Top Employment Law Challenges in the Workplace

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Top Employment Law Challenges in the Workplace

#1 Discrimination & Retaliation

#2 Pre-employment Inquiries

#3 Interfering with Employees Rights to use FML

#4 Failure to Accommodate a Disability

#5 FLSA Issues

What is the difference between unacceptable vs. illegal conduct?

- Culture- how we do things around here.
- Standard- Treating people with dignity and respect.
- Emp’ees may not put themselves above the company by acting outside its culture!

PRE-JUDGING = PREJUDICE

(Courtesy of EEOC conference on 4/19/18)

#1. Discrimination and Retaliation

- Race
- Color
- National Origin
- Religion
- Sex/Gender
  - Sexual Orientation



#1 Discrimination

Title VII of the Civil Rights Act of 1964

What is prohibited?

Discrimination in hiring, firing, training, promotion, discipline or other workplace decisions based on race, color, gender/gender identity, national origin, or religion



#1 Retaliation

Unlawful to fire, demote, harass, or otherwise “retaliate” against an applicant or employee.

- Filed a charge of discrimination.
- Complained to the employer about discrimination on the job.
- Participated in an employment discrimination or lawsuit.



#2 Pre-Employment Inquiries

- Employers must refrain from any pre-employment inquiry that would reveal the applicant's status in a protected category:
  - Race/Color
  - National Origin
  - Sex/Gender/ Orientation
  - Religion
  - Age
  - Disability
  - Credit History



#3 Interfering Employee's Right to Use Family Medical Leave (FML)

FMLA Basics

- 12 weeks of job protected leave- can't give discipline or other adverse action
- Same or equivalent job upon return
- Continuation of group health insurance
- Unpaid, but most employers including City require unpaid FMLA to run concurrently with paid leave (vacation, sick leave, etc.)

FMLA Basics

- Eligibility
- 50 or more employees
- 12 months of employment and 1,250 hours (include OT) during 12 months before start of leave
- Not already taken or more weeks leave within previous 12-month period

FMLA Basics

- Covered Absences
- Employee's own serious health condition
- To care for a spouse, child or parent with a serious health condition
- Incapacity due to pregnancy, prenatal medical care, or child birth

Does employee have choice to not designate absence as FMLA?

- Employer may place employee on FMLA leave if absence is due to serious health condition.
- It is NOT employee's choice.
- Refusal can be insubordination.

FMLA: Fitness-for-Duty/Return to Work Certification

- With advance notice of requirement, employee can be ordered to provide a fitness-for-duty before returning to work if FMLA leave is due to employee's own serious health condition.
- Must specifically address employee's ability to perform essential job functions set out in job description.

FMLA: Fitness-for-Duty/Return to Work Certification

- HR (not supervisor) may contact health care provider to clarify and/or authenticate
- Can’t require for each intermittent leave, but can require once every 30 days if reasonable safety concerns exist (i.e., a reasonable belief of significant risk of harm to the emp’ee or others)

Intermittent Leave

- FMLA can be taken in small periods of time if:
  - Medically necessary
  - Because of a qualifying exigency
  - For planned medical treatment, or
  - As otherwise approved by emp’er

Intermittent Leave

- Certification must set out reasons for and schedule of intermittent leave. If unknown, then an estimate of the frequency and duration of absences.
- Can’t require employee to bring doctor’s note for each intermittent FMLA absence.

Call-In Procedures

- Employee must comply with City's normal call-in procedures for reporting absences, tardiness and requesting leave, *e.g.* contacting a specific supervisor by a certain time.
- Notice may be given by emp'ee representative only if emp'ee is physically unable to do so.

Call-In Procedures

- If employee does not comply with call-in procedures and no unusual circumstances exist, FMLA job-protected leave may be delayed/denied.
- Employee is also subject to discipline.

Use caution when communicating with Employee while on FMLA!

- Reasonable amounts of contact with employee during FMLA leave, e.g. getting passwords, determining status of pending projects, and identifying others who can fill in during absences, are acceptable, but too much is violation of FMLA. (*Vess v. Scott Medical Corp.* (N.D. Ohio 2013)

What happens if No FMLA or if 12 Weeks of FMLA Runs Out?

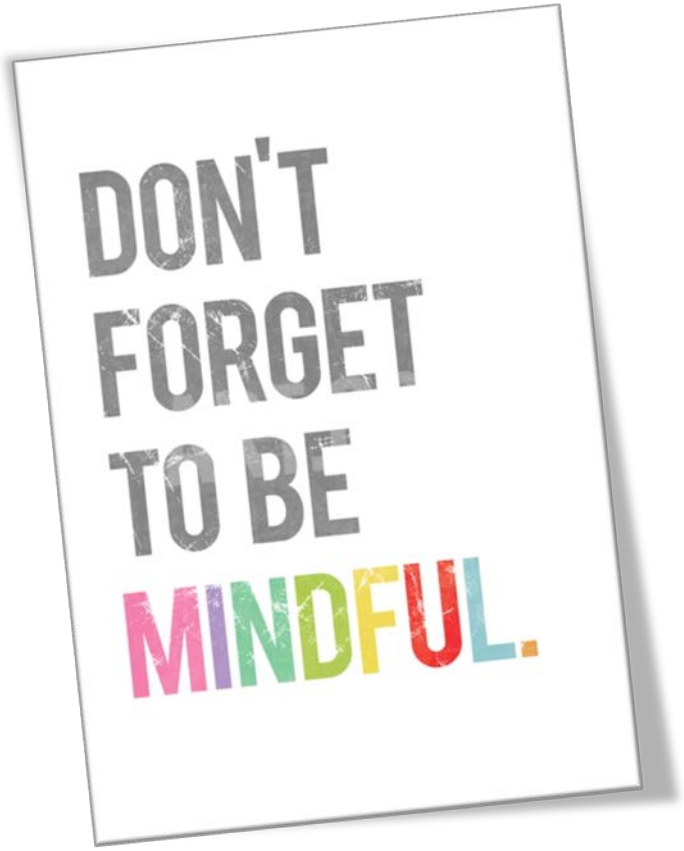
ADA requires evaluation of whether Employee can

- return to work and perform essential job functions with or without accommodation and
- the accommodation does not pose undue hardship.

#3 Interfering Employee's Right to Use Family Medical Leave (FML)

Practice Tips:

- Proper documentation is key to defending a claim under this statue.
- Discipline based on work performance and/or behavioral deficiency is defensible if it can be supported by verifiable facts.
- Proximity to a FMLA event is important in considering whether there is a pretext for the disciplinary action, and whether the true, underlying reason for the action is the employer's retaliation for the employee using FMLA leave.



#4 Failure to Accommodate a Disability

- The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability in all employment aspects.

- "Disability" under ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of impairment, or is regarded as having a disability.



President George H.W. Bush signed the Americans with Disability Act on July 26, 1990

#4 Failure to Accommodate a Disability

Major changes included the following:

- List is "non-exhaustive". Includes "general categories" and "major bodily functions."

- "General": caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.

#4 Failure to Accommodate a Disability

Major changes included the following:

- "Major Bodily Functions": function of the immune system, normal cell growth, digestive, bowel, bladder, neurological brain, respiratory, circulatory, endocrine and reproductive functions.

- An impairment that substantially limits one major life activity need not limit other major life activities to be considered a "disability."

#4 Failure to Accommodate a Disability

Who is "qualified"?

- Satisfies the skill, experience, education and other job-related requirements of the position held or desired and

- Can perform the essential functions of that position with or without accommodation.





#4 Failure to Accommodate a Disability

Reasonable Accommodation

An employer is required to provide reasonable accommodation to a qualified individual with a disability unless it causes undue hardship on the employer's operation.

"Undue hardship"—the requested accommodation must result in significant difficulty and expense considering the business size, financial resources and the nature and structure of its operation.







#4 Failure to Accommodate a Disability

No Direct Threat to Self or Others

- An individual cannot pose a direct threat to the health or safety of himself or others in the workplace.

#4 Failure to Accommodate a Disability

Practice Tips:

- Re-evaluate job descriptions, essential job functions and job production standards.
- If not identified, hard to show it is "essential," including attendance.



#5 Fair Labor Standards Act (FLSA)

Requirements:

- Exempt versus Non-exempt
- Is travel time to out-of-town conferences compensable?



#5 Fair Labor Standards Act (FLSA)

Requirements:

- When a non-exempt employee works more than 40 hours in a consecutive seven day period, that individual is entitled to overtime pay or comp time at the rate of one and one/half times his/her regular rate of pay.

- "Work"—Activity performed for the benefit of the employer and related to the employee's duties.



#5 Fair Labor Standards Act (FLSA)

Requirements:

- On-call time is not considered work time, unless the employee is so restricted that s/he cannot use the time for his/her needs.
- Time spent checking e-mails and other electronic communications is compensable.
- The employer is not required to compensate each time an employee stays a few minutes before or after shift.



#5 Fair Labor Standards Act (FLSA)

Requirements:

- Generally, up to ten minutes is tolerated before the time is counted as work.
- If the employer uses a time clock, it cannot rely on this rule.



#5 Fair Labor Standards Act (FLSA)

Practice Tips:

- Establish a policy that overtime is for emergency purposes and must be pre-approved by a supervisor.
- Include in your policy that all employees must report all hours worked on their time sheets and sign their time sheets.
- Action should be taken against an employee who disregards the policy by working unnecessary overtime.



#5 Fair Labor Standards Act (FLSA)

Practice Tips:

- If you know or should know an employee is working beyond their work hours, you must be proactive in addressing the problem.

