- Whether the conduct was hostile and patently offensive;
- Whether the alleged harasser was a co-worker or a supervisor;
- Whether others joined in perpetrating the harassment; or
- Whether the harassment was directed at more than one individual.

# Reasonable Care Standard

- Employers must show that they took reasonable actions to prevent or promptly correct any sexual harassment behavior.
- The harasser's intent is irrelevant when evaluating his or her conduct.
- The conduct is evaluated from an objective —reasonable person standard:
  - Whether a reasonable person in similar circumstances would have found the conduct to be so severe or pervasive that it created a hostile environment.





# Sexual Harassment Forms

- **2 categories of Sexual Harassment**
  - Quid Pro Quo
  - Hostile Work Environment
- **3 Forms of Sexual Harassment**
  - Verbal
  - Non-verbal
  - Physical conduct



# Verbal



- Calling a person a hunk, doll, babe, honey, sweetie, etc.
- Whistling at someone or cat calls
- Making sexual innuendoes
- Turning work discussions to sexual topics
- Telling sexual jokes or stories
- Asking about sexual fantasies, preferences, or history
- Asking personal comments about a person's clothing, body, or looks
- Repeatedly asking out a person who is not interested
- Making kissing sounds, howling, smacking lips
- Telling lies or spreading rumors about a person's sex life
- Name calling of a sexual nature

# Non-verbal



- Looking a person up and down (elevator eyes)
- Staring at someone
- Blocking a person's path; restricting, hindering the other person's movements
- Following the person
- Displaying sexually suggestive visuals, posters, items
- Displaying sexual and/or derogatory comments on coffee mugs, hats, clothing, etc.
- Making facial expressions, such as winking, blowing kisses, or licking lips
- Making sexual gestures with hands and/or body movements
- Giving letters, gifts, and or materials of a sexual nature
- Hanging around a person
- Invading a person's body space; standing closer than appropriate or necessary for the work being done

# Physical Conduct



- Massaging a person's neck, shoulders, etc.
- Touching the person's clothing, hair, or body
- Touching or rubbing oneself sexually around or in the view of another person
- Hugging
- Patting
- Kissing
- Brushing up against a person
- Bumping into someone on purpose
- Pulling on a person's clothing
- Assault

# Retaliation

- 55.8% of EEOC claims in 2020 (Over 37,000 complaints)
- Defined as an adverse action taken against an employee because he/she complained of harassment or discrimination
  - Adverse action includes demotion, discipline, termination, salary reduction, negative performance appraisal, change in job duties or shift assignment.
- Applies even if the claim is proven to be unfounded
- Protection for employees who participate in the investigation



# Retaliation

To have a retaliation claim, an employee must prove the following:

- That he/she engaged in a protected activity when reporting/complaining in “good faith”
- That he/she suffered an adverse employment action, such as demotion, termination
- That the protected activity and adverse action are linked.

To avoid charges of retaliation:

- Document the reason for any adverse employment against an employee. Make sure that the documentation shows no discriminatory reason for the adverse action.
- Do NOT take any adverse action against an employee who has complained of sexual harassment without discussing with and obtaining approval from the HR Director.



# Retaliation

Completely distinct from underlying discrimination or sexual harassment claim

- EEOC statics:
- 2019: 39,110 claims of retaliation
- 2020: 37,632 claims of retaliation.
- 2021: 34,322 claims of retaliation.
- High Points were 2016, 42,018; and 2017, 41,097



# Retaliation

- From 2012 to 2016, about 40% of workers reporting experiencing employer retaliation, such as verbal abuse or being passed over for work opportunities like training or promotion, for filing a claim. At 46%, employer retaliation was most common for sex discrimination cases.
- Source: *Government Executive Magazine* (July 19, 2021)





# What if...?

- An employee reports harassment to his/her supervisor and says, “I don’t want you to do anything about this. I just want you to listen to me and be aware of what’s going on.”
- How should the supervisor respond?
  - Responsibility to ensure the integrity of the workplace
  - A supervisor must exercise reasonable care to first prevent and secondly to promptly correct any harassment they know about
    - Initial review of the information given
    - Formal investigation if warranted



# Who is a Supervisor?

- The US Supreme Court has defined supervisor as an employee empowered by the employer to take tangible employment actions against the victim.

Vance v. Ball State Univ., 470 U.S. 421 (2013).



# When is the Employer liable?

- Employer liability for supervisor harassment depends on the type of harassment at issue (*quid pro quo* versus hostile work environment) and whether the *Faragher-Ellerth* defense is available to the employer in hostile work environment cases. In a *quid pro quo* case, an employer will be held strictly liable if a tangible employment action occurred. In a *hostile work environment* case, in order to avoid vicarious liability employers must be able to show that:
  1. No tangible adverse employment action was taken against the plaintiff.
  2. The employer exercised reasonable care to prevent and promptly correct the harassing behavior.
  3. The plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid the harm. Faragher, 524 U.S. at 807-08 and Ellerth, 524 U.S. at 765.

# What is a Tangible Employment Action?

Under both theories, the presence or absence of a tangible employment action is crucial. A tangible employment action is a significant change in employment status, including:

1. Termination of employment.
2. Failure to hire.
3. Failure to promote.
4. Reassignment with significant changes in quality or quantity of work.
5. A less distinguished title.
6. A significant change in benefits.
7. Unfavorable compensation decisions.

# Importance of Prompt and Reasonable Investigation

## **Strategy**

1. Written statements or interviews (to record or not?)
2. Who does the investigations (avoiding a conflict of interest)

## **Practical Applications**

# HR Investigations

- Under many laws, Dealer is required to investigate complaints in a timely manner (ADA, ADEA, OSHA, etc.)
- Corrective action may also be required to be sure illegal actions and behaviors cease immediately
- Dealer should identify who is going to conduct investigations and guidelines

# HR Investigations

- Role of Investigator
  - Evaluate the risk and minimize liability
  - Be objective
  - Alleviate burden of outcome from manager to impartial party
  - Be trained on interpersonal interview tactics

# HR Investigations

- Step 1 – Ensure confidentiality
  - Tell complaining party and everyone involved that all information gathered will remain confidential to the extent possible
- Step 2 – Create a plan
  - Tell complaining party and everyone involved that info will be gathered for a thorough investigation



# HR Investigations

- Step 3 – Conduct Interviews
  - All viable witnesses
  - Accused should be last one interviewed
  - Conduct same day if possible
  - Take detailed notes
  - Assess credibility – demeanor, motive, corroboration, past behavior and accusations, etc.

# HR Investigations

- Step 3 – Conduct Interviews
  - Collect documentation
    - Deal documents
    - Bank statements
    - Vendor records
  - Analyze responses and statements for
    - Inconsistencies
    - Inaccuracies
    - Affect

# HR Investigations

- Step 4 – Make a Decision
  - Don't jump to conclusions
  - Evaluate interviews, documents, credibility
  - Reach a formal recommendation
  - Review recommendation with Dealership Executive Management

# HR Investigations

- Step 5 – Take Corrective Action
  - Discipline/Termination
  - Education/Training
  - Review/Modify Policies
  - Damages incurred/Remedies

# HR Investigations

- Step 6 – Closure
  - Notify complaining employee and accused of outcome
  - Complaining employee and accused knows Dealer took complaint seriously even if they are not satisfied with results
  - Create written summary of investigation results so there is record for any court actions, complaints to agencies, future violations

# HR Investigations

Most important:

- Ensure Confidentiality
- Be consistent
- Give feedback
- Document Document Document
- Create culture of open door policy

# Common Wage Issues

## **Minimum Wage**

1. Applies to all hourly employees, including those on commission
2. Applies to most Full-time and Part-time employees
3. Does not have to apply to meal and rest breaks
4. Very State Specific

## **Compensable Working Time**

1. Waiting Time: “Engaged to wait”
2. On-Call Time: Depends up constraints on employee activities during on-call time.
3. Required training.
4. Travel Time: Depends upon purpose. Commute time, not normally paid.

# Common Wage Issues

## Commissions

1. Still have to be paid minimum wage.
2. Many states exempt from overtime but check your state.
3. *Navarro v. Encino Motorcars, LLC*, 136 S. Ct. 2117 (2016): Salesman and service advisors are excluded from overtime pay under the FLSA.



# Pay Plans

Automotive Industry is different from most other industries as employees in different classifications are paid differently.

- Fixed Operations

  - Service/Parts

- Variable Operations

  - Sales

  - Finance

  - Management

# Pay Plans

Dealership employees will

**WORK THEIR PAYPLAN**

When creating a pay plan consider the job description, the goals of the Dealership and competitive nature of position.

# Pay Plans

- INSPECT WHAT YOU EXPECT
  - Pay plan should focus employee on goals of Dealer
    - Sales/gross/CSI/PVR
    - Goals can change as Dealer evolves
    - Goals can change as Market evolves

# Pay Plans

- SALESPERSONS
  - Salary/Draw
  - Commission basis/ Additional volume bumps
  - Incentives – individual/team
    - Warranty incentive – to increase penetration/PVR
    - Trade incentive – to build used inventory
    - Referral incentive – to increase sales
    - Other incentives – accomplish Dealer goals

# Pay Plans

- SALES MANAGERS
  - Salary/Draw/Target Salary Build
  - Gross/Volume
  - Internet Closing %
  - CSI – zone/Dealer goal
  - New Car Volume/Used Car Volume
  - Bonuses – be clear about accrual/payout requirements

# Pay Plans

- F&I
  - Salary/Draw/Target Build
  - PVR (Per Vehicle Retail)
  - Penetration – service/aftermarket
  - Products per Deal
  - CSI – Customer Satisfaction Index
  - E-contracting
  - CIT – Contracts in Transit

# Pay Plans

- Be clear
  - Formulas should be explained
  - Conditional payouts explained
  - Nothing in pay plan creates an employment contract
  - Whether or not employees are required to use time card (electronic) for vacation, min wage comparisons, etc.
  - That commissions are through date of separation if terminated

# Pay Plans

- Define what is a Deal
  - At what point in transaction is commission or incentives earned
    - At billing
    - At receipt of funds by lender
    - Chargebacks affecting pay



# Pay Plans

- Hiring Bonus Agreements
  - Memorialize the Offer
  - Contain Terms
    - Amount – interval – taxes and other deductions
    - Conditions – performance or length of employment
    - Payback if any
  - Does not create or modify any employment contract

# FLSA Classification Issues

## **Exempt v. Non-Exempt: Common Exemptions**

1. Administrative
2. Professional
3. Executive
4. Computer
5. Outside Sales Employees
6. Highly Compensated

# FLSA Classification Issues

## **Administrative Exemption:**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

# FLSA Classification Issues

## **Professional Exemption:**

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

# FLSA Classification Issues

## **Executive Exemption:**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than \$684\* per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

# FLSA Classification Issues

## Highly Compensated Exemption:

Highly compensated employees performing office or non-manual work and paid total annual compensation of \$107,432 or more (which must include at least \$684\* per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Be aware of recent U.S. Supreme Court decision of *Helix Energy Solutions v. Hewitt* \_\_\_\_ U.S. \_\_\_\_ (2023).

Plaintiff worked on an offshore drill rig and was paid a salary day rate. Each day he was on the rig, he made a certain amount, but was not paid if he did not work. He was paid over \$200,000 per year but his employer claimed he was exempt from overtime pay under the FLSA because he was a “bona fide executive.” There was no question that he was had executive duties. The dispositive issue was whether he was paid as a “salary employee” and thus exempt. Because he was paid a day rate for his work, it was determined that he was not a salary employee.

# Employer/Employee Communications

- Good Employee Performance Communication will:
  - Reduce Turnover
  - Reduce Claims – EEOC/NLRB/ Discrimination/Retaliation, etc
  - Increase Employee Satisfaction
  - Increase Employee Performance

# Employer/Employee Communications

## Regular Employee Feedback

- Supervisor evaluation
- Identify areas of evaluation
  - Customer Service
  - Teamwork
  - Productivity/Quality of work
  - Job Knowledge
  - Decision Making



# Employer/Employee Communications

## Employee Feedback Communication

- Manager Statement
- Employee Statement
- Acknowledges achievement and growth of Employee
- Sets Goals and Action for Employee
- Set Intervals – Annual, Quarterly, etc.

# Employer/Employee Communications

## Performance Coaching Communication

- Identify performance deficiency
- Identify performance change needed
- Identify pathway to change
  - Training
  - Mentoring
  - Specific performance modification
- Identify when review will take place

# Employer/Employee Communications

## Corrective Action Communication

- Identify Performance Involved
- Identify Policy Violated
- Identify Corrective Action Expected
- Identify Repercussions of Failure to Correct
- Identify Review Period
- Employer Statement
- Employee Statement

# Employer/Employee Communications

- DOCUMENT DOCUMENT DOCUMENT
- Communicate Clearly
- Communicate Consistently
- Communicate Fairly
- Communicate Review Period

# Handbooks

- Very State Specific

- To Have or Not to Have

- What policies should be included? How specific?

- Must include Company Philosophy

**\*\*Handbook Template Included in Materials.**

# Social Media Issues and Policies

- It is important to have a Social Media Policy, to publish it in your Employee Handbook, and include in Training
  - So that employees know their rights and responsibilities
  - So that employees know guidelines for use of social media
  - So that counseling and corrective action or termination has a known basis.

# Social Media Issues and Policies

- WE ARE WATCHING!
- Advise employees that they have no expectation of privacy
  - At work
  - On Dealer owned devices and networks
  - Dealer routine monitoring
  - No requests for Employee confidential passwords for personal accounts

# Social Media Issues and Policies

- Definition of SOCIAL MEDIA
  - Includes all postings on internet
  - Web logs, blogs, journals, diaries
  - Personal websites
  - Social networking sites
  - Bulletin boards/chat rooms
  - Employees or someone else's



# Social Media Issues and Policies

- Guidelines
  - Handbook policies applies to social media
    - Harassment, etc.
  - Company accounts belong to company
    - Company websites
    - Company Facebook accounts
    - Company Instagram accounts
    - Etc.

# Social Media Issues and Policies

- Guidelines

- Personal Accounts

- SALES –

- request permission and assistance

- » Managers

- » Marketing departments – logos, names, etc

- Advertising laws apply – Dealer and Employee liability

- » Advertising products

- » Advertising pricing

- » Advertising terms

- » Advertising availability

# Social Media Issues and Policies

- Guidelines
  - Inappropriate postings
    - Violate company policies
      - Harassment
      - Other handbook regulations
    - Violate state statutes
      - Threats
      - Harassment

# Social Media Issues and Policies

- Guidelines
  - Confidential Information
    - Trade Secrets
      - Development of systems
      - Company policies
      - Internal business-related communications
      - Training documents
    - Customer information
      - Protections of GLBA
      - Safeguards Rule
      - State statutes

# Social Media Issues and Policies

- Guidelines
  - Retaliation – illusion of privacy encourages retaliatory actions
- Include NLRB language
  - Policy does not prohibit employees from posting complaints or criticism about work conditions

# Brief FMLA Overview

## **Family Medical Leave Act:**

- Definition of Covered Employer (Over 50 employees within 75 miles)
- Employee Eligibility Issues (1 year and 1250 hours)
- Applies to care of child
- What constitutes a “serious health condition”
  - an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider
  - three-day period of incapacity.
  - Care of spouse, child or parent with a serious health condition.
- Impact of Military Service (doubles time allowed)
- Documentation Needed (Department of Labor forms)
- Proper calculation of FMLA leave (Holidays excluded)
- Interaction with Paid Time Off (can run concurrently)
- Intermittent Leave Issues

# Drug Testing

- State Law will Control
- To Test or Not?
- Post-hire/Pre-work
- Random or Reasonable Suspicion Only
- “Safety Sensitive” positions
- Post-Accident
- Inter-play with ADA reasonable accommodations.

# ADA: Brief Overview

- State Law Considerations: Human Rights Acts
- Private Employers covered if they have 15 employees or more
- Is an employee a “qualified employee” (Has the skills, experience, etc. and able to perform the essential job functions with or without a reasonable accommodation)
- Definition of “Disability”-greatly expanded over the years: (physical or mental impairment that substantially limits one or more major life activities; or a record of impairment; or perceived has having such an impairment.)
- The Employee Interactive Process
- what is a “reasonable accommodation” (facility or equipment more accessible, restricting a job, change in work schedule)
- undue burden analysis: (not required to make reasonable accommodations that would impose an undue hardship on the employer. Undue hardship is any action that is unduly costly, extensive, substantial, disruptive, or fundamentally alters the nature or operation of the business)
- Religious exceptions
- Direct Threat
- importance of job descriptions: Impact on question of an “essential job function”



# Employment Contracts

- Impact on Employment at Will
- Non-Competes (Recent FTC Public Comment)
- Use of Non-solicitation of customers/employee provisions
- Protection of defined “confidential information” of the dealership

*Thank You*

**Questions?**