

Employment Law Basics
Learning What to Do and Not to Do

Why are We Here?

- Harassment and Discrimination
- The Americans with Disabilities Act
- Fair Labor Standards Act
- Job Descriptions and It's Interplay with ADA and FLSA
- Movie! Avoiding Litigation Landmines
- The Family and Medical Leave Act
- What is Our Role?

Harassment and Discrimination

Harassment

- Quid Pro Quo Harassment – "This for That"
 - occurs in cases in which employment decisions or treatment are based on submission to or rejection of unwelcome conduct, typically conduct of a sexual nature.
- Hostile Work Environment Harassment
 - unwelcome conduct of supervisors, co-workers, customers, contractors, or anyone else with whom the victim interacts on the job, and the unwelcome conduct renders the workplace atmosphere intimidating, hostile, or offensive.

When Harassment Violates the Law

- Unlawful harassing conduct must be:
 - unwelcome and
 - based on the victim's protected status.
- Second, the conduct must be:
 - subjectively abusive to the person affected; and
 - objectively severe and pervasive enough to create a work environment that a reasonable person would find hostile or abusive.

Discrimination

- Direct Discrimination
- Indirect Discrimination – apparently neutral policies that disproportionately impact protected groups and do not reflect a valid business reason
- Bona Fide Occupational Qualification – discrimination permitted if BFOQ exists

State of Nevada Protected Classes

- NRS 613.330(1)(a) – It is unlawful to fail or refuse to hire or to discharge any person, or otherwise to discriminate against any person with respect to the person's compensation, terms, conditions or privileges of employment, because of his or her:
 - race,
 - color,
 - religion,
 - sex,
 - sexual orientation,
 - gender identity or expression,
 - age,
 - disability or
 - national origin

State of Nevada Protected Classes (Con't)

- NRS 281.370(1) – All **personnel actions taken by state, county or municipal departments**, housing authorities, agencies, boards or appointing officers thereof must be based **solely on merit and fitness**.
- NRS 281.370(2) – [Above group] shall not refuse to hire a person, discharge or bar any person from employment or discriminate against any person in compensation or in other terms or conditions of employment because of the person's
 - race,
 - creed,
 - color,
 - national origin,
 - sex,
 - sexual orientation,
 - gender identity or expression,
 - age,
 - political affiliation or
 - disability,
 - except when based upon a bona fide occupational qualification.

Tangible Employment Actions

- The means by which a supervisor brings the official power of the enterprise to bear on subordinates.
- A tangible employment action consists of a significant change in employment status such as
 - hiring
 - firing
 - failing to promote
 - reassignment
 - a significant change in responsibilities
 - undesirable reassignment or
 - a significant change in benefits.

Additional Federally Protected Classes

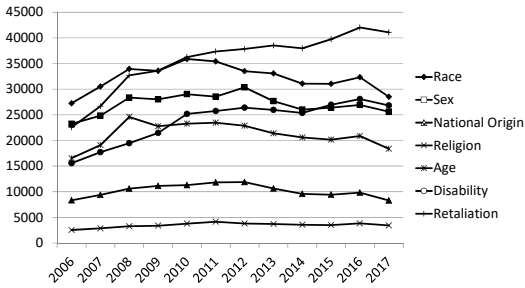
- Veterans of the Armed Forces
 - Uniformed Services Employment and Reemployment Rights Act of 1994
- Pregnancy
 - Pregnancy Discrimination Act
- Genetic Information
 - Genetic Information Nondiscrimination Act of 2008 (GINA)

Federal and State Laws

- What is the difference between federal and state laws?
 - Supremacy – a federal law will trump any conflicting state laws (but there might be a parallel, or even stricter, state law);
 - Not always the case, but generally in employment law
 - Control – a federal law can bar the creation of a state law.

Does Harassment and Discrimination Still Happen?

U.S. Equal Employment Opportunity Commission – Statistics on Filed Charges



What Would You Do If Sexual Harassment Is Reported to You?

- Board members?
- Superintendents?
- Do you make the subjective and objective analysis?

Compliance

- Employer is responsible for all harassment it knew or should have known was being committed, including those by vendors or customers
- Legal duty to undertake necessary steps to prevent or stop sexual harassment
- Have a policy and train employees
- Have a confidential avenue for complaints
- Investigate all complaints promptly

Remedies for Discrimination

- Order to hire, rehire, reassign, or promote the employee
- Compensate the employee for all lost pay and benefits
- Pay damages for emotional distress, mental anguish or inconvenience
- Change policies
- Pay punitive damages if malicious or reckless
- Pay employee's legal fees

Retaliation

- Employer may not retaliate against an employee for opposing discrimination, filing a complaint, or cooperating with an investigation of a complaint
- Legal defense against retaliation claim is that the adverse job action was taken for a legitimate business reason unrelated to the discrimination complaint

ROBERT JOHNSTON, et al. v. SCHOOL DISTRICT OF PHILADELPHIA

- 4 Purchasing Managers fired
- Reason Given for Firing: Reduction in Force
- School District increased that department's budget by \$500,000 three months after firing
- The fired employees complained about racial discrimination
- School District would not interview the fired personnel when they applied for open positions
- Manager tried to hire one the former employees
- School District revoked the offer
- Lawsuit went to trial, resulting in a \$2.96 million verdict

The Americans with Disabilities Act

Who does the ADA Protect?

- Protects “qualified individuals with disabilities”
- Qualified Individuals: Individuals with the skill, experience, education, and ability to perform the essential functions of the position, with or without reasonable accommodations.
- www.eeoc.gov for more information on ADA

Disability – Title 42, Chapter 126, Section 12102

- The term "disability" means, with respect to an individual
 - (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
 - (B) a record of such an impairment; or
 - (C) being regarded as having such an impairment
- If the disability is episodic or in remission, it will still be considered a disability
- Cannot consider ameliorative or mitigating measures

Examples of Major Life Activities

- Caring for oneself
- Hearing
- Seeing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Breathing
- Reading
- Communicating
- Operation of a major bodily Function

Regarded As Impaired

- Person with a minor impairment is treated as if the impairment if a major one; or
- Person has an impairment that is a problem because of the perception of others; or
- Person has no impairment, but the employer believes he or she does

Assessing the Disability

- The law favors a broad interpretation for greater coverage
- Compare the claimed disability in that individual with the general population
- Generally does not require extensive analysis
- May require a release-to-work from the primary care provider, after provider is provided a detailed job description
- May request a medical exam
 - Only if job-related **AND** necessary

Reasonable Accommodations

- Reasonable Accommodations: Any modification or adjustment to a job or work environment that will allow the applicant or employee with a disability to perform the essential functions of the position.
- Access
- Schedules
- Modifying Training or testing
- NOT required to lower quality or quantity of required work

Reasonable Accommodation v. Undue Hardship

- Factors to Consider
 - Nature and cost of the accommodation
 - The financial resources of the facility making the accommodation
 - The effect on the expenses and resources of the facility making the accommodation
 - The number of persons employed at the facility
 - The type of facility and/or employer
 - The nature of the facility's operations
 - Seek advice from legal counsel
- The employer had the burden to show that it made reasonable efforts to accommodate!
- Employee does not get to choose the accommodation

Not Covered By ADA

- Illegal drug use, if current, but possibly protected if in past
- Gay and lesbian workers
- Sexual and behavioral disorders
- Physical and psychological characteristics such as poor judgment, anger control or cultural or economic disadvantages

**Are Independent Contractors Covered
by the ADA?**

- The ADA covers “employees.”
- Section 504, Rehabilitation Act of 1973
 - Non-discrimination under federal grants and programs
- No otherwise qualified individual with a disability ... shall, solely by reason of his or her disability ... be subjected to discrimination under any program or activity receiving Federal financial assistance...
- 9th Circuit says that independent contractors are covered.
- 8th Circuit says no.
- Probably headed to the United States Supreme Court.

**UNITED STATES OF AMERICA
v. THE PEA RIDGE SCHOOL DISTRICT**

Discussion

Fair Labor Standards Act

To Whom Does the FLSA Apply?

- All Employers engaged in commerce
 - Small family businesses are exempted
- All public sector hospitals, schools and agencies
- Most employees in the US are covered by the FLSA

When Does FLSA Apply?

- In order for the FLSA to apply, there must be an employment relationship between the “employer” and the “employee”
- What is an employee?
 - Any individual employed by an employer 29 U.S.C. § 203(e)(1)
 - SUPER HELPFUL!
- Whether a worker is an employee is determined by the “economic reality test.”

Economic Reality Test

- Consider the following factors when determining if a worker is an employee or independent contractor:
 - Is the work an integral part of the employer’s business?
 - Does the worker’s managerial skill affect his or her opportunity for profit and loss?
 - Relative investments of the worker and the employer
 - The worker’s skill and initiative
 - The permanency of the worker’s relationship with the employer
 - Employer control of employment relationship

Work Integral to the Business

- Work is integral to the employer's business if it is a part of the production process or is a service that the employer is in business to provide.
- If the work performed is integral to the employer's business, the worker is more likely economically dependent on the employer.

Managerial Skill Affecting Opportunity for Profit and Loss

- Does the person make independent business decisions from the employer?
 - Hiring own help
 - Advertising
 - Buying new Equipment

Relative Investments of the Worker and the Employer

- If worker's investment is greater than the employers investment in work, it is a sign that the worker is a independent contractor.
 - Does the worker have extensive and expensive equipment owned by the worker? [For example, a suite of construction tools]
 - Or does the worker use all or most of the employers equipment and the worker's primary contribution is the work itself?
- If the worker's investment is used for the purpose of sustaining a business beyond the job or project the worker is performing, that is a sign that the worker is an independent contractor.

Skill and Initiative

- Does the worker’s skills demonstrate independent judgment or initiative?

The Permanency of the Worker’s Relationship with the Employer

- A permanent or indefinite relationship with the employer suggests the worker may be an employee.
- If not, why?
 - Short term basis by the choice of the worker?
 - Then leans toward independent contractor
 - Nature of the Industry?
 - Then may lean towards employee

Employer Control of Employment Relationship

- Who controls:
 - Hiring and firing,
 - The amount of pay,
 - The hours of work, and
 - How the work is performed

How weighted?

- This is not a “pro v. con” list where most factors win.
- Like many things in the law, it is a weighted consideration under the “totality of the circumstances.”
- No factor, by itself is determinative.
- This is an illustrative, not an exclusive list.

Now that we know WHO is covered, WHAT subjects are covered by FLSA?

- Minimum wage
- Hours worked
- Overtime
- Exemptions
- Child Labor (Not Covered Today)

Subjects NOT Covered by FLSA

- Vacation Time
- Holiday Pay
- Sick Time
- Severance Pay

Minimum Wage

- Federal Minimum Wage is \$7.25/hr
- However, in Nevada, this is irrelevant because the Nevada minimum wage is \$8.25/hr

Hours Worked

- Paid work time is all work suffered or permitted.
 - This is true even if the work is not requested
- In the case of unauthorized work, the employer still must pay; however, the employee may be disciplined

Hurry Up and Wait!

- Waiting time IS counted as hours worked when:
 - Employee is unable to use the time effectively for his or her own purposes; and
 - Time is controlled by the employer
- Waiting time is NOT counted as hours worked when:
 - Employee is completely relieved from duty; and
 - Time is long enough to enable the employee to use it effectively for his or her own purposes

Rest Periods

- Meal periods may be unpaid IF:
 - The employee is relieved of duties for the purposes of eating a meal AND given sufficient time to do so (usually at least 30 minutes)
- Short breaks are counted as hours worked (5 to 20 minutes)

Training Time

- Time employees spend in training MUST be paid, unless:
 - Attendance is outside regular working hours
 - Attendance is voluntary
 - The course, lecture, or meeting is not job related AND
 - The employee does not perform any productive work during attendance
- All factors must exist to not be paid work hours

Travel Time and the Portal-to-Portal Act 29 U.S.C. 9

- Passed by Congress as an amendment to FLSA in 1947.
- Employers do not need to pay for time spent traveling from home to work and vice versa.
- Requires employers to pay for time spent traveling from one workplace to another during the same workday.
- Employers must pay for time spent traveling to and from another city in the same day.
- When employees are required to travel away from their homes and that travel spans more than one workday, an employer must include in hours worked the time actually spent traveling, only if it occurs during the employee's normal work hours.

Overtime

- Covered, non-exempt employees must receive one and one-half times the regular rate of pay for all hours worked over forty in a workweek
- Each workweek stands alone
 - Defined as seven consecutive 24-hour periods
 - Begins and ends at the determination of the employer

What is Regular Rate?

- Base pay + other pay (incentive pay, shift differential pay, longevity pay, scheduled bonuses, hazardous duty pay, etc.) DIVIDED by number of hours worked.

What is a Lawyer?

Somebody not smart enough for the math classes required to be a doctor

STOLEN!!!!

- Example from the Department of Labor

Total Hours = 48
Hourly Rate = \$9.00
Bonus = \$10

48 hours x \$9.00=	\$432.00
Bonus	+ 10.00
	<u>\$442.00</u>

\$442.00 / 48 hrs =	\$9.21 (Regular Rate)
\$9.21 x .5	= \$4.61
\$4.61 x 8 hrs	= \$36.88 (Overtime Due)

So You're an Employee; What is Your Classification?

- Non-Exempt: subject to minimum wage and overtime provisions of FLSA
- Exempt: Not subject to minimum wage and overtime provisions of FLSA

Three Tests for Exemption

- To be an exempt employee, the employee must:
- earn at least \$455 per week; \$23,600 annually
- paid on a salary basis. ; AND
- The employees must perform an executive, administrative, professional, outside sales, or computer professional job duties.

Highly Compensated Employees

- Highly compensated employees are exempt, if:
- A full-time salaried employee making at least \$100,000, annually,
- The employee's primary duty includes performing office or non-manual work; and
- The employee customarily and regularly performs at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee.

Executive Duties

- Primary duty is management of the enterprise or of a customarily recognized department or subdivision
- Customarily and regularly directs the work of two or more other employees
- Authority to hire or fire other employees or recommendations as to the hiring, firing, advancement, promotion or other change of status of other employees given particular weight

Administrative Duties

- Primary duty is 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
- Primary duty includes the exercise of discretion and independent judgment with respect to matters of significance

Professional Duties

- Primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
- Primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor

Field of Science or Learning

- Occupations with recognized professional status, as distinguished from the mechanical arts or skilled trades
 - Law
 - Accounting
 - Actuarial Computation
 - Theology
 - **Teaching**
 - Physical Sciences
 - Medicine
 - Architecture
 - Chemical Sciences
 - Pharmacy
 - Engineering
 - Biological Sciences

Computer Related Occupations

- Primary duty is:
 - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications
 - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
 - The design, documentation, testing, creation, or modification of computer programs related to machine operating systems
 - A combination of the above requiring the same level of skills, and

Additional Nonexempt Professions

- Licensed practical nurses
- Accounting clerks and bookkeepers who normally perform a great deal of routine work
- Cooks who perform predominantly routine mental, manual, mechanical or physical work
- Paralegals and legal assistants
- Engineering technicians

Common Errors to Avoid

- Assuming that all employees paid a salary are not due overtime
- Improperly applying an exemption
- Failing to pay for all hours an employee is “suffered or permitted” to work
- Limiting the number of hours employees are allowed to record
- Treating an employee as an independent contractor
- Failing to include all pay required to be included in calculating the regular rate for overtime

Job Descriptions

Purpose

- Set clear job expectations.
- Accurate recruiting and hiring of employees.
- Basis for performance reviews, promotions, discipline, and termination.
- Discrimination claims.
- ADA – Identifying essential functions of the position.
- FLSA classification.
- FMLA claims.
- Determining appropriate compensation levels.
- Various other legal issues.

Discrimination

- If an unfounded discrimination claim is filed, a well-written description can help support the employer’s decision, whether it is related to compensation, promotion, discipline or discharge.

Americans with Disabilities Act (ADA).

- Employers must provide reasonable accommodations to qualified individuals with a disability, unless to do so would impose an undue hardship on the employer.
- The duty to accommodate relates to the employee's essential job duties.
- If a disabled employee is unable to perform an essential function of the job, even with a reasonable accommodation, the employer is not required to retain the employee in that position.
- A good job description will identify the position's essential functions.

Fair Labor Standards Act (FLSA).

- As you all now know, it requires overtime pay for hours worked over 40 in a week by non-exempt employees.
- The classification of an employee is determined, in part, on an employee's duties.
- Job description's will not be determinative, in themselves, but be persuasive in confirming an employee's status.

Family and Medical Leave Act (FMLA)

- FMLA requires that the employee's health care provider certify that the medical condition for which the employee is seeking leave renders the employee unable to perform one or more of the employee's essential job functions.
- The FMLA further provides that, under specified conditions, an employer may require a return to work certificate from the employee's health care provider before the employer is required to return the employee to work following an FMLA leave.
- In order for the doctor to accurately do this, a good job description is helpful for the medical provider to give an informed opinion.

What to Include in a Job Description

- Job summary
- Job requirements
- Essential job functions
- FLSA Status – exempt, nonexempt
- Physical and Mental requirements
- Working conditions

Job summary

- An overview of the position with a brief description of the most important functions.

Job requirements

- Education
- Certifications
- Experience necessary
- Special licenses
- Special knowledge

Essential job functions

- Essential functions are the basic duties that an employee must be able to perform, with or without reasonable accommodation.
- Factors in determining that a function is essential include:
 - whether the reason the position exists is to perform that function,
 - the number of other employees available to perform the function or among whom the performance of the function can be distributed, and
 - the degree of expertise or skill required to perform the function.

Essential job functions (con't)

- Evidence that a particular function is essential includes:
 - the employer's judgment,
 - written job descriptions,
 - the amount of time spent on performing the function,
 - the terms of a collective bargaining agreement,
 - the work experience of present or past employees in the job, and
 - the consequences of not requiring that an employee perform the function.
- a detailed description of the job duties.

Best Practices in Creating Job Descriptions

- Be concise
- Be unambiguous
- Include the effective date on every job description and ensure that the date is revised when changes are made.
- Confirm that the job description is current before posting any open position.
- Confirm that the job description is up-to-date as part of the performance review process.
- Review all job descriptions on a set schedule.

Family and Medical Leave Act
(FMLA)

Purpose as Stated in the Act

- To balance the demands of the workplace with the needs of families,
- To promote the stability and economic security of families, and to promote national interests in preserving family integrity

Which Employers Does FMLA Cover?

- Private sector employers with 50 or more employees,
- Public Agencies,
- Public and private elementary and secondary schools.

Which Employees Does FMLA Cover?

- Employed by covered employer,
- Worked at least 12 months,
- Have at least 1,250 hours of service during the 12 months before leave begins,
- Employed at a work site with at least 50 employees within 75 miles.

Qualifying Reasons for Leave

- Birth of a child;
- Placement of a child for adoption or foster care
- Serious Health Condition
 - To care for a spouse, son, daughter, or parent with a serious health condition
 - For their own serious health condition
- Military Family Leave

Birth or Placement of a Child

- Both the mother and father are entitled to FMLA for the birth or placement of the child including bonding time.
- Employees may take FMLA leave before the actual birth, placement or adoption
- Leave must be completed by the end of the 12-month period beginning on the date of the birth or placement

Serious Health Condition

- Illness, injury, impairment or physical or mental condition involving:
 - Inpatient Care, or
 - Continuing Treatment by a Health Care Provider
- May include a period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective, or
- Restorative surgery after an accident or other injury, or
- For conditions that, if left untreated, would likely result in incapacity of more than three consecutive, full calendar days

Military Family Leave

- Qualifying exigency leave
 - provides up to 12 workweeks of FMLA leave to help families manage their affairs when a military member has been deployed to a foreign country
- Military caregiver leave
 - provides up to 26 workweeks of FMLA leave to help families care for covered service members with a serious injury or illness

Qualifying Exigencies

- Short-notice deployment (up to seven days)
- Military events and related activities
- Childcare and school activities
- Financial and legal arrangements
- Non-medical counseling
- Care of the military member's parent
- Rest and recuperation (up to fifteen days)
- Post-deployment activities (90-day period)
- Additional activities by agreement

Military Caregiver Leave

- Eligible employees may take up to 26 workweeks of FMLA leave in a “single 12-month period” to care for a “covered service member” with a “serious injury or illness” if the employee is the covered service member’s spouse, parent, son, daughter, or next of kin
- All FMLA leave is limited to a combined total of 26 workweeks during the “single 12-month period”; no more than 12 workweeks can be taken for other leave reasons

Qualifying Family Members

- Parents
 - biological, adoptive, step or foster
 - No in-laws!
- Spouse
 - Includes same sex marriage
- Children

Amount of Leave

- 12 workweeks per 12 month leave year
 - Year calculated from the date of leave
 - Rolling 12 month period measured backward
- 26 workweeks for military caregiver leave

Intermittent Leave

- Employee is entitled to take intermittent or reduced schedule leave for:
 - Employee's or qualifying family member's serious health condition when the leave is medically necessary
 - Covered service member's serious injury or illness when the leave is medically necessary
 - A qualifying exigency arising out of a military member's covered active duty status
- Leave to bond with a child after the birth or placement must be taken as a continuous block of leave unless the employer agrees to allow intermittent or reduced schedule leave

Employer Responsibilities

- Provide notice
 - Post or provide a General Notice, informing of FMLA
 - Notice of eligibility or non-eligibility
- Maintain group health insurance
- Restore the employee to same or equivalent job and benefits
- Maintain records

Prohibited Employment Actions

- Employers cannot:
- interfere with, restrain or deny employees' FMLA rights
- discriminate or retaliate against an employee for having exercised FMLA rights
- discharge or in any other way discriminate against an employee because of involvement in any proceeding related to FMLA
- use the taking of FMLA leave as a negative factor in employment actions

Employee Responsibilities

- Provide sufficient and timely notice of the need for leave
 - Foreseeable Leave - 30 days notice, or as soon as practicable
 - Unforeseeable Leave - as soon as practicable
- If requested by the employer:
 - Provide certification to support the need for leave
 - Provide periodic status reports
 - Provide fitness-for-duty certification

What is Our Role?

Systems and Policies v. Direct
Involvement
Discussion
