Legal Terminations Workshop

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BusinessManagement DAILY

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Workshop Agenda

- **Record Termination Jury Awards**
- **Part 1:** Planning for termination from the start
- **Part 2:** Disciplinary and performance failure terminations
- **Part 3:** Terminating workers without violating FMLA, ADA, PWFA, PUMP Act and religious reasonable accommodation obligations
- **Part 4:** Reductions in force, reorganizations and mass layoffs

Record Termination Jury Awards

Juries are **very** generous when confronted with an employer they believe has unfairly terminated workers.

2024 and 2025 were pretty good for workers. $11 million for failure to accommodate back pain and termination.

2026? Too early to tell.

Bottom line – getting a discharge wrong can cost your organization millions in lost time and cash.

Record Termination Jury Awards

Bystanders and harassed workers receive many millions for ignored complaints

- A Los Angeles jury sat through two months of testimony against Edison after the company fired two workers who separately reported racial and sexual harassment. HR allegedly did nothing and management forced the men out.

- The jury said the former employees are due a whopping $464,500,000 in compensatory and punitive damages.

- The case is *Alfredo Martinez et al. v. Southern California Edison Co. et al.,* California Superior Court.

Record Termination Jury Awards

IT Firm Workers Win $70M in Race Bias Battle

- Glow Networks, an information technology service provider to telecommunications companies, will have to pay **10 employees** upward of **$7 million each** in their race discrimination and retaliation suit after a Texas federal jury sided with the workers.

- After a 10-day trial, jurors awarded each of 10 workers $3 million for past and future pain and suffering, plus $4 million in punitive damages.

Yarbrough et al. v. CSS Corp. et at., Eastern District of Texas

Record Termination Jury Awards

Unwanted birthday party leads to termination and $450K

- Kevin worked as a lab technician and suffers from anxiety when dealing with other people. His employer liked to throw birthday parties at lunch for workers. Kevin asked the offer manager to skip Kevin's birthday.

- A surprise party left Kevin with a panic attack, and he fled the workplace. The next day. HR told him his reaction was unacceptable, triggering another panic attack. The company then fired him.

- A Kentucky jury awarded him $450,000, including $300K in punitive damages.

Berling v. Gravity Diagnostics LLC, Kenton Circuit Court

Record Termination Jury Awards

Some recent jury verdicts:

- A former UPS truck driver was awarded $5.45 million in his whistleblower retaliation suit alleging he was wrongfully fired from his job as a truck driver after reporting he was targeted for a reduced schedule because of his age.
- A jury awarded a man $3 million after reporting he observed sexual harassment and was fired.
- A gay public defender fired because he wasn't a "good fit" and was "too flamboyant" was awarded $2.6 million.
- California school employee who complained about safety equipment won $1.7 million for wrongful discharge.

Rethena Flowers v. Compton Unified School District

The Termination Nightmare

Acrimonious terminations are bad news because:

- Angry ex-workers often visit an attorney immediately
- Angry ex-employees can become unhinged and dangerous
- Angry ex-employees have nothing to lose and everything to gain by making your life miserable

DON'T CREATE ANGRY EX-EMPLOYEES IF POSSIBLE!

New Termination Nightmare

Supreme Court makes suing easier:

- In 2024, S.C. ruled that any action changing workplace terms could be adverse
- Police officer transferred with no changes to pay or title but less prestige
- Boss said he wanted a male. Transfer was enough to sue

Now much easier to sue!

Termination Trouble Triggers

- Not treating the employee being terminated with respect
- Not offering the employee something positive to walk away with (if not terminating for gross misconduct)
- Forgetting WARN or Mini-WARN obligations – Some states have beefed up WARN requirements
- If terminating someone who has filed internal or external discrimination claims, not considering possibility termination as retaliation

New Litigation Dangers

Discharged employees often find reasons to sue – and COVID-19 opened new claims you may never have anticipated like:

- **Exempt status while working remotely** – status may change due to lack of direct supervision, new job duties that resemble hourly
- **Religious claims –** these are increasing fast, triggered by vaccine claims and Supreme Court decision making it harder to turn down requests
- **New laws** – Pregnant Workers Fairness Act (PWFA) and PUMP Act
- **Reverse discrimination claims** – EEOC actively asking white males to come forward
- **Increased ADA/FMLA claims** – from new illnesses, rising stress and mental health problems

Part One

Planning for Termination From the Start

Planning for Termination

It is inevitable – you *will* eventually have to terminate an employee. And that employee is increasingly likely to sue. Perhaps they are aware of some of those eye-popping jury verdicts or is being coached by an attorney in how set up a lawsuit.

Minimize the chances of a wrongful discharge lawsuit by building in defenses from the beginning. Do so by:

- Retaining your right to fire for any reason or no reason (within the law)
- Building systems that identify problems early and allow easy dismissal before the employee becomes entrenched
- Disciplining according to a consistent, well-organized, and well-executed progressive discipline plan
- Following all state and federal laws that require pre-discharge actions or notifications

Your Right to Fire At Will

As an employer, you have the right to fire for any reason or no reason as long as doing so isn't illegal under federal or state law or you've signed away that right with an employment or union contract.

There are a limited number of exceptions, including the prohibition of firing workers for an illegal reason such as sex, race or other discrimination illegal under state, federal or local employment laws. Other reasons include firing someone in violation of public policy (a rare charge).

Your Right to Fire At Will

At-will Exceptions:

USERRA - a reemployed employee may not be discharged **without cause**:

1. For one year after the date of reemployment if the person's period of military was for 181 days or more;
2. For 180 days after the date of reemployment if the person’s period of military service was for 31 to 180 days.

Your Right to Fire At Will

At-will Exceptions:

USERRA: To prove cause to fire a returning service member, an employer must show that both:

1. it was reasonable to terminate the employee based on his or her conduct and
2. the employee received notice that the conduct in question would give the employer cause to terminate.

Therefore, before discharging a returning service member, make sure that the rule you're using appeared in the employee handbook and that the service member received a copy of that handbook to prove they had notice.

Your Right to Fire At Will

At-will Exceptions - continued

- **Montana:** Except during an initial probationary period, employers cannot fire workers without cause. Montana employers should therefore be sure to set up a formal probationary period and let the employee know what's required of them

- **Public Sector employees:** Many public employees have a property right in established employment – and can only be fired after notice and "some kind of hearing"

Your Right to Fire At Will

Preservation of at-will status

Although it is presumed that all employment is at-will unless there's a specific exception, it's still best to:

- State that at-will status governs the job. Do this in all job advertisements, job offers, and in the employee handbook.

- Make sure that the hiring manager or recruiter does not make promises that could create an employment contract or negate at-will status.

Your Right to Fire

Bad at-will statement:

“I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.”

Why is this an example of a bad at-will proclamation? Because it may trigger an unfair labor charge at the National Labor Relations Board – a federal agency that views at at-will statements with skepticism. The NLRB views statements like this one as a “no union” clause because the wording implies that no employee action – like forming a union and negotiating for a labor contract – can alter the employment relationship.

Your Right to Fire

Better at will statement:

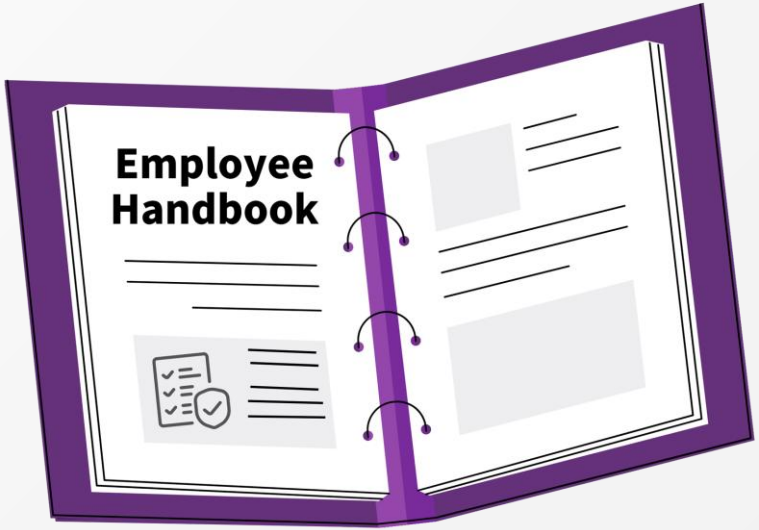
“No manager, supervisor or employee has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the company has the authority to make any such agreement and then only in writing.”

What’s the difference? The statement implies that the company can choose to create an employment contract (presumably after employees push for that change directly or by unionizing.)

Your Right to Fire

Where to include at-will statements:

- Applications
- Employee handbooks
- Orientation
- Any time there’s a change to handbook or promotion



Your Right to Fire

Make sure all managers understand they can't offer employment for a term without approval from higher up and then only by written contract approved by counsel and upper management. Why?

- A manager anxious to hire someone may accidentally or sloppily create an employment contract or an enforceable promise. A statement like "you will have a job as long as you want it" or "we've never laid anybody off" or "we've funded this position for ten years and you'll have security" may be viewed as quasi-contractual.

Your Right to Fire

Common (legitimate) reasons to fire workers include:

- Reorganization that eliminates or restructures jobs, assigning new functions to some jobs or eliminating others with the end result that some workers are no longer needed

- Across the board budget reductions for various reasons (i.e. economic downturn, decision to cut costs to maximize profits etc.) accompanied by eliminating jobs

All above reasons pose potential for lawsuits even though they're legal – the devil's in the details (and documentation).

Your Right to Fire

Common (legitimate) reasons to fire workers include:

- Worker wrongdoing necessitating discipline – commonly after either egregious misbehavior or error – pursuant to progressive discipline or no-fault discipline program
- Poor performance or frequent errors
- Failed reasonable accommodation for disability or religion
- Simply finding a better qualified candidate after hiring and deciding they're a better fit

All above reasons pose potential for lawsuits even though they're legal – the devil's in the details (and documentation).

Discharging for other reasons

- Layoffs due to business reasons such as restructuring – that aren't WARN layoffs;
- Terminations for lack of proper documentation – such as current DREAMER certifications
- Termination for lack of legal status to remain in the United States (i.e. undocumented or immigrants from nations whose who had broad temporary protection that has been revoked)

The last two reasons require careful monitoring of the state of litigation and legislation – consult counsel before acting – especially to balance risk of criminal prosecution from NOT acting versus allegations of retaliation

Discharging under USERRA

Be cautions – remember those returning from active duty are entitled to several protections including:

- Seniority credit for time off
- No discharge but for cause for 12 months after return in most cases
- Protection from retaliation for military service
- New SC ruling says USERRA applies to public employers too

Be ready to show you would have fired regardless of service

Probationary Terms

One way to decide early on whether to retain a new employee is to create a probationary term that makes very explicit the employer's right to terminate the employee. Why?

- There are likely fewer things to trip up employers at this early stage of the employment relationship. They likely have not yet filed an internal discrimination complaint so discharge can't be retaliatory.

Probationary Terms

One way to decide early on whether to retain a new employee is to create a probationary term that makes very explicit the employer's right to terminate the employee. Why?

- Plus, it's pretty likely that all the same individuals involved in hiring the employee will be involved in terminating him if he proves to be a poor hiring choice. The hiring manager likely hasn't quit, transferred, retired, or died during the probationary period. Employers get a legal presumption that no one hires someone and then fires them because of a known protected characteristic.

Probationary Terms

One way to decide early on whether to retain a new employee is to create a probationary term that makes very explicit the employer's right to terminate the employee. Why?

- Employers can use the probationary term to find reasonable accommodations for a newly hired disabled worker and test those accommodations. Make sure you document the entire process so that you can easily prove that you made efforts to accommodate and they failed if that's the reason the employee doesn't successfully complete probation.

Probationary Considerations

Here's what to consider when putting together a probationary policy:

- Who does it apply to?
- How long does it last?
- What is required of the employee and their supervisor to complete probation?

Probationary Considerations

Here's what to consider when putting together a probationary policy:

- What are the consequences of not completing probation?
- What are the consequences of completing probation successfully?

Note: Beware referring to someone who has completed probation as a permanent employee. It's better to use a term like regular employee. Why? The word permanent may trigger an argument that there's an employment contract in place and hamper termination.

Probation Terms

Typical rule setting who must complete probation:

The following employees must complete a __- day probationary period:

1. Newly hired or rehired employees
2. Current employees who have been promoted to a higher grade or have been laterally transferred to a job with different responsibilities from the one they previously held
3. Current employees who have been disciplined and offered another opportunity to remain with the company in lieu of discharge.

Probation Terms

Typical policy explaining the purpose of the probationary period:

“The probation period is meant as an opportunity for the employee to demonstrate their ability to fully perform the job they have been selected to fill and for their supervisor to assess whether the new employee is a good fit overall. For employees offered probation as an alternative to discharge, probation offers an opportunity to improve performance under the guidance of their supervisor using constructive criticism aimed at successfully performing the job moving forward.”

Probation Terms

Setting expectations may include something like this:

“Working with HR, the probationary employee’s supervisor and the employee will review the job description and expectations.

The probationary employee will receive a list of expectations, including any projects to be completed along with the timeline for doing so. The supervisor will meet regularly with the probationary employee to discuss progress and offer suggestions for successfully completing probation.”

Probation Terms

The policy should spell out what happens at the end of the probationary period.

“At the end of the probationary period, HR and the supervisor will determine whether the employee has successfully completed probation. If so, the probationary employee will be designated a regular employee with all the rights and benefits of the company’s other regular employees. If, in the sole discretion of HR, the probationary employee has been deemed to not have completed probation satisfactorily, HR may extend the probationary period or terminate the probationary period.”

Probation Terms

Early termination

“In the event that it becomes clear that the probationary employee is not capable of completing the terms of probation, they may be terminated before the end of the probationary period."

Handling Accommodation During Probation

The initial probationary period is also a time to assess and finalize any reasonable accommodation requests. This allows employers to demonstrate their commitment to following the law while also assessing whether a reasonable accommodation is feasible.

Do this by:

- Immediately beginning the interactive accommodations process after the employee requests one. This is merely a back-and-forth discussion to determine whether the employee is disabled and whether an accommodation will allow the employee to perform the essential functions of their job.

Setting Up Disciplinary Rules as Part of Planning for Termination

Good employers clarify exactly what they expect from employees both in terms of performance and following rules. Be sure to:

- Provide and train all new employees on the handbook.
- Thoroughly go over the new employee's job description.
- Review your organization's disciplinary program – especially if you use a progressive disciplinary approach. New employees should understand what the rules are, how they are applied, and what happens if the rules aren't followed.

Part Two

Disciplinary & Performance Failure Terminations

Job Descriptions

Every position should have a job description that includes at a minimum:

- **A list of essential functions.** These are the job duties and expectations that are fundamental to the job. The list will be used to determine what reasonable accommodations, if any, a disabled employee is entitled to. It will also be used to determine whether an employee with a serious health condition is entitled to FMLA leave for self-care.

Job Descriptions

Every position should have a job description that includes at a minimum:

- **A list of non-essential functions.** These are job tasks and responsibilities that aren't integral to the main purpose of the job and could be eliminated if necessary.

- **Designation of FLSA overtime status.** Determine whether the job duties you identified as essential and non-essential allows you to classify the worker as exempt from overtime. Note the position's FLSA status as exempt or hourly.

Job Descriptions

Every position should have a job description that includes at a minimum:

- **An acknowledgment** from the employee that he or she has read the job description and it accurately describes the job as performed.

- **A pledge** to update the supervisor should the job change before the next review.

Performance Reviews

Once you have job descriptions, use them as the basis for conducting regular performance reviews.

- Employees who are surprised by firings are more likely to sue.

- Inconsistencies between performance evaluations and adverse decisions are often introduced in court to indicate that the company's reasons for termination were just an excuse to fire employees for other unlawful reasons.

Performance Reviews

Once you have job descriptions, use them as the basis for conducting regular performance reviews.

- Before beginning discipline, review the worker's last performance review.

- Was the current problem listed as a concern? If so, did the employee promise to improve?

Structuring Discipline

Progressive discipline versus ad-hoc discipline

- Progressive discipline is seen as fairer, more transparent, and less prone to manipulation

- Problem – it may cost you a great employee if you include no-fault aspect for attendance or tardiness

You need a system that allows some flexibility and guards against bias.

Structuring Discipline

Some rules for administering discipline that helps limit liability – sometimes.

- Always require review before final decision.
- Beware of **cat's paw doctrine** – you're responsible for a supervisor's bias even if you don't know about it.
- Try to have hiring manager make discharge decisions too.
- Conduct frequent self-audit of discipline for hidden bias.

Structuring Discipline

Some rules for administering discipline that helps limit liability – sometimes.

- Discover a difference during an informal audit? It may be okay if discovered by different supervisors – but aim for organization-wide consistency.

- Be ready to admit mistake and fix it fast including a rehire offer to cut liability. How? It cuts lost income moving forward if former employee rejects offer.

Structuring Discipline

How to discipline to discharge:

- Clear rules with built-in exceptions for exceptional circumstances
- Always include an “out”
- Always document each step of the way with as much objective information as possible

Structuring Discipline

How to discipline to discharge:

- Always look for ways to distinguish discipline. Why? Because when suing, an employee will argue they were treated more harshly than other workers who belong to a different protected class.

Some possibilities:

- Repeat offender?
- Dollar amount of mistake?
- How tardy? How often?
- Improvement since last incident?

Progressive Discipline

A good progressive discipline program:

- Usually point-based
- Usually time-limited
- Often sets limits on how many rule infractions an employee can accumulate in a specific time period before being discharged.

Progressive Discipline

A good progressive discipline program:

- Often assigns points based on the seriousness of the rule violation. For example, being tardy may carry a lower point score than being absent for an entire shift without notice.
- Sometimes includes a way for accumulated points to be erased based on improved performance or behavior.
- May culminate in a last chance agreement, PIP, or probation before discharge.

Progressive Discipline

Should a discipline policy include co-worker conflict? Why?

- Personality conflicts can escalate into loud arguments and eventually become physical.
- Include behavioral norms in disciplinary rules such as a requirement that workers treat each other with dignity.
- Make sure that if violence or threats occur, your rules allow for immediate dismissal.

Structuring Discipline

Performance improvement plans

The final step in a progressive discipline program is to place employees on a PIP.

Plans should be uniform for all employees. Essential features include:

- **Strict time limit.** A PIP should be time-limited. Consider 60 to 90 days as the outer limit.
- **Objective goals.** A good PIP will include objective and reasonable goals that can be accomplished in the time frame allowed. It should include regular meetings to assess improvement.

Structuring Discipline

Performance improvement plans

Other essential features include:

- **Consequences.** Make sure the PIP specifies the consequences of missing objectives, including termination. Then follow through.

- **PIPs and probation.** You can run a PIP as part of a probationary plan – often they are the mirror image of one another.

Preventing Workplace Violence

Do not assume it cannot happen. It does – regularly. Some recent examples:

- June 3, 2019 – 12 Virginia Beach municipal employees were shot and killed by a fellow employee who had just quit.
- January 2023 mass shooting across two workplace locations in California.
- April 10, 2023 mass shooting at Louisville, Kentucky bank by bank employee who knew he was about to be fired.

Preventing Workplace Violence

- Be aware of weapons laws in your jurisdiction. Some states allow weapons in cars in company lots
- Be attuned to any threats – especially if they underlie discharge decision
- Get expert help if mental health, violent past, or threats are involved
- Increase security temporarily
- Have a plan in place – OSHA has guidance

OSHA Guidance

Violence prevention steps you should take

The OSHA directive advises employers to develop a written workplace violence prevention program that includes these measures:

- **Adopt a policy statement** regarding potential violence in the workplace that assigns oversight and prevention responsibilities.
- **Conduct regular a workplace violence hazard assessment** and security analysis.
- **Implement a record-keeping system** designed to report any violent incidents.

OSHA Guidance

Violence prevention steps you should take

The OSHA directive advises employers to develop a written workplace violence prevention program that includes these measures:

- **Train employees** on the company's workplace violence program.
- **Develop procedures** and assign roles in the event of a violent incident.
- **Develop a response team** to provide immediate care for victims, re-establish safe work areas, and conduct debriefing sessions with victims and co-workers.

Practical Aspects of Termination

- The best time of day and week to terminate **individual** employees
- The best time of day and week to terminate **groups** of employees and how to inform remaining employees
- WARN and Mini WARN concerns
- Monitoring EEOC and other agency filings and litigation

The “Meeting”

Don’t delay discharge too long after decision – fast is almost always best:

- Employees know when they’re in trouble
- Don’t leave them on pins and needles or worse… plotting revenge and mayhem
- Make sure discharge is dignified

The “Meeting”

How to hold a termination meeting

- Private setting, away from prying eyes
- Always at least one additional neutral witness
- Include any pay that is due, even if it is not payday (required in many states and recommended for all)

The “Meeting”

How to hold a termination meeting

- No shouting, recriminations, or lengthy explanations
- Make it quick – fifteen minutes max
- No need to include specific reasons – chances are employee knows and doing so may be used against you later

The “Meeting”

Options for lawsuit mitigation

- Consider including an offer of severance if not discharging for gross misconduct
- Severance should be pre-approved by counsel
- Severance should be conditional on signing lawsuit waiver

The “Meeting”

Options for lawsuit mitigation

- If worker is over 40 – special rules apply, including time to think it over
- Remind employee of any arbitration requirements and include copy in discharge packet
- Always end on a positive note (except in rare instances)

The “Meeting”

Avoid setting up a libel lawsuit over the way you terminated an employee

- Let employee leave in a dignified way
- Do not publicly strip credentials – do so privately
- Have manager walk out with employee rather than security unless you expect trouble

The “Meeting”

Avoid setting up a libel lawsuit over the way you terminated an employee

- Tell the employee you will pack up their belongings and deliver, or let employee retrieve their belongings (i.e.: purse or coat) out of view of others.

- DO NOT announce to others the reason for discharge or offer any comment beyond “Joe is no longer employed by the company.”

- DO NOT create CHAOS

When to Terminate

- Individual employees generally should be terminated at end of workweek and end of the day to avoid awkward interactions post-termination
- Do not terminate via text, email, or phone call
- Do not change schedules ahead of time or otherwise signal the end is near without informing the employee

Unemployment?

Generally, most states say no payments for willful misconduct.

Strategic decision to oppose benefits or allow them without protest:

- Can backfire if reasons stated to unemployment board differ from other stated reasons
- May mean attending hearings and presenting evidence

Unemployment?

Generally, most states say no payments for willful misconduct.

- Gives employee and his attorney chance to gather evidence for possible litigation and at very least test your response under pressure
- Makes you look small-minded especially if you lose
- If only means of support, likely employee will seek counsel, who may discover other grounds for lawsuits

Monitoring Litigation

- Be alert to EEOC or state agency filings – respond fast
- Get counsel involved sooner rather than later
- Do not ignore any filing even if clearly frivolous. You have very little time to react
- Know the deadlines for your state courts and federal rules
- Think twice before suing departing worker over alleged breach

Legal Terminations Workshop

Q&A Session / Break

Part Three

Terminating Workers on FMLA, ADA and Religious Reasonable Accommodations

More Accommodation and Leave

Inevitably, the increase in workers with new disabilities and needing both intermittent leave and accommodations means potential means:

- Updating your processes to make sure workers get the accommodations they're entitled to

- Preserving and exercising your organization's right to discipline and terminate those who can't be accommodated or have used their leave and can't return

Yes, You Can Discipline

There is a common misconception that certain workers are protected from consequences because they're on FMLA or receiving accommodations.

- **Discipline is possible:** But neither the FMLA nor the ADA nor other laws blocks all disciplinary actions – it's not a total shield.

- **There is no accommodation *guarantee:*** Plus, the ADA isn't a guarantee of an accommodation. Instead, it's designed to explore possible reasonable accommodations. If there are none, or they aren't reasonable there's no protection.

Accommodate or Terminate?

When an employee isn't performing at an acceptable level is to terminate the worker or make an adjustment to expectations. Should you accommodate or terminate? Here's how to make that decision:

- **Find out whether the employee is eligible for some sort of leave (paid, unpaid) if the employee believes they can't work a regular schedule.**
- **Start with the FMLA. If it looks like the worker is eligible for intermittent or full leave.**
- **At the same time, consider whether the employee may be disabled under the ADA and possibly entitled to reasonable accommodations**.

Accommodate or Terminate?

Continued:

- Is the employee disabled under the ADA?
- Is absenteeism, tardiness, or noncompliance with dress code related to claimed religious beliefs?
- If so, is there a reasonable accommodation available? Your burden to accommodate religion is lower … for now.

Accommodate or Terminate?

Continued:

- Is it *not* possible to accommodate? Or would the accommodation be unreasonable? Then, and only then – consider termination.

- WARNING: If the disability is temporary but total, you may have to provide extra *unpaid* leave even if none is otherwise available.

- WARNING: If worker hasn't earned leave yet you may still have to provide unpaid time off as a reasonable accommodation.

Major Laws

There are four major federal laws to consider when determining whether to accommodate or terminate. Each defines accommodation somewhat differently.

- The Americans with Disabilities Act (ADA)
- The Family and Medical Leave Act (FMLA)
- Title VII of the Civil Rights Act religious discrimination provision
- The Pregnant Workers Fairness Act (PWFA)

Major Laws - ADA

The ADA provides, among other things, that:

- Disabled employees are entitled to reasonable accommodations that allow them to perform the job's essential functions
- To be disabled means having a physical or mental condition substantially impairs a major life function like breathing, walking, talking, hearing, being able to concentrate, digest, sleep and many other functions
- Employers must engage in an interactive process to determine whether there is a reasonable accommodation possible
- The employer gets to choose which reasonable accommodation if there are multiple options

Major Laws - ADA

The FMLA provides, among other things, that:

- Employees can take up to 12 weeks unpaid leave for a long list of reasons including their own serious health conditions
- Eligible employees who cannot perform an essential functions of their jobs are entitled to the time off
- Leave can be taken on an intermittent basis
- Time off cannot be counted against the employee, nor can the lost productivity be taken into account at evaluation time
- FMLA is an entitlement
- The FMLA “accommodation” is time off either in a block or intermittently.

Major Laws – Title VII Religion

Title VII Religious discrimination clause provides, among other things, that religious and other sincerely held beliefs are entitled to reasonable accommodations in the workplace.

These include:

- Time off for religious services and practices
- Exemption from dress codes and grooming rules
- Exemption from activities that may conflict with religious beliefs

Major Laws – PFWA

Newish federal law, the Pregnant Workers' Fairness Act (PWFA), extends reasonable accommodations to pregnant workers with pregnancy-related temporary disabilities and requires employers to accommodate those during and post-pregnancy.

- The PWFA went into effect on June 27, 2023. The EEOC regulations issued a year later June 18, 2024
- Regulations include long list of accommodations, including some employers are expected to grant automatically with no paperwork.

Major Laws – PFWA

EEOC accommodations:

- The ability to sit or drink water
- Receive closer parking
- Have flexible hours
- Receive appropriately sized uniforms and safety apparel

Major Laws – PFWA

EEOC accommodations:

- Receive additional break time(s) to use the bathroom, eat, and rest
- Take leave or time off to recover from childbirth
- Be excused from strenuous activities or activities that involve exposure to compounds not safe for pregnancy

Major Laws – PFWA

EEOC accommodations:

- Receive time off for fertility treatment – currently under EEOC review
- Be excused from later arrivals due to common pregnancy-related limitations like morning sickness
- The ability to choose one's accommodation if one involves time off and another allows continued paycheck. Employer doesn't get to pick.

Handling an Accommodation Request

Follow these steps whenever an employee requests a disability-related or religious accommodation:

- Verify the disability. Exactly what condition(s) has the employee claimed is disabling? You can get basic verification from the employee's doctor or therapist.

- Decide whether the verified disability substantially impairs a major life function. These include walking, breathing, communicating, caring for oneself, working, seeing, hearing, and other basic bodily functions.

- Do the same with a religious accommodation request – does the worker claim a belief on par with that of a religion – does not have to adhere to a major or minor religious sect.

Handling an Accommodation Request

Follow these steps whenever an employee requests a disability-related or religious accommodation:

- Begin immediately to discuss possible reasonable accommodations.
  IMPORTANT: ***This must be a back-and-forth interactive effort.***
  Always ask what accommodation the employee would like but research your own.
  Remember that it is the employer that gets to pick the accommodation, not the worker.

- For an ADA accommodation, the expense and inconvenience associated with making the accommodation turns on whether an organization your size would experience undue hardship if you provided the accommodation

Handling an Accommodation Request

Follow these steps whenever an employee requests a disability-related or religious accommodation:

- Under federal law, an employer must demonstrate that the religious accommodation would create an undue hardship considering the resources of the employer and the financial cost of the accommodation. Substantial burden.

- To determine whether an undue hardship exists for religious accommodations, assess factors such as the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who need a particular accommodation, focusing on cost.

Handling an Accommodation Request

Follow these steps whenever an employee requests a disability-related accommodation:

- Document every step of the process. **It is crucial that you retain records showing who broke off discussions if no accommodation is arrived at. Unless the breakdown is on the worker's part, you may be vulnerable to a failure to engage in the interactive accommodations process.**

- Remember that the accommodation must be **REASONABLE.** This is a fluid requirement, depending on your organization's size, resources, the cost of the accommodation and the likelihood the accommodation will allow the employee to perform the essential functions of her job.

Handling an Accommodation Request

Have up-to-date and accurate job descriptions that:

- Describe every aspect of the position, including which functions are essential and which are not
- Remember that these will be the basis for your approval or denial of reasonable accommodations
- Remember that the job description must reflect the actual job as it is being performed by the incumbent
- New position? It's best to rely on standard position descriptions and THEN follow up in a few months after the job has been performed to confirm the description reflects the job actually performed

Handling an Accommodation Request

After you reach an accommodation agreement:

- Implement it ASAP. Delaying an accommodation that can help the disabled employee perform his job and then firing the worker for not meeting performance goals is a BAD situation.

- Check with the employee to make sure the accommodation is working as intended.

Handling an Accommodation Request

After you reach an accommodation agreement:

- If not, reconsider. Do the same if the employee's condition changes for the BETTER or WORSE. For example, you can withdraw an accommodation if no longer needed and modify or change one if the employee's disability requires it.

- For religious accommodations – especially those involving schedule changes, requests to skip Friday, Saturday, or Sunday hours – assume you must allow all methods to make this happen (i.e. schedule changes, paying others overtime)

- Remember that the employee can still (and always) be disciplined for poor performance.

Handling an Accommodation Request

WARNING: If the accommodation includes time off, including FMLA leave, DO NOT count that time towards work goals. For example, adjust deadlines and don't count time off towards attendance.

- The same goes for time off for religious practices *if* the accommodation doesn't include enough alternate hours to make up for the missed days or hours that are the accommodation.

Handling an Accommodation Request

PWFA accommodations are handled differently:

- Cutting off paycheck is last option
- Discharge associated with pregnancy highly suspect – should be absolutely last resort
- Example – discharging formerly pregnant woman who was grieving miscarriage violated PWFA.
- Example – discharging newly pregnant employee because of fear the work would be too hard violated PWFA

Handling an Accommodation Request

PWFA accommodations are handled differently:

- Most accommodations should be routinely granted by immediate supervisor
- Time missed must not be held against the pregnant worker
- Request for medical documentation should be very rare
- There should be almost no delay in approving request
- Emphasis is always on retaining paycheck

The Supreme Court & Religious Accommodations

The Supreme Court has made turning down religious accommodation request almost impossible

The case: Gerald celebrates the Sabbath on Sundays. He worked as a part-time U.S. Postal Service driver with no Sunday deliveries. Then Amazon contracted with the Post Office to deliver Prime purchases on Sundays. Gerald requested a reasonable accommodation of every Sunday off. His supervisor agreed and Gerald swapped shifts with other drivers. Later, the supervisor transferred Gerald to a no-Sunday delivery location.

The Supreme Court & Religious Accommodations

The Supreme Court has made turning down religious accommodation request almost impossible

- **A unanimous decision said employers now must show that turning down the request is required because making the accommodation would involve a substantial cost give the overall operations, resources and size of the employer**
- **Bottom line: Better show dollars and cents result that would flow from making accommodation.**

Most Requested Accommodation? Telework

During the pandemic, just about every worker who could telework was sent home to do so. And that's led to an explosion in the number of disabled people who now request telework as a reasonable accommodation.

Here's what the EEOC says about telework:

- In addition, the ADA's reasonable accommodation obligation, which includes modifying workplace policies, might require an employer to waive certain eligibility requirements or otherwise modify its telework program for someone with a disability who needs to work at home. For example, an employer may generally require that employees work at least one year before they are eligible to participate in a telework program. If a new employee needs to work at home because of a disability, and the job can be performed at home, then an employer may have to waive its one-year rule for this individual.

Most Requested Accommodation? Telework

Could permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?

Yes. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies, even if the employer does not allow other employees to telework. However, an employer is not obligated to adopt an employee's preferred or requested accommodation and may instead offer alternate accommodations as long as they would be effective.

Most Requested Accommodation? Telework

How should an employer determine whether someone may need to work at home as a reasonable accommodation?

The employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability.

Most Requested Accommodation? Telework

How should an employer determine whether a particular job can be performed at home?

Consider:

- Can the employer supervise the worker remotely?
- Are there equipment or tools that cannot be used at home?
- Is there a need for face-to-face interaction and coordination of work with other employees?
- Is work with outside colleagues, clients, or customers necessary face to face?
- Are documents or other information located only in the workplace?
- Can meetings and communication effectively take place over the phone, email or other technology?

Most Requested Accommodation? Telework

How frequently may someone with a disability work at home as a reasonable accommodation?

An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (e.g., for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home.

Most Requested Accommodation? Telework

Can an employer make accommodations that enable an employee to work full-time in the workplace rather than granting a request to work at home?

Yes, the employer may select any effective accommodation, even if it is not the one preferred by the employee. Reasonable accommodations include adjustments or changes to the workplace, such as: providing devices or modifying equipment, making workplaces accessible (e.g., installing a ramp), restructuring jobs, modifying work schedules and policies, and providing qualified readers or sign language interpreters. An employer can provide any of these types of reasonable accommodations, or a combination of them, to permit an employee to remain in the workplace.

Most Requested Accommodation? Telework

What happens if telework or any other accommodation isn't working?

- Assess whether the employee is performing the essential functions of their job.
- If not, reopen the reasonable accommodation process.
- If it appears no alternative reasonable accommodation is possible, employer should monitor performance with the accommodation withdrawn.
- If performance doesn't meet acceptable standard, the employer may discipline the employee as any other employee would be disciplined.

Telework and Religious Accommodation

EEOC and DOJ now say telework for religious reasons should be approved

- This is true even though the administration has been removing telework options for others, including for disability reasons
- Consider religious requests as you would disability ones
- DOJ suggests it's appropriate for fasting, prayer and holy days

Legal Terminations Workshop

Q&A Session / Break

Discipline

Some employees with health issues may also be struggling to perform their jobs well. Here are some tactics for managing declining performance:

- Resist the temptation to ask about potential mental or physical health issues unless the employee volunteers the information. Asking may violate the ADA and risk a lawsuit over regarding the worker as disabled.
- Stick strictly to poor performance – don't speculate on the underlying reason.
- Ask what you can do to help the employee improve.
- Treat the employee as any other employee until or unless she self-identifies as disabled.

Discipline

Remember that you are free to discipline and terminate workers who aren't doing their jobs **after** you have made allowances for their FMLA ,ADA, PWFA and religious rights.

Examples:

- Employee is on FMLA leave and you discover a pile of uncompleted work or mistakes you weren't aware of.
- Employee with an ADA disability receives an accommodation of a schedule change allowing late arrival and late quit. After six months, their productivity remains lower than your minimum standard.
- Employee with disability requests and is approved for telework. Productivity falls.

Discipline

Remember that you are free to discipline and terminate workers who aren't doing their jobs **after** you have made allowances for their FMLA or ADA rights.

Examples:

- Employee comes back from FMLA leave. After a proportional reduction of sales quotas for the year because of leave, they still miss targets.

- Employee with an ADA mental health disability gets into a fight with a co-worker and blames the disability. Both employees are punished equally.

Let's work with an example: Mental Health

Workers suffering from mental health issues are also protected under the ADA if their mental health issues also constitute a disability.

- ADA prohibits discrimination based on serious mental health conditions that substantially impair a major life function like depression, anxiety, bipolar disorder, panic disorder, PTSD and many many more common mental health problems.

- ADA requires reasonable accommodations for mental health, too.

Another example: Mental Health

Workers suffering from mental health issues are protected under the Family and Medical Leave Act

- Employers must comply if they have 50 or more employees.
- Covered workers (one year service plus 1250 hours) are entitled to up to 12 weeks unpaid leave for treatment, recovery, and related issues.
- Leave can also be taken intermittently – that is, when the need arises out of a serious health condition.
- Apply same analysis to mental health disorders as you do to any other serious health condition.

What the ADA Requires

The ADA considers a wide range of accommodations to be reasonable.
Some examples include:

- A depressed employee may need a schedule shift to attend talk therapy sessions or medication checks. If insomnia is an issue, it may be reasonable to allow later start times. If you modify starting times, be sure to also require core hours in the office. While the employee may need to arrive late due to insomnia, having core hours helps to stay focused.

- A recovering cocaine addict may need access to daily AA meetings to maintain recovery as well as time off for medical appointments or maintenance drug treatments.

- An obese employee may request telework as a reasonable accommodation.

What the ADA Requires

Other possible accommodations may include:

- **Work from home:** Telework may be a viable option for many with mental health disabilities. Under the ADA, if you have a telework program for similar positions to the one the disabled worker holds, you must consider allowing him or her to telework too.

- With the recent upswing in telework, you may have learned much about which positions are suited and which are not. Especially if the disabled worker has succeeded at telework, you may want to offer a permanent telework assignment. If it has not worked out, document that too when you deny the request.

- Also see previous section on telework.

The FMLA

Handling the request

- Make sure all workers understand how to request FMLA leave.
- Leave requests for an employee's serious health condition triggers your responsibility to let the employee know what their FMLA eligibility is.
- The leave request need not be formal – simply stating that one is depressed and needs to take time off would be enough to trigger **your obligation** to let the employee know about FMLA leave, how to ask for it, how much leave they are entitled to, and whether they will need a return-to-work certificate.

The FMLA

WARNING

- Employees suffering from mental health issues may require immediate treatment during a mental health crisis such as a suicide attempt or drug overdose.

- In a crisis the employee may not be able to request leave in a timely fashion. In that case, the law says you must receive notice as soon “as practicable.”

- Ordinarily, employees requesting FMLA leave must follow call-off rules the employer has in place even for urgent need.

The FMLA

WARNING

Employees may not be ready to return to work after the 12-week FMLA break. But they may still qualify as disabled under the ADA.

- Your return-to-work notification should include both a fitness for work certification (if you informed employee at beginning of leave that you want one) and a notice that employees who are not fully able to resume their jobs *may* be entitled to more time off as a reasonable accommodation. This may be a block of time or another accommodation.

- Even though out of leave, the worker may therefore be entitled to the equivalent of intermittent leave for AA meetings, counseling sessions and so on.

Job Accommodations Network

The Job Accommodations Network is a valuable resource for employers struggling with accommodations requirements. JAN is a service of the U.S. Department of Labor's Office of Disability Employment Policy/ODEP

- SOAR is its Searchable Online Accommodations Resource
    - SOAR allows employers to search out reasonable accommodations for a variety of situations. Employers who document their use of SOAR have valuable evidence if sued showing that they took their ADA obligations to reasonably accommodate seriously.
- Each disability includes a description of the disability to help employers familiarize themselves with the condition and a list of possible reasonable accommodations.

Job Accommodations Network

Some examples of specific disabilities and their reasonable accommodations:

- ADHD
- Fibromyalgia
- Diabetes
- PTSD
- Body Odor
- Cancer

Part Four

Reductions in Force, Reorganizations & Mass Layoffs

Reorganizations

Organizations sometimes undergo major changes that require the dismissal of workers who have been performing well but simply won't be needed after the changes management wants to make are implemented.

- Generally, employers are free to reorganize as they see fit regardless of the consequences for workers.

- However, when it comes to choosing who stays and who goes, employers can't pick and choose based by discriminating against protected classes.

Lessons from Viral Layoffs

When Google underwent a layoff in early 2023, they cut a total of about six percent of their workforce. Meanwhile, a few months earlier the company had announced new, generous maternity and paternity leave, including paid time off for 24 weeks.

Then came the layoffs:

- Over 100 employees whose names were on the layoff list were already on approved parental or other medical leave.

- Google, according to the employees, informed them that they had lost their jobs – and with the layoff, also their paid leave.

- Yes, that's perfectly legal *provided the employees weren't picked for the layoff list* ***because*** they were on FMLA leave. Usage can't be a factor in the selection process.

Who Stays? Who Goes?

For a reorganization, employers need a way to pick who is on the layoff list that does not take into factor:

- Any protected status like age, race, sex, national origin, disability, pregnancy, or religion
- Any past, present, or future use of FMLA leave
- The cost associated with providing medical insurance coverage because of age, disability, genetic condition, or other protected characteristics

Who Stays? Who Goes?

Options for picking who goes:

- Close entire divisions, offices, or other clearly defined groups without regard to past individual performance and allow affected employees to apply for open positions elsewhere within the company. If you adopt this approach, make sure hiring managers don't discriminate in who they hire.

- This is generally the safer option because it hits employees across a range of demographics.

Who Stays? Who Goes?

Options for picking who goes:

- If you do close entire offices or divisions – you still need to make sure that there's no disparate impact on a particular protected class. For example, if the division happens to have lots of older workers, a court might agree that you targeted the division for closure because you wanted to end up with a younger overall worker population.

Who Stays? Who Goes?

Options for picking who goes:

- Targeted discharges within offices, divisions or other groups that uses performance metrics to rank employees.

- If you use performance reviews to select layoffs, make certain that those reviews are untainted. For example, are employees who took FMLA leave rated lower because their supervisor took into account missed goals due to the protected absence?

Who Stays? Who Goes?

Performance reviews as selection criteria:

- Try to group employees by supervisor to get better comparisons – a lenient manager would otherwise find her subordinates ranked higher than a tougher manager if all were placed together. Her subordinates would then have an unfair advantage.

Who Stays? Who Goes?

Layoffs that rely on incentives to leave

- This is another targeted approach that avoids selecting individuals to lay off but relies on offering an incentive to go.

- **Example:** A bank must eliminate 20% of its 200 teller positions in a particular geographic location and decides to retain only those employees who most recently received the highest performance ratings. The bank sends a letter to 50 tellers who were rated “needs improvement” offering them six months pay if they voluntarily agree to resign and sign a waiver. This is an “exit incentive program.”

Who Stays? Who Goes?

Self-audit:

- Before termination, make certain that no protected group is disparately impacted by the selection. If so, make certain you have the documentation for each individual that shows objective, definable and solid reasons for their overall performance review score in case you're sued.

Severance?

To avoid drawn out litigation over a reorganization, most employers offer some sort of severance payment in exchange for a release of liability related to the layoff. These benefits can include:

- A lump sum payment based on years of service
- Continued health coverage for a period of time followed by COBRA benefits
- Outplacement and career guidance services

Severance?

To be binding, a severance agreement conditioned on receiving a release of liability must meet certain conditions:

- Must be a valid severance agreement under state laws and the NLRA
- If for an older worker, must comply with the Older Workers' Benefits Protection Act (OWBPA)

Severance?

National Labor Relations Act (NLRA) requirements:

- If the severance agreement includes a non-disparagement or confidentiality agreement that's very broad, those provisions are invalid if the employee is covered by the NLRA, which excludes most managers and supervisors.

Severance?

OWBPA requirements:

- Employees age 40 or older must be given 21 days to consider the employer's severance and waiver offer, unless it is part of a group termination.
- In a group termination, employees must be given 45 days.
- Older workers can only waive existing rights, not future rights.
- The waiver must be knowing and voluntary.

Severance?

OWBPA requirements:

- EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.

- A waiver must advise the employee in writing to consult an attorney before accepting the agreement.

- A waiver must give an employee seven days to revoke his or her signature. The seven-day revocation period cannot be changed or waived by either party for any reason.

Severance?

OWBPA requirements:

- A waiver must be supported by consideration in addition to that to which the employee already is entitled. That is, the severance payment must go beyond accumulated sick and vacation leave or other vested payments.

Severance?

OWBPA requirements:

- If it is a group layoff where members of the group are offered an incentive to leave, those older than 40 have the right to additional information - an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

- The EEOC has a sample compliant waiver agreement at its website.

WARN and Mini WARN

The Worker Adjustment and Retraining Notification Act (**WARN**)

- **WARN** requires employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs

- **WARN** applies if you have 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week

- DOL has guidance here

WARN Triggers

Plant Closing: A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss (as defined later) for 50 or more employees during any 30-day period.

WARN Triggers

Mass Layoff: A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce.

WARN

The exceptions to 60-day notice are:

- **Faltering company.** This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings.

- **Unforeseeable business circumstances.** This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required.

- **Natural disaster.** Wildfires, floods with serious damage

Mini WARN

Many states have their own versions for smaller employers not covered by federal WARN. Always check with your state Department of Labor:

- Some states have recently expanded their mini WARN laws. For example, New Jersey now includes an automatic severance payment – which means NJ employers will have to top that off if they also want a release of liability.

- Maine's mini WARN also includes a severance payment.

- https://www.dol.gov/agencies/eta/layoffs/contact provides a list of state agencies that handle mass layoffs.

Group Termination

- Requires careful planning
- Meetings are best – no mass termination via mail, email, text etc.
- Have pay plus termination package available
- Have open job list ready if there are any
- Have someone available to discuss any severance, continued benefits, outsourcing of job hunt, counseling services, etc.
- Emphasis is on dignity and concern

The Virtual Mass Termination Meeting

- DO arrange for a web-based or other telecast instead
- DO have termination packets ready to send to all terminated workers immediately following the address – though not during as it may distract.
- DO include a severance agreement or waiver if approved by counsel, being mindful of special requirements for older workers who must be given extra time to accept or reject, including opportunity to consult counsel.
- DO NOT forget specific state laws that require immediate payment of wages due, vacation, and other accrued benefits.

Press Inquiries

- For any layoff (individual or mass) expect press questions
- Have point of contact and standard policy for inquiries to the HR office (link on your webpage is helpful in channeling press to the right HR person instead of going directly to employees).
- Suggest to employees they should refer inquiries to HR designee (be aware that the NLRB says you can't ban workers from talking to press).
- Consider bringing in crisis management if discharge is sensitive or otherwise newsworthy.

Reverse Discrimination Terminations

Reverse discrimination Unanimous Supreme Court decision 2025 makes it easier to sue over a termination for so-called reverse discrimination.

- Marlean, a heterosexual, worked for the Ohio Department of Youth Services for more than two decades. In 2019, she was interviewed for a promotion. She wasn't picked but a lesbian woman was. Soon after, she was demoted, and a gay male got her old job. The successful candidates had less education or experience than Marlean. She then sued, alleging she was denied a promotion and demoted because she is a heterosexual.
- The court concluded that because minority groups don't have that burden, neither should members of majorities. Title VII gives all individuals the right to sue over disparate treatment accorded them because of their protected status – in this case, as a heterosexual. Belonging to a majority (heterosexual) or minority (homosexual) group makes no difference.

Reverse Discrimination Terminations

Reverse discrimination Unanimous Supreme Court decision last week makes it easier to sue over a termination for so-called reverse discrimination.

- This case makes it easier for workers to sue their employers for discrimination based on all protected classifications, whether that classification constitutes a majority or minority. This is colloquially known as a reverse discrimination claim. Expect more reverse discrimination lawsuits to be filed and go to trial.
- Employers should treat reverse discrimination claims as seriously as they do all other discrimination claims.
- **REMEMBER EEOC IS ASKING FOR WORKERS TO FILE COMPLAINTS OF REVERSE DISCRIMINATION!**

Legal Terminations Workshop

Thank you!

We look forward to seeing you again.

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Thank you for participating in the Legal Terminations Workshop

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