

7. BASICS OF EMPLOYMENT LAW

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Bridging the Gap: the Basics of Labor & Employment Law

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EMPLOYMENT-AT-WILL: THE BASICS

- The principle: an employee can be terminated at any time, with or without cause
- It's a two-way street: an employee can quit at his/her discretion
- But wait, there are some exceptions...

EMPLOYMENT-AT-WILL EXCEPTIONS: ANTI-DISCRIMINATION/RETALIATION LAWS

- Federal, state, and city laws prohibiting discrimination and retaliation:
 - Title VII of the Civil Rights Act of 1964, ADEA, Rehabilitation Act of 1973, ADA, ERISA, Civil Rights Act of 1866, OWBPA, Executive Order 11246, Equal Pay Act, Sarbanes-Oxley Act, NLRA, Veterans Rights, FLSA, FMLA, NY State/City Human Rights Laws, NY Labor Law, NY Workers' Compensation Law, etc.

WHAT IS DISCRIMINATION?

- Types of Discrimination
 - **Facially Discriminatory Policies or Practices (rare):** the policy or practice's actual language treats employees or applicants differently
 - **Disparate Treatment:** intentional discrimination by an employer against employees or applicants who are members of a protected class (*e.g.*, Hispanics, females, disabled persons) (*McDonnell-Douglas* burden-shifting)
 - **Disparate Impact:** discrimination resulting from practices or procedures which, although not facially discriminatory, have the effect of discriminating against members of a protected class (*Duke Power Co. v. Griggs*)

WHAT IS HARASSMENT?

- **Sexual Harassment:** form of sexual discrimination that is in violation of Title VII of the Civil Rights Act of 1964 (i.e., unwelcome sexual advances, unwelcome requests for sexual favors, or words or conduct of a sexual nature having the purpose or effect of creating a hostile, intimidating or offensive work environment)
- Does it matter who does the harassing -- supervisor, co-workers, etc.?
- Related: what about workplace bullying (e.g., NY's Healthy Workplace bill)?
- **Other Kinds of Harassment:** harassment based on a protected characteristic

RETALIATION

- **Retaliation:** any materially adverse action taken against an employee because the employee engaged in protected activity -- i.e., protesting perceived unlawful discrimination or retaliation, or participating in an investigation of alleged unlawful discrimination or retaliation -- that is harmful to the point that such conduct could well dissuade a reasonable employee from making or supporting a charge of discrimination.

HOW DOES THIS ACTUALLY WORK?

- Avenues of recourse available to employees who allege discrimination, harassment and/or retaliation against their employer:
 - The Equal Employment Opportunity Commission (“EEOC”)
 - Litigation (the EEOC right-to-sue letter)
- Available damages for successful plaintiffs include unlimited back pay, reinstatement, emotional distress damages, punitive damages, front pay, attorney fees

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- Federal anti-discrimination law: protects employees and applicants against discrimination based on race, color, sex, religion, and/or national origin (Title VII does not address age or disability, but we’ll get to that)
- Requires reasonable accommodations for religious needs and other observances
- Bottom line: an employer cannot use any of the above-mentioned criteria as a motivating factor in an employment decision (hiring, firing, promoting, demoting, etc.)

AGE DISCRIMINATION IN EMPLOYMENT ACT (“ADEA”)

- An employer cannot discriminate against an employee with respect to the terms, privileges and conditions of employment based on the employee’s age
- The ADEA protects only workers age 40 and over, but New York state and city laws protect workers over the age of 18

ADA, ERISA & § 1981

- **Americans with Disabilities Act (“ADA”)**: an employer cannot discriminate against an employee with a disability (the ADA will be discussed in greater detail at a later point)
- **Employee Retirement Income Security Act of 1974 (“ERISA”)**: prohibits discriminating or retaliating against an employee in order to deprive him/her of the benefits of an employee benefit plan
- **Civil Rights Act of 1866 (“§ 1981”)**: Section 1981 of the Civil Rights Act of 1866 (and Section 1981(b) of the Civil Rights Act of 1991) prohibits retaliation and discrimination in the making of contracts based on race, national origin, and alienage

OWBPA & EXECUTIVE ORDER 11246

- **Older Workers Benefits Protection Act (“OWBPA”)**: amended the ADEA to protect older workers from age discrimination
- **Executive Order 11246 (1964)**: prohibits federal contractors and subcontractors from discriminating on the basis of race, color, sex, religion, or national origin, and requires them to take affirmative action to eliminate discrimination in the workplace

EQUAL PAY ACT OF 1963

- The EPA prohibits an employer from paying different wages to men and women who perform equal work in the same workplace

OTHER ANTI-DISCRIMINATION/RETALIATION LAWS

- **Sarbanes-Oxley Act:** protects whistleblowers who expose their employers' financial misconduct
- **National Labor Relations Act:** protects private-sector workers based on "protected concerted activity" (e.g., forming labor unions, engaging in collective bargaining, participating in strikes)
- **Veterans Rights:** several federal laws prohibit discrimination against those citizens who have served in the armed forces and, further, protect their jobs and benefits when they return from active leave

NEW YORK STATE & CITY LAWS

- **NYS Human Rights Law:** prohibits discrimination on the basis of age, race, creed, color, national origin, *sexual orientation*, military status, sex, *marital status*, disability, arrest or conviction record, or status as a victim of domestic violence
- **NYC Human Rights Law:** prohibits discrimination on the basis of race, color, creed, age, national origin, alienage or citizenship status, *gender (including gender identity and sexual harassment)*, *sexual orientation*, disability, arrest or conviction record, *marital status*, partnership status, or status as a victim of domestic violence, stalking, and sex offenses

NEW YORK STATE & CITY LAWS

- NYC Human Rights Law is intended to be construed very, very liberally (the Restoration Act)
 - See *Phillips v. City of New York*, 66 A.D.3d 170, 884 N.Y.S.2d 369 (1st Dep't 2009)
- Other relevant New York state laws:
 - N.Y. Lab. Law § 201-d (prohibits discrimination and retaliation for political and recreational activities, use of consumable products, and membership in a union)
 - N.Y. Lab. Law § 740 (whistleblower protection)
 - N.Y. Workers' Comp. Law § 120 (prohibits retaliation for claiming or attempting to claim compensation)

OTHER EMPLOYMENT-AT-WILL EXCEPTIONS

- **Employment for a fixed term:** e.g., professional athletes; remember the Statute of Frauds
- **Collective Bargaining Contracts:** termination only for good cause after probationary period
- **Constitutional Restrictions:** apply only to government employees
- **Legislation:** look to various state/local laws that may amend the employment-at-will doctrine
- **Tort of Wrongful Discharge:** common law remedy (i.e., judge-made); e.g., termination violates public policy
- **Implied Contracts:** holding employers responsible for statements made in employee handbooks

OTHER EMPLOYMENT-AT-WILL EXCEPTIONS

- **Constructive Discharge:** employee X quits his job. X wasn't fired, but resigned due to alleged intolerable workplace conditions. Does X have a viable cause of action?
- Elements:
 - The employee's work conditions are so intolerable as to cause a reasonable person to resign under the same circumstances.
 - The employer intentionally created, implemented, or permitted the conditions to occur.

FAMILY AND MEDICAL LEAVE ACT ("FMLA")

- Allows employees to take up to 12 weeks of medical leave upon the occurrence of one or more of several qualifying events or 12/26 weeks for military leave
- But you must have been employed for the previous 12 months and worked at least 1,250 hours during that time (i.e., you cannot ask for FMLA leave due to your pregnancy on your first day of work).
- Most importantly, your job will be waiting for you when you return (with one slight exception)

FMLA QUESTIONS

- What qualifies as a “serious health condition”?
- What are the primary considerations related to “qualified exigency” leave?
- Are step-relatives covered?
- Does FMLA leave need to be taken in one lump sum?
- Is FMLA leave a paid leave period?
- What notice obligations are imposed upon both the employer and employee?
- What do I need to keep in mind regarding FMLA medical certification?

AMERICANS WITH DISABILITIES ACT (“ADA”)

- Let’s refresh: an employer cannot discriminate against an employee with a disability
- Did the ADAAA, or any other legislation/regulations, change anything?
- Who is considered disabled/what is a disability? (Hint: it’s a broader definition than you might think)
- If an employee is “disabled,” an employer has a duty to provide a reasonable accommodation so that the employee can perform the essential functions of his/her job, unless doing so would cause an undue hardship or pose a direct threat to health/safety
- How does an employer determine the appropriate accommodation?

FAIR LABOR STANDARDS ACT ("FLSA")

- The FLSA establishes:
 - Minimum wage (federal/NY = \$7.25/hour)
 - Overtime pay (generally one and one-half times the regular rate of pay for work over 40 hours per week)
 - Record-keeping requirements
 - Child labor standards
 - Wage exceptions for workers who receive tips

FLSA EXCEPTIONS

- But there are exceptions to the FLSA:
 - Executives
 - Administrators
 - Professionals
 - Computer professionals
 - Highly paid employees
 - Outsides sales
- Related: the NY Domestic Workers' Bill of Rights (a law that is the first of its kind)

Worker Adjustment and Retraining Notification (WARN) Act

- Federal legislation intended to protect communities in the event of a mass layoff or plant closing
- WARN requirements:
 - When employer with 100 or more employees intends to close a plant with at least 50 employees or plans a mass layoff, the employer is required to provide 60 days of notice to all affected employees
- What is the single site of employment?
- What are the implications when a state, like New York, has its own WARN Act?

WHERE CAN I LEARN MORE?

- <http://www.eeoc.gov>
- <http://www.employmentlawalliance.com>
- <http://www.dol.gov>
- <http://www.labor.ny.gov>
- <http://www.nlrb.gov>
- <http://www.law360.com/employment>
- <http://www.bna.com/products/labor/dlr.htm>