Institute Local Government Law



Institute Local Government Law Employment Law

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FEDERAL EMPLOYMENT LAWS

- Title VII
- Fair Labor Standards Act (FLSA)
- Pregnancy Discrimination Act
- Fair Credit Reporting Act
- Equal Pay Act
- COBRA
- Age Discrimination In Employment (ADEA)



FEDERAL EMPLOYMENT LAWS (But wait, there is more!!!)

- NLRA? – No
- Family Medical Leave Act (FMLA)
- Americans With Disabilities Act (ADA)
- Employment and Re-employment Rights (USERRA)
- ERISA –Govt. plans exempt from Title I fiduciary requirements



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FEDERAL EMPLOYMENT LAWS

(Much, much more!!!)

- Occupational Health and Safety Act (OSHA)- No, but about 28 states have adopted Mini-OSHAs…
- PWFA
- PUMP ACT
- FTC Regulation – Non-compete Agreements
- Rehabilitation Act of 1973 – if federal funding…
- Title VI of the Civil Rights Act – if federal funding…

DOL/TWC/EEOC: The Enforcer

- Equal Employment Opportunity Commission is the federal agency charged with enforcement of federal anti-discrimination laws.
- Fair Employment Practice Agencies have overlapping authority
  - Under Title VII, employees have 300 days to bring an EEOC/TCHRA complaint.
  - Both agencies implemented electronic filing several years ago which dramatically lengthened the response time.
- Both DOL and FEPA investigate and prosecute wage claims.

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AT-WILL EMPLOYMENT

Some states are an “At-Will Employment” State:

“…absent a specific agreement to the contrary employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”

- Policies or Handbooks can compromise the at will relationship by creating contracts unless the contract is explicitly denied. (*City of Houston v. Williams* and *City of Denton v. Rushing*.)
- Developing area: If policies are not contracts, are the policies enforceable?

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AT WILL EMPLOYMENT



So long as the reason is not illegal:

- Discrimination
- Retaliation for filing a claim or asserting rights
- Refusal by employee to perform an illegal act
- Any other illegal reason

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INDEPENDENT CONTRACTORS

- Most likely to be vendors for a specific service.
- Usually have a business risk/interest
- Usually able to set their own hours/determine amount of time to spend on the project or work.
- Are not supervised, as is an employee – watch the words!!
- Generally, furnish their own materials to accomplish the job.
- NOT seasonal or temporary employees.

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TITLE VII AND "MINI-CIVIL RIGHTS ACTS" @ THE STATE LEVEL



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DISCRIMINATION AND HARASSMENT

- Mirroring statutes seek to prohibit three types of workplace conduct:
  - Discrimination
  - Harassment
  - Retaliation



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WHO'S COVERED BY TITLE VII?

Prohibits employers from discriminating against employees on the basis of

- Sex, race, color, national origin, and religion
- Generally applies to employers with **15 or more** employees, including federal, state, and local governments.
- DOJ changed materials to substitute "sex" for "gender" discrimination in its materials.



WHO IS COVERED?

- **Sexual Orientation and gender identity**/expression, including transgender identity:

  Bostock v. Clayton County, 590 U.S. ____ (2020)

- **Same-sex harassment:**

  Oncale v. Sundowner Offshore Servs., 573 U.S. 75 (1998)



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DISCRIMINATION

- Discrimination – generally unlawful to refuse to hire, to fire, or to treat differently in compensation or work conditions ***based upon a protected classification***:
  - Race, color, national origin, gender, disability, age, religion, etc.
  - Disparate treatment vs. disparate impact vs. hostile work environment
  - Defense: legitimate non-discriminatory business reasons.

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HARASSMENT

Harassment is prohibited conduct ***distinct*** from hiring and firing decisions.

Two Types of **Illegal** Harassment:

- Quid quo pro sexual harassment: An advantage promised or given in return for providing or agreeing to a sexual demand.
- Hostile Work Environment: Must be based on a protected characteristic and conduct must be **severe and pervasive** to a reasonable person. **Stand alone incidents do not typically create a hostile work environment. Employer's response should be "thorough, prompt and remedial."**

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HARASSMENT – Severe OR Pervasive

- *Tolliver v. YRC, Inc.*, LEXIS 17806 (5th Cir. 2018) (unpublished)
  - Unknown persons left a noose at the workplace
  - another incident with racist graffiti on company truck
  - Held not sufficiently severe or pervasive to create a hostile work environment for racial harassment claim.
  - Employer was NOT liable for these incidents because it took "**prompt remedial action:** Offered $25,000 reward to find perps, interviewed 100s of employees, reported incidents to police, hired more security guards & provided weekly reminders re: company's antidiscrimination policies.
  - No employees were disciplined, however.

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RETALIATION

When Employer takes an **adverse action** against a **covered individual** because they **engaged in "protected activity"**



COVERED INDIVIDUAL:

- Opposed unlawful practices,
- participated in proceedings,
- requested employment accommodations
- related to employment discrimination based on race, color, sex, religion, national origin, age, or disability.

RETALIATION

When Employer takes an **adverse action** against a **covered individual** because they **engaged in "protected activity"**

PROTECTED ACTIVITY includes:

- Internal complaints about alleged discrimination;
- threatening to file charge of discrimination;
- expressing opposition to an employment practice employee reasonably believes is unlawful
- refusing to undertake an act reasonably believed to be illegal under Title VII/ADA

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PROTECTED BY AGE: ADEA

- ADEA: Prohibits discrimination against employees **over the age of 40.**
- **Bona Fide Occupational Qualifications** can exempt Employer from age-related restrictions, e.g.:
  - Law enforcement (18/45)
  - Fire Suppression (18/36)
- Often arises in Older Worker Benefit Protection Act Separation Agreements…

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AMERICANS WITH DISABILITIES ACT

- Prohibits discrimination against disabled people.
- **"Disability:"**
  - a person with a **physical or mental impairment** that ***substantially limits*** **1** or more **major life activity.**
  - a person with history/record of such an impairment; or
  - A person perceived by others as having such an impairment.
  - Major Life activities include: caring for oneself, walking, seeing, hearing, speaking, working, sitting, standing, lifting, sleeping, thinking or concentrating, interacting with others.

ADA

- Qualified individual with a disability meets the fundamental qualifications of the job and can perform **essential functions** of job **with or without reasonable accommodations.**
- Employer has an **obligation to engage** the employee in discussion about what accommodations employee seeks & make determination re: reasonableness of request. **"Interactive Process"**

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ADA (cont.)

- Accommodations may include making facilities accessible, providing modifying equipment, flexible scheduling, leave or job restructuring.
- Accommodation cannot impose an “undue hardship” to the employer.
- Individuals can be held liable under the Public Services Provision of the Act.

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USERRA: UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

- Protects Veterans, military's civilian job rights and benefits (Active & Reserve U.S. Armed Forces).
- Returning service members must be reemployed in the same position BUT FOR their military service: same seniority, status and pay, & other rights and benefits tied to seniority.
- Includes raises, other seniority-based benefits such as rate of vacation accrual. Health insurance must be reinstated upon the employee's return with no waiting period.



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THE EQUAL PAY ACT

- Requires men & women be given equal pay for equal work in the same establishment.
- Jobs need not be identical, but they must be substantially equal.
- ***Job content***, not job titles, determines whether jobs are substantially equal. EPA prohibits unequal wages to men & women performing jobs
- requiring **substantially equal skill, effort & responsibility**, & are performed under similar **working conditions within the same establishment.**
- **Individuals can be held liable under the Act.**

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FAIR LABOR STANDARDS ACT (FLSA)

- Establishes minimum wages and overtime payments for "covered" employers and employees.
- Federal Minimum Wage: $7.25/hour effective July 24, 2009.
- Overtime: 1 ½ times the regular rate of pay for all hours worked over 40 in a work week –
  - If state law/Union agreement provides > protection/pay to the employee, those provisions apply.
- **Individuals can be held liable under the Act.**

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FAIR LABOR STANDARDS ACT (FLSA)

Exempt v. nonexempt status

- Worker Classification: The most litigated employment issue in federal courts.
- FLSA has approximately 30 separate exemptions from minimum wage and/or overtime requirements.
- Complex, case-by-case, analysis: Ex: Texas Fireworks Stands held to be covered by FLSA because they do not fall under "seasonal amusement or recreational establishment" exemption.

FAMILY MEDICAL LEAVE ACT

- Requires qualifying employees be granted **unpaid** leave for up to 12 weeks for an employee's own or a dependent's serious health condition.
- Leave Entitlement, *not* a benefit.
- Can overlap with other types of leave like worker's compensation leave.
- Military members can get up to 26 weeks of leave.
- **Individuals can be held liable under the Act.**



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HEALTH INSURANCE PORTABILITY ACCOUNTABILITY ACT (HIPAA)



- The Privacy Rule **does not apply to employers or employment records**, *with the exception of health plan records*.
- Information contained within unprotected records **MAY** be protected.
- Employers may have an obligation to keep Protected Health Information (PHI) confidential under other laws, so continue to treat all health care records as PHI.
- **Individuals can be held liable under the Act.**

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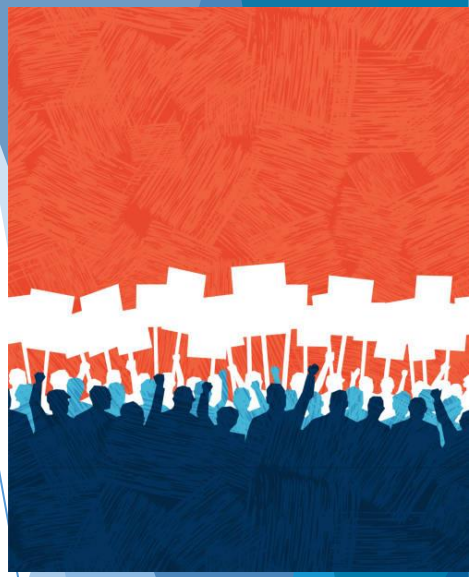
OTHER SOURCES OF REGULATION

- County resolutions and municipal ordinances
- Professional licensing boards and commissions such as Police or Professional Engineers.
- Quasi-governmental entities such as pension systems
- Professional Associations (Ethics policies may require interaction with other rules.)

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CIVIL RIGHTS

- Public employers can be held liable for civil rights violations under 42 USC 1983 when
  - A person subjected the employee to conduct that occurred under color of state law.
    - (Pattern and Practice can create state law.)
  - The conduct deprived the employee of rights, privileges or immunities guaranteed under federal law or the United States Constitution
  - Cities are “persons” under the Act.
  - **Individuals may be held liable under the Act.**



CIVIL RIGHTS – QUALIFIED IMMUNITY

- Qualified Immunity Doctrine is an available defense to a civil rights violation when:
- The violation of law is not "clearly established."
- Means @ time of the conduct, law was sufficiently clear that Reasonable official would understand what they did was unconstitutional. E.g.:
  - Free Speech
  - Unreasonable Searches
  - Excessive Force



POLICIES AND THE LAW

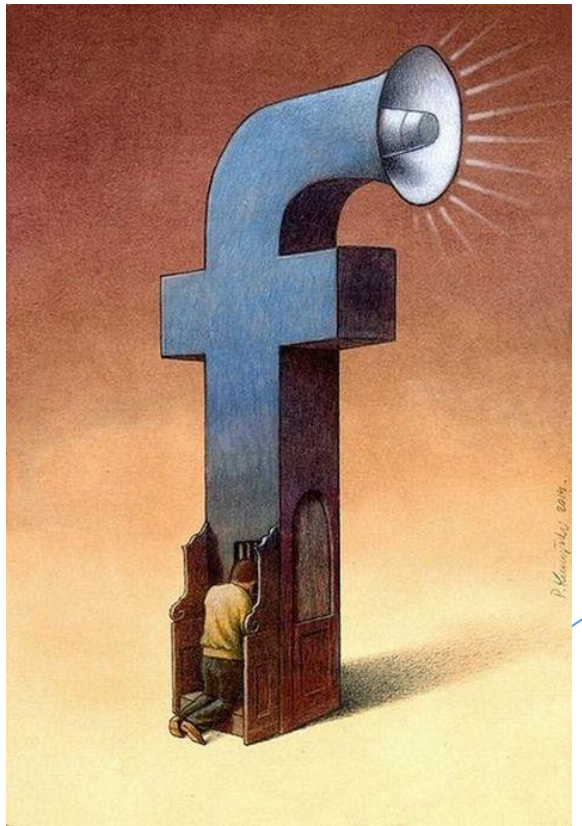
- ***Policy Enforcement***
- ***Does City or department have a relevant policy?***
- Are relevant policies clear and enforceable?
  - Does policy create an impermissible restraint of free speech?
  - Is policy discriminatory on some other basis, such as disability, gender (Disparate Impact)?
  - Is policy discriminatory as enforced? (Disparate Treatment)
    - What is organization's history regarding the policy?
    - Prior examples of enforcement and discipline?

THE FIRST AMENDMENT

- **Establishes freedom** (right cannot be abridged or denied) **from governmental regulation of:**
  - religion Groff v. DeJoy, __ U.S. __ (2023)
  - speech (Ex: Public employees/officials get to engage in social media use.)
  - the press (Ex: Employees have a right to speak on a matter of public concern.)
  - to peacefully assemble (Case law merges with the right of petition)
  - to petition the government (Ex: grievance policy)
- First Amendment applies to public employers through the 14th Amendment. It does not generally apply to private industry.

THE FIRST AMENDMENT

- **PRIOR RESTRAINT-** government action which prohibits speech or expression before it happens.
  - Ordinances
  - Policies
  - Established practice



THE FIRST AMENDMENT (cont.)



- **RETALIATION**
  - The employee engaged in protected speech (ex: political, whistleblowing, grievances)
  - The employee was subject to adverse action (ex: termination, loss of wages)
  - The action would keep a reasonable person from continuing to engage in the speech or conduct. FACT QUESTION!
  - There is a cause-and-effect relationship between the speech and the adverse action. FACT QUESTION!

FOURTH AMENDMENT- DRUG TESTING

- ***Drug testing***
  - *Pre-employment*- No *clear* guidance for governments as an employer.
  - *Random*- Fourth Amendment limits public entities.
    - FMCSA/DOT guidelines are an exception to 4th Amendment.
    - Safety-sensitive positions may be excepted from search rule.
  - *Reasonable Suspicion*- requires witnesses articulate basis for testing.
  - *By consent*- Employee has right to refuse w/o consequence for refusal.

DRUG TESTING



- Active addiction NOT protected, unless,
  - Employee previously informed Employer of history of addiction or treatment and
  - Employee discloses a relapse/current use in the course of seeking an accommodation for treatment

- EAP programs should be separated from/not used as basis for any disciplinary proceeding.

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PERSONAL RELATIONSHIPS WITH STAFF

- How do you handle changes in relationships with former peers?
- How do you handle social media connections with staff? First Amendment speech concerns?
- How do you handle political speech in the workplace?
- Friendships-Romantic relationships with or among staff can create supervisory challenges.

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QUESTIONS?



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