

EMPLOYMENT LAW EXECUTIVE DIRECTOR & SUPERVISOR TRAINING

Presented By:

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AT-WILL EMPLOYMENT

- ▶ Generally, employees are considered “At-Will” meaning that the employer/employee relationship can be terminated at any time, but either the employer or the employee, with or without notice, for any reason or no reason at all.
- ▶ Individuals who are subject to an employment agreement or other contract with their employer may not be considered “At-Will.”
- ▶ The “At-Will” doctrine is superseded by numerous Federal and State Employment and Civil Rights Laws.
- ▶ Due-process requirements for public/quasi-public entities

INDEPENDENT CONTRACTORS

- ▶ Independent Contractors are not employees, so they may not be entitled to benefits that employees may receive.
- ▶ If an employee is found to have been misclassified as an Independent Contractor, the employee may be entitled to backpay, including overtime.

FAIR LABOR STANDARDS ACT (FLSA)

- ▶ The FLSA requires employers to pay non-exempt employees at an hourly rate not less than the federal minimum wage and at a rate of one and a half times their regular rates of pay for any hours work in excess of 40 in a week.
- ▶ Exemptions:
 - ▶ Executive Exemption
 - ▶ Administrative Exemption
 - ▶ Professional Exemption
 - ▶ Computer Employee
 - ▶ Outside Sales Exemption

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- ▶ Prohibits employment discrimination based on:
 - ▶ Race
 - ▶ Color
 - ▶ Religion
 - ▶ Sex
 - ▶ National Origin
 - ▶ Sexual orientation

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (cont'd)

- ▶ It is an unlawful employment practice for an employer:
 - ▶ To fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his or her terms and conditions of employment, because of such individual's race, color, religion, sex, sexual orientation, or national origin; or
 - ▶ To limit, segregate, or classify individuals so as to adversely affect their status as an employee, because of such individual's race, color, religion, sex, sexual orientation, or national origin.
- ▶ State civil rights laws offer broader protections and include sexual orientation, marital status, veteran status, criminal convictions, parenthood, political affiliation, credit score, height, weight

PREGNANCY DISCRIMINATION ACT OF 1978

- ▶ Amended Title VII
- ▶ Discrimination “because of sex” includes:
 - ▶ Pregnancy
 - ▶ Childbirth
 - ▶ Related medical conditions
- ▶ Must treat pregnancy the same as you would for someone with a disability
 - ▶ Accommodations
- ▶ Pending law - Pregnant Worker Fairness Act

NATIONAL ORIGIN

- ▶ National Origin is another category protect by law. Don't ask an applicant about his or her national origin.
- ▶ However, an employer may require applicants to provide proof that they are legally able to work in the U.S.

AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

- ▶ Covers employees age 40 and older (no upper limit). Some states limit claims after age 70.
- ▶ Bars mandatory retirement, refusal to hire because of age, as well as different treatment because of age.

AMERICANS WITH DISABILITIES ACT (ADA)

- ▶ The ADA prohibits discrimination on the basis of disability status.
 - ▶ Prohibits discrimination against qualified employees and applicants with a disability.
 - ▶ A qualified employee or applicant is one who can perform the essential functions of the position with or without a reasonable accommodation.
 - ▶ The ADA also protects individuals who have been disabled or are regarded as being disabled.

AMERICANS WITH DISABILITIES ACT (con't)

- ▶ Covers physical or mental disabilities
- ▶ Employers must engage in the Interactive Process to explore reasonable accommodations for an applicant's or employee's disability

ACCOMMODATION UNDER THE ADA

- ▶ If an employee expresses a need for accommodation in order to perform the essential functions of the position, the company must engage in an informal interactive process with the employee regarding possible reasonable accommodation.
- ▶ An employee can ask for any type of accommodation, you don't have to say yes if the request would cause an undue hardship upon the Company

ACCOMMODATION UNDER THE ADA (con't)

- ▶ Potential accommodations may include:
 - ▶ Restructuring schedule or duties;
 - ▶ Unpaid leave for treatment or recovery;
 - ▶ Temporary or permanent transfer to an open position for which the employee is qualified;
 - ▶ Physical and/or technological accommodations to allow the employee to perform the essential functions of the position.
- ▶ Reasonable accommodation does *not usually* include hiring another employee to perform the essential functions of the position, promotion to a higher-level position, elimination of essential functions of the position, or indefinite leave of absence.

PHYSICAL EXAMINATIONS

- ▶ Under the ADA an employer may ask disability related questions or require a physical exam only after extending a conditional job offer.
- ▶ You must ask the same questions or require a physical examination of all applicants for that job category.
- ▶ Questions and/or physical examinations must be “job-related and consistent with business necessity.”

FAMILY AND MEDICAL LEAVE ACT (FMLA)

- ▶ FMLA entitles eligible employees to up to 12 weeks of unpaid time off for:
 - ▶ The birth or adoption of a child
 - ▶ To care for a spouse, son, daughter, or parent who has a serious health condition
 - ▶ A serious health condition that make the employee unable to perform the essential functions of his or her job
- ▶ FMLA Leave may be used intermittently under most circumstances (an employer may elect not to allow employees on leave related to the birth or adoption of a child to use intermittent leave)
- ▶ FMLA Leave is UNPAID. During COVID-19, the Act was temporarily expanded to require paid leave and include leave for childcare. However, the expanded benefits are no longer required by law.

FAMILY AND MEDICAL LEAVE ACT (con't)

- ▶ To be eligible for FMLA Leave, an employee must have:
 - ▶ Worked for the employer for at least 12 months, and
 - ▶ Performed at least 1,250 hours of service for the employer in the preceding 12 months, and
 - ▶ Work at a location where the employer has at least 50 employees within 75 miles.
- ▶ Medical documentation can, and should be, required.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSH ACT)

- ▶ The OSH Act requires employers to provide a safe and healthful working environment for employees.
- ▶ The Occupational Safety and Health Administration adopts “Standards” related to common workplace risks that must be followed when applicable.
- ▶ The OSH Act includes the “General Duty Clause” which requires employers to protect employees from recognized hazards in the workplace when a Standard does not exist.

NATIONAL LABOR RELATIONS ACT (NLRA)

- ▶ The NLRA allows employees to bargain or act collectively to address the common terms and conditions of their employment, regardless of union status.
- ▶ The NLRA prohibits employers for adopting policies that may have a chilling effect on employees exercising their rights under the Act.

STATE LAW

- ▶ All states have adopted laws that coincide with some federal regulations but may have different requirements.
- ▶ For example: Although the minimum wage set by the federal government is \$7.25/hourly, many state and local governments have adopted higher minimum wage rates, such as \$11.15 in Missouri
- ▶ Both federal and state law should be consulted to ensure compliance with both because they may include different requirements.
- ▶ State law is typically controlling when it comes to:
 - ▶ Breaks and meal periods
 - ▶ Final pay requirements
 - ▶ Workers Compensation claims

TYPES OF DISCRIMINATION

- ▶ Disparate Treatment
 - ▶ Premised upon motive
 - ▶ Individual intentionally treated differently because of race, color, religion, sex, national origin, or any other classification protected by law
- ▶ Disparate Impact
 - ▶ Motive irrelevant
 - ▶ Facially neutral employment practice that has an unjustified adverse impact on members of a protected class
- ▶ Retaliation
 - ▶ Participation
 - ▶ Opposition

SEXUAL HARASSMENT

- ▶ Employees are prohibited from making unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature where the following are present:
 - ▶ The conduct becomes a condition of an employee's employment, advancement, or continued employment,
 - ▶ Submission to or rejection of such conduct is a basis for employment decisions affecting another employee, or
 - ▶ The conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.

WORKPLACE HARASSMENT

- ▶ Although sexual harassment is the most common type of workplace harassment, harassment based on any protected trait is unlawful.
- ▶ Title VII also prohibits harassment which rises to the level of affecting the terms and conditions of any employee's employment.

QUID PRO QUO HARASSMENT

- ▶ “If you do this for me, I’ll do that for you.”
- ▶ If it involves a manager and a subordinate, Companies are strictly liable for the supervisor’s acts.

HOSTILE WORK ENVIRONMENT HARASSMENT

► Common Features:

- Severe or Pervasive - A single act can create a hostile work environment if the act is sufficiently severe.
- Unwelcome - It is no defense that the complainant voluntarily participated in the sex-related conduct.
- Offensive Physical Contact or Offensive Comments - Conduct is more likely to be considered harassing where it is physically threatening or humiliating.
- Unreasonable Interference with Job.
- Based on Gender or Other Protected Characteristic - To be actionable, conduct to which complainant is subjected must be based on sex or another protected characteristic (e.g., race). It is a best practice to prohibit any harassment regardless of the basis.

HARASSMENT BY NON-SUPERVISORY CO-WORKERS OR CLIENTS

- ▶ An employer will be liable for harassment by non-supervisory co-workers or customers over whom:
 - ▶ The employer has control,
 - ▶ If the employer knew, or should have known, about the harassment, and
 - ▶ The employer failed to take prompt and appropriate remedial action.

REPORTING DISCRIMINATION OR HARASSMENT

- ▶ An employer should inform employees how to report discrimination and harassment.
- ▶ A least 2 options for who to report discrimination and harassment should be provided (i.e. supervisor or HR) to ensure that no employee is required to report discrimination or harassment to the individual engaged in the unlawful activity.
- ▶ Employees should be advised that they will not be subject to unlawful retaliation for reporting discrimination or harassment. However, they may be informed that failure to report discrimination or harassment may be grounds for discipline.

WORKPLACE INVESTIGATIONS

- ▶ Any complaints of unlawful behavior should be taken seriously and handled in a manner to respect employee confidentiality and privacy when possible.
- ▶ Witness should be interviewed when available.
- ▶ The alleged perpetrator of the behavior should be informed of the allegations and allowed to provide defense and/or alternate explanations and evidence to consider.
- ▶ **REGARDLESS OF THE ALLEGED VIOLATION, ALL INVESTIGATIONS SHOULD BE WELL-DOCUMENTED!!!**

EFFECTIVE DOCUMENTATION

- ▶ “If it’s worth remembering, it’s worth writing down.”
- ▶ Important personnel actions should be promptly documented in writing while memories are fresh.
- ▶ Imperfect documentation promptly recorded is more valuable than later created documentation.
- ▶ Hand-written documentation is acceptable.
- ▶ Documentation must be signed and dated.
- ▶ Stick to the facts - do not record opinions about personal characteristics of employees unrelated to the issue.

AVOIDING RETALIATION

- ▶ It is illegal under Title VII, the ADEA, the ADA, the OSH Act, FLSA, FMLA, the NLRA, and state law to retaliate against an employee for engaging in protected activity.
- ▶ Retaliation includes any adverse employment action taken against an employee because he or she engaged in protected activity.
- ▶ Protected Activity encompasses a range of conduct including complaining about or reporting discrimination, participating in an investigation, requesting an accommodation for a disability, complaining about an unsafe workplace condition, or filing a charge with a state or federal agency.

AVOIDING RETALIATION (con't)

- ▶ An employee does not have to prove the underlying claim involved in the Protected Activity in order to receive protection from retaliation.
- ▶ It is enough that the employee believed, in good faith, that he or she was opposing illegal conduct.

QUESTIONS?