Employment Law Master Class

A to Z legal training for HR professionals

BusinessManagement DAILY

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Business Management Daily

Agenda

- PART 1: Recruiting, screening, and hiring
- PART 2: Federal anti-discrimination and leave laws
- PART 3: Discipline, discharge and RIFs
- PART 4: The FLSA, exempt status, and overtime
- PART 5: Unions, the NLRA, and workplace rules

Trump Administration Changes

- Immigration – Raids, I-9 Audits, Visa restrictions and changes
- Wage and Hour – no tax on tips, overtime IRS rules now in place
- DEI – new dismantling mandates – and new rules for contractors
- EEOC – entirely new focus

PART 1

Recruiting, Screening, and Hiring

Recruiting, screening, and hiring

Hiring is a flashpoint

When workers sue, it's often about something that happened in the hiring process or in the firing process. That's one reason you should review those processes regularly to make sure you're not inviting a lawsuit. Some dangers:

- Advertising in a way that implies discrimination. For example, using loaded phrases in job announcements is a recipe for a lawsuit. "Energetic" "Young" "Recent college grad" can all trigger scrutiny.

- Advertising in places that are likely to draw from a specific segment of the labor pool at the expense of others is also a no-no. For example, recruiting on college campuses exclusively may spur an age lawsuit.

Recruiting, screening, and hiring

Hiring is a flashpoint

When workers sue, it's often about something that happened in the hiring process or in the firing process. That's one reason you should review those processes regularly to make sure you're not inviting a lawsuit. Some dangers:

- Both DOL and DOJ scrutinizing visa certifications - and suing employers that prefer foreign labor to American labor
- EEOC has new focus on preference for other nationalities over American nationality

Recruiting, screening, and hiring

Other hiring flashpoints

Reconsider all these:

- Requiring a personality test that's clearly not job related may violate the ADA (if it can reveal a psychological disability)
- Requiring any medical test before an offer of employment violates the ADA too
- Interviews are tricky if questions aren't job-related or every interviewee isn't asked the same questions
- Hiring with goal to diversify now suspect, even if using seemingly neutral factors. This is a huge change and DOJ has even gone back to 2019 and alleged illegal DEI

Recruiting, screening, and hiring

Other hiring flashpoints

Reconsider all these:

- Refusing to offer a reasonable accommodation during the interview and hiring process violates the ADA
- Asking about children or childbearing plans may spur sex discrimination charges
- Screening applications via artificial intelligence is increasingly problematic as programs may discriminate
- Limiting applications to those submitted online may discriminate
- Targeting demographics problematic

Recruiting, screening, and hiring

Hiring based on citizenship status

Recent litigation and Department of Justice actions provide warning against:

- Only offering positions to citizens because you know you don't have to monitor work authorization moving forward after the initial I-9 document inspection
- Refusing to hire "Green Card" or other work authorized applicants because you fear changes to the immigration laws may occur – yet you must stay alert to status changes
- Refusing to hire current DACA card holders may be seen as national origin discrimination
- You *can* refuse to hire someone who does not have an appropriate security clearance if the job requires a security clearance

Recruiting, screening, and hiring

Hiring and I-9s

Prepare for I-9 audits

- DHS/ICE are conducting many more I-9 audits than before and are showing up armed in some cases
- Employers have 3 business days from date they receive Notice of Inspection from ICE to produce records
- DHS/ICE now appear to be serving those in person, sometimes with armed agents blocking exits and entrances when requesting the records
- Employers do not have to allow those agents beyond public areas unless they have a judicial warrant signed by a federal judge nor do employers have to allow them to speak with employees

Recruiting, screening, and hiring

Hiring and I-9s

Prepare for I-9 audits

- The best way to prepare is to review your I-9 records for completeness
- Make sure you have those records easily retrievable – ideally at an off-site location to avoid business interruption
- Have your attorney review your I-9 process for compliance
- Designate someone at each location to greet ICE officers and explain records are off-site
- Immediately call your attorney when ICE shows up

Recruiting, screening, and hiring

Advertising an open position

The job listing or advertisement should include the following:

- Job title and number; location of position.
- Hours of work and whether travel/overtime is required.
- Salary range and brief explanation of benefits. If you do not routinely include salary, make sure you aren't in a jurisdiction that requires you to do so. Recently, many states and cities have begun requiring salary or salary ranges in all job announcements and recruiting materials. Some of these laws carry hefty penalties for failing to post.

Recruiting, screening, and hiring

Advertising an open position

The job listing or advertisement should include the following:

- Description of essential functions of the job and experience and educational qualifications required.
- Instructions and deadline for submitting applications.
- An equal employment opportunity statement and a notice to disabled applicants about accommodation requests.

Recruiting, screening, and hiring

Advertising an open position

The job listing or advertisement should NOT include the following:

- Job ads should not refer to age, gender, race or any other protected characteristic.
- Ads that say “Perfect for college students” may discourage older workers and violate the ADEA.
- “Ideal for working mothers” may violate Title VII because it discourages men from applying.
- “Person in good health” may violate the ADA or the Genetic Information Non-discrimination Act (GINA) by discouraging disabled workers or those affected by genetic disorders.

Recruiting, screening, and hiring

Advertising an open position

Employers who have practices that discourage or prevent applicants from seeking work because of their sex, race, color, religion, national origin or other protected characteristics are committing what the agency calls “systemic discrimination.”

- Focus currently is on reverse discrimination claims

- Plus, it has recently filed many more lawsuits than in the past decade, with many settled for a million dollars or more. That’s quite a payday for never working for you!

Recruiting, screening, and hiring

Advertising an open position

Systemic discrimination can manifest itself in many ways.

- Automatically screening out those with criminal records or low credit scores likewise have spurred EEOC systemic discrimination investigations and subsequent lawsuits.
- Plus, more states are banning the use of credit scores or credit history in hiring
- Hiring practices that screen for a desired demographic – sometimes using a third-party recruiter – are increasingly singled out.

Recruiting, screening, and hiring

Criminal Records

Criminal records: Estimates are that one in three Americans of working age have a criminal conviction on their record.

- Many convictions are decades old and the applicant has “paid their debt to society.”
- More and more employers are taking a chance on applicants with minor criminal records during these times of labor shortages particularly for hard to fill service positions.
- Plus, the EEOC has long taken the position that, unless consistent with “business necessity,” hiring decisions based solely on arrest or conviction records, as opposed to the underlying offense, are potentially discriminatory.

Recruiting, screening, and hiring

Criminal Records

Criminal records: An employment practice is considered consistent with business necessity if it's genuinely related to job performance.

If the conduct underlying an arrest or conviction record indicates that the applicant isn't suited for a particular job, you may base your hiring decision on that conduct. For example, a conviction of fraud would disqualify someone from a job as a fiduciary for a trust fund. Even in the case of a conviction, an employer must consider three factors:

- The nature and gravity of the offense
- The amount of time that passed since it was committed
- The nature of the job held or sought
- This analysis is highly fact-specific

Recruiting, screening, and hiring

Criminal Records

Ban the Box: Employers routinely perform criminal background checks for employment on applicants. They may worry that hiring applicants with criminal histories expose them to negligent hiring liability, potential theft or fraud.

- More than 75% of the U.S. population lives in a “Ban the Box” jurisdiction. Ban the Box refers to the practice of asking about criminal records during the initial screening and hiring process. When an applicant is asked to “Check the Box” for past criminal history and provide details about that history, he or she is less likely to move to the next phase.

- Delaying that question until the applicant has shown he or she is a good candidate for the position may lessen the inclination to turn the applicant down. Thus, “Ban the Box” laws aim to give those who have paid their debt to society a second chance.

Recruiting, screening, and hiring

Criminal Records

35 states and over 150 municipalities prohibit public employers from asking job applicants about their criminal history at various stages in the hiring process.

- Some also have enacted ‘fair chance’ laws allowing for the expungement of old convictions for individuals who have not committed recent crimes.
- In fifteen states, the prohibition applies to private employers as well. These states are California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington state.
- The District of Columbia also bars asking about criminal history on applications and before a conditional job offer has been made.

Recruiting, screening, and hiring

Salary History

Salary history: What was once a common job application question has now become a source of controversy.

- The state of Massachusetts was the first to outlaw employers asking for an applicant's salary history during the screening process in the belief that doing so contributed to the gender wage gap. Effective in 2025, the state now requires salary postings.
- As of October 2026, there are 22 states with statewide prohibitions against using past salaries to set salary on hire or that forbid asking an applicant about their past pay. In addition, a growing number of cities and towns have added their own laws – often when their state legislatures have not taken action. Employers should check the rules in every state where they operate.

Recruiting, screening, and hiring

Using Artificial Intelligence in hiring

The use of artificial intelligence (AI) has exploded. Its use has already resulted in significant outsourcing of some of the more mundane aspects of human resource work to computer programs using algorithms.

- AI programs can search for resumes online, sort through those submitted in response to job postings, conduct video interviews and screening tests and even make hiring recommendations.
- Part of the promise of AI in human resource applications is that theoretically its use can avoid bias.

Recruiting, screening, and hiring

Using Artificial Intelligence in hiring

AI programs rely on algorithms to sort data and analyze it quickly, without human input.

- There are commercially available human resource screening programs that sort through applicant résumés and identify key words or phrases.
- Those résumés that meet a company's screening criteria for open positions are then forwarded to the HR office, while the rest are summarily rejected and perhaps even sent a form rejection letter.
- Companies developing and selling these programs tout not just their time-saving features, but often claim the programs prevent discrimination. After all, no human—with possible prejudices—decides who to reject and who to interview.

Recruiting, screening, and hiring

Using Artificial Intelligence in hiring

Already, some states and cities have moved to regulate AI programs used in making hiring and other job-related suggestions.

- For example, New York City now requires that employers that use AI programs perform bias audits on those systems.
- The rule applies whether the AI system is employer-created or purchased from a vendor/developer.
- Make sure you ask your vendor for proof of compliance if you use the AI program in New York City. Always check your state and city for the latest AI rules.

PART 2

Federal Anti-discrimination and Leave Laws

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

The Civil Rights Act prohibits discrimination against workers on the basis of race, color, religion, sex including gender identity and sexual orientation, and national origin or any combination of these characteristics.

- Title VII applies to all employers that have at least 15 workers, full or part-time and includes U.S. companies that employ Americans abroad.
- The Equal Employment Opportunity Commission (EEOC) enforces Title VII via regulation, adjudicating/mediating complaints, litigating cases that don't settle or passing cases along to private litigants.
- EEOC also frequently litigates cases it views as important.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

“It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- The EEOC enforces Title VII and additional federal employment discrimination laws that have been passes since 1964. These are covered in subsequent slides.
- For each law the EEOC enforces, it has issued regulations and enforcement guidance.
- The EEOC also litigates ***aggressively***, taking many test cases to the Supreme Court. Prime example were the three sexual orientation and gender identity cases decided by the Supreme Court in June 2020. The court accepted the EEOC's interpretation that sex discrimination includes discrimination based on both sexual orientation and gender identity.
- But now the agency may be taking the opposite view. That doesn't mean the old rule are out!

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- Discrimination can be direct or indirect.
- A form of indirect discrimination is disparate impact discrimination, which occurs when a facially neutral policy nonetheless impacts a protected class more than other workers.
- Disparate impact can occur, for example, when a rule against hiring applicants with a “poor” credit score disproportionately impacts Hispanic or Black applicants or when a fitness test disproportionally impacts female or older applicants.
- Disparate impact discrimination usually uses advanced statistics to evaluate disparate impact on a protected group and does not require that the plaintiff prove the employer intended to discriminate when it created the rule.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- The White House recently issued an Executive Order directing agencies to no longer pursue disparate impact litigation.
- That means agencies like the EEOC, Department of Justice and DOL likely will no longer pursue disparate impact cases and may withdraw guidance for employers on the topic.
- DOJ already withdrew a case against NYC fire department based on a screening test that disparately impacted some protected classifications.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- The US Supreme Court recognized disparate impact theory in a 1971 decision. Under the theory, an employer can be liable if a facially neutral policy adversely affects a protected class.
- Even if the EEOC, DOL, DOJ no longer support the theory, it remains the law of the land.
- That means employers can still be sued by private attorneys and special interest groups, who have signaled they will try to step in when agencies back out of cases they previously filed.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- Diversity, equity and inclusion (DEI) generally refers to a concept employers have attempted to use to diversify their workforces and bring groups that have been historically underrepresented into the mainstream workforce.
- DEI efforts greatly expanded after the unrest following police shootings in the early 2020s.
- Some opponents saw the efforts as a form of reverse discrimination and sued over purported lost opportunities because of their race.
- In 2026, these cases are becoming quite common

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

- The Trump administration issued an executive order outlawing diversity, equity and inclusion policies by, among other things, requiring federal contractors to drop DEI policies as a condition of government contracting (and receiving grants).
- The EEOC has taken a similar stand, promising to bring more reverse discrimination lawsuits against employers.
- DOJ recently settled a case against IBM based on idea that by having a DEI program, and certifying as a federal contractor they didn't discriminate is a false statement. It paid millions to settle.

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

What's allowed and what's not:

- No reserving opportunities for one class while excluding another
- No balancing rules that require a particular mix in the employer's workforce
- No affinity groups that exclude some
- No bonuses tied to meeting diversity goals

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964

What's allowed and what's not:

- Yes casting wider net for a more diverse applicant pool – maybe….
- No requiring hiring specific demographics from the resulting pool
- No diversity + factor in hiring
- Yes making reasonable accommodations for disabled applicants and workers
- Yes reasonable accommodations for religious beliefs and practices

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The EEOC process in a nutshell

1. Workers must file an EEOC complaint as pre-requisite to filing a federal lawsuit – within 180 or 300 days depending on which state the employer is located in or where the employee teleworks from

2. EEOC investigates

3. EEOC concludes the charges are unfounded and dismisses with a “right to sue” letter giving the worker the right to file a federal lawsuit within 90 days, or EEOC finds charges founded, offers conciliation

4. If conciliation fails, EEOC either files lawsuit on behalf of worker and offers opportunity to join that lawsuit or dismisses with a right to sue letter to worker whose attorneys then have 90 days to sue

Title VII of the Civil Rights Act of 1964

Types of discrimination covered

- Discrimination based on protected characteristics of race, color, religion, sex, or national origin
- Harassment based on those characteristics
- Retaliation for complaints based on those characteristics

Title VII of the Civil Rights Act of 1964

Race and color as a protected characteristic

- Race discrimination involves treating someone (an applicant or employee) unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features)

- Color discrimination involves treating someone unfavorably because of skin color complexion

- Race/color discrimination also can involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or color. This is also known as associational discrimination

Title VII of the Civil Rights Act of 1964

Race and color as a protected characteristic

It is unlawful to harass a person because of that person's race or color.

Harassment can include:

- Racial slurs, offensive or derogatory remarks about a person's race or color, or the display of racially-offensive symbols.
- Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).
- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Title VII of the Civil Rights Act of 1964

Sex as a protected characteristic

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy. For example, it is sex discrimination:

- To pay someone less because of their sex
- To deny promotions to someone because of their sex
- To force a pregnant employee to quit or take maternity leave before she needs to
- To refuse to hire someone for a position because it’s perceived as a job that’s typically done by a member of one sex rather than another

Sex discrimination includes discrimination against either sex.

Title VII of the Civil Rights Act of 1964

Harassment based on sex

It is unlawful to harass a person because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy. Harassment can include:

- "sexual harassment" such as unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.
- Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex, including the person's sexual orientation, gender identity, or pregnancy. It is illegal to harass a woman by making offensive comments about women in general.
- Both the victim and the harasser may be any sex, and the victim and harasser may be the same sex or a different sex.

The Equal Pay Act of 1963 (EPA)

The EPA, which amended the FLSA, provides equal pay for equal work

The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work.

- The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal.

- All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.

The Equal Pay Act of 1963 (EPA)

The EPA, which amended the FLSA, provides equal pay for equal work

Although technically part of the FLSA, the EEOC enforces it

- If there is an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.
- **The EPA does not require that the worker file an EEOC complaint before filing a federal EPA lawsuit!!!**
- **Workers have up to two years to file that lawsuit – and up to three years if the violation is "willful."**

Lilly Ledbetter Fair Pay Act of 2009

Law was passed to counter a Supreme Court decision

Extends time to file charges based on sex discriminatory pay decisions in the past still felt today

- The law allows individuals to file charges of alleged pay discrimination under Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act without regard to the normal 180/300-day statutory charge filing period.

- Before, per the Supreme Court, you had to file EEOC sex discrimination charges within 180/300 days of the first employment decision setting a discriminatory salary. The pay disparity would then grow year after year, leaving Ms. Ledbetter with no remedy.

Lilly Ledbetter Fair Pay Act of 2009

Law was passed to counter a Supreme Court decision

The law declares that an unlawful employment practice occurs when:

- A discriminatory compensation decision or other practice is adopted
- An individual becomes subject to the decision or practice
- An individual is affected by application of the decision or practice, including each time there is a payment of compensation – i.e. with each paycheck reflecting the cumulative impact of the first discriminatory pay decision that could have occurred many years or even decades ago

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Religion

Recent case law and action at the Supreme Court means big changes:

- The Supreme Court has made it easier than ever for employees to demand and receive reasonable accommodations for religious needs like time off to worship.
- The EEOC has seen an explosion of religious discrimination complaints including claims of religious bias, failure to accommodate religious beliefs, refusing to allow workers to dress and groom according to their religion and even claims to be excused from performing certain tasks the employees deem inconsistent with their sincerely held religious beliefs and practices.
- Bottom line – employers now must do more to accommodate varying and diverse religions and beliefs to stay out of court.

Title VII of the Civil Rights Act of 1964

Religion as a protected characteristic

This provision prohibits discrimination on the basis of religion

- Employers can’t discriminate based on a worker’s religious beliefs or practices.
- Employees are entitled to reasonable accommodations based on their religious needs like time off for worship services and being excused from dress code provisions that violate their sincerely held religious beliefs or practices.

Title VII of the Civil Rights Act of 1964

Religion represents a growing number of EEOC complaints

- EEOC complaints based on religious accommodations had already increased substantially over the last few fiscal years.
- EEOC is also bringing more federal lawsuits based on religious discrimination.
- In 2021, there were 2,111 religious discrimination charges.
- By the end of fiscal year 2022, the number jumped to 13,814 cases – likely reflecting COVID vaccine mandates and religious objections.
- In 2023, the number fell to 4,341 – still more than twice the 2021 cases.
- In 2025-6, the number of cases is again growing, and religion is an EEOC priority.

Title VII of the Civil Rights Act of 1964

Religion and reasonable accommodations

Some religious reasonable accommodations include:

- Allowing workers to wear religious garb like headscarves, turbans and yarmulkes.
- Allowing facial hair like beards and long hairstyles for men like dreadlocks and braids when required or recommended by a religion.
- Allowing women to wear long hair and long skirts when required or recommended by a religion.
- Allowing time off for religious practices or if required by a religious belief.

Title VII of the Civil Rights Act of 1964

What is religion?

Religion is defined expansively

- Traditional, organized religions like Buddhism, Christianity, Hinduism, Islam and Judaism are covered.

- So are other sincerely held religious, ethical or moral belief systems, including Agnosticism, Atheism, and Druid, Wicca and Native American beliefs.

Title VII of the Civil Rights Act of 1964

What is religion?

Religion is defined expansively

- Employers may inquire about beliefs underlying a request for reasonable accommodations, but they should be cautious about questioning its sincerity. Doing so opens the prospect of appearing hostile to religion generally and specific beliefs specifically.

- You can ask employee to fill out a request for reasonable accommodation form, asking the nature of the accommodation but requiring more can create legal trouble.

Title VII of the Civil Rights Act of 1964

Challenging religious beliefs – if you must

It may make sense to challenge whether the employee is eligible for a religious accommodations up front.

- The EEOC defines religion to include all the common religions focusing on a belief in a monotheistic God, belief systems with multiple gods, no gods and nature-based beliefs. Belief systems focusing on ideas about life, purpose and death can count as religions, while social, political and economic beliefs and personal preferences do not count.

- The EEOC says employers can ask the following: Please identify the requirement, policy, or practice that conflicts with your sincerely held religious observance, practice, or belief.

Title VII of the Civil Rights Act of 1964

Challenging religious beliefs – if you must

The EEOC says employers can ask the following:

- Please identify the requirement, policy, or practice that conflicts with your sincerely held religious observance, practice, or belief.
- Please describe the nature of your sincerely held religious beliefs or religious practice or observance that conflict with the requirement, policy, or practice identified above.

- Employers can also consider the following:
  - Inconsistent behavior with the professed belief underlying the request.
  - Suspicious timing of the request.
  - Other objective reasons the employer believes the requested accommodation is for an unrelated reason.

Title VII of the Civil Rights Act of 1964

Case Example

Asking too many questions about nature of religious belief

- Demetrius is an adherent to Messianic Judaism and converted to that religion in 2006, about a decade before going to work at a call center, Center One. On certain Jewish holy days, including Rosh Hashanah and Yom Kippur, his claims his religion forbids him to work.

- Center One has a strict absenteeism policy that assigns points to missed shifts. Demetrius called off for Rosh Hashanah. When he returned to work, he was called into the office and asked to provide documentation that his religion required his absence – preferably on a congregation's letterhead.

Title VII of the Civil Rights Act of 1964

Case Example

Asking too many questions about nature of religious belief

- He could not because he didn't belong to a specific congregation. He tried printing out an internet calendar with holy days listed, but HR rejected it.
- When the absence and other that followed were counted against him, he resigned. He complained to the EEOC, which sued on his behalf.
- Big wins happening regularly in appellate courts – especially inquisitions about beliefs!!!

Title VII of the Civil Rights Act of 1964

Case Example

Asking too many questions about nature of religious belief

- The lower court tossed the case out, but the EEOC appealed. At oral argument, the 3rd Circuit Court of Appeals panel handling the case seemed ready to reinstate the case and send it back to the trial. The justices were highly critical of the demand for written, verified proof that the religion required certain holy days off. (*Ford v. Center One,* No. 2:19-CV-01242, 3rd Cir., 2023)
- The employer capitulated in October 2024 rather than face a trial. The employee received $60,000. The employer paid a fortune for its defense.

Title VII of the Civil Rights Act of 1964

Protection from bias against religion in hiring, employment and firing

Title VII protects workers from discrimination in hiring, employment and firing based on the applicant/employee's religious beliefs or those of the employer.
For example:

- It is illegal to refuse to hire an applicant because of his/her membership in a religion *or* lack of membership in a religion with very limited exceptions for religious organizations.

- It is illegal to fire someone who does not share the employer's religious beliefs or who refuses to engage in forced religious practices like Bible readings.

Title VII of the Civil Rights Act of 1964

Religious harassment

Title VII protects workers from harassment based on religion. For example:

- Supervisors making fun of religious beliefs or co-workers pushing their beliefs on an employee who does not share those beliefs.

- Subjecting employees belonging to a particular religion to slurs, degrading comments or other behavior most reasonable persons would deem offensive.

Title VII of the Civil Rights Act of 1964

Religious Reasonable Accommodations

Title VII requires that employers reasonably accommodate religious beliefs, practices and customs

- The U.S. Supreme Court ruled in June 2023 that for an employer to prove that making a religious accommodation creates an undue burden, they must show that the accommodation would have a substantial financial impact on their operations, given the employer's size, resources and the nature of its business.

Title VII of the Civil Rights Act of 1964

Religious Reasonable Accommodations

The big Supreme Court case:

A unanimous Supreme Court has ruled 9-0 that employers are obligated to accommodate religious practices and belief unless doing so creates an undue hardship. (*Groff v. DeJoy*)

In doing so, it redefined undue hardship to mean that the accommodation would result in **"substantial increased cost in relations to the conduct of an employer's particular business."**

Title VII of the Civil Rights Act of 1964

How to Reasonably Accommodate Religion

Review current religious accommodation policies.

- That policy should now direct supervisors to direct all requests to the HR office for review.
- The policy should state that supervisors can't grant or deny the request without HR approval.

Employment Law Master Class

Break and Questions

The Pregnant Workers Fairness Act and the Pump Act

The Pregnant Workers' Fairness Act (PWFA) extends reasonable accommodations to pregnancy and aftermath. Not technically an amendment to the ADA, it nevertheless specifies that the ADA accommodation process must be used.

- The EEOC is charged with enforcing the PWFA and to create regulations, including examples of appropriate reasonable accommodations.
- Effective date was June 27, 2023.
- The EEOC began accepting complaints under the PWFA on that day – even though it had not yet issued regulations instructing employers on implementing the law.

The Pregnant Workers Fairness Act and the Pump Act

What the PWFA says:

- **Covers only reasonable accommodations.** Employers already are prohibited from discriminating based on pregnancy.

- **References limitations rather than disabilities.** That means it covers a far broader range of medical, physical or other conditions.

- **You can read the entire law here.**

The Pregnant Workers Fairness Act and the Pump Act

What the PWFA says:

- **Undue hardship.** Employers who can show that making a reasonable accommodation for a pregnancy-related limitation creates an undue hardship for that employer won't have to provide the accommodation.
- **Definition of undue hardship.** There's no definition of *undue hardship* in the statute. However, the EEOC FAQ says it considers "undue hardship" a **significant difficulty or expense** for the employer.

The Pregnant Workers Fairness Act and the Pump Act

What the PWFA says you cannot do:

Require an employee to accept an accommodation without a discussion about the accommodation between the worker and the employer.
Employers should make sure that all supervisors understand they cannot simply offer up an accommodation on a take-it-or-leave-it basis. There needs to be documented give-and-take discussions aimed at reaching a reasonable accommodation acceptable to all parties.

Deny a job or other employment opportunities to a qualified employee or applicant based on the person's need for a reasonable accommodation.
Under this provision, employers can’t automatically assign a pregnant worker needing reasonable accommodations to a light-duty position during pregnancy if other opportunities open up for promotions.

The Pregnant Workers Fairness Act and the Pump Act

What the PWFA says you cannot do:

Retaliate against an individual for reporting or opposing unlawful discrimination under the PWFA or participating in a PWFA proceeding (such as an investigation).
This is similar to other anti-retaliation provisions in federal discrimination laws. Generally, the definition of retaliation is anything that would dissuade a reasonable employee from cooperating, taking action or testifying in the first place.

Interfere with any individual's rights under the PWFA.
Employers aren't allowed to dissuade workers from requesting reasonable accommodations or taking any other action that might prevent the pregnant worker from asserting rights under the PWFA.

The Pregnant Workers Fairness Act and the Pump Act

Common PWFA Accommodations:

- Ability to sit or drink water
- Receive closer parking
- Have flexible hours
- Receive appropriately sized uniforms and safety apparel
- Additional break time to use the bathroom, eat, and rest
- **Take leave or time off to recover from childbirth**
- Be excused from strenuous activities and/or activities that involve exposure to compounds not safe for pregnancy

The Pregnant Workers Fairness Act and the Pump Act

Common PWFA Accommodations:

Take leave or time off to recover from childbirth.
This is probably the most interesting accommodation on the EEOC's list in that it may serve as the basis for a request for a reasonable accommodation of maternity leave. Employers should consider amending their leave policies to include this as a reasonable accommodation for pregnancy. This would apply to employers with far fewer workers than coverage under the FMLA.

The Pregnant Workers Fairness Act and the Pump Act

The EEOC issued final regulations in 2024

The regulations make it clear that:

- Most accommodations must be approved with little or no paperwork
- Managers and supervisors must be authorized to grant most common limitations on the spot.
- Time off post-pregnancy must be approved similarly to the FMLA – but NOT for child bonding and not for the partner.
- Some of these may be modified now that EEOC has a quorum.

The Pregnant Workers Fairness Act and the Pump Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) accords a nursing parent unlimited unpaid pumping breaks and amends the Fair Labor Standards Act (FLSA) to expand an Affordable Care Act pumping breaks law for hourly workers.

- The Department of Labor is charged with enforcing the PUMP Act.
- The effective date for breaks was December 29, 2022 – the day of signing.
- Additional provisions allowing lawsuits went into effect on April 28, 2023.

The Pregnant Workers Fairness Act and the Pump Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act:

- Amends the Affordable Care Act/Fair Labor Standards Act to include milk expression breaks as a right under the FLSA.

- Initially passed in 2010 with the ACA and extended to cover far more employees in December 2022.

- Applies to nearly all employees covered by the FLSA as of December 29, 2022 Employers with fewer than 50 employees are not subject to the FLSA break time and space requirements if compliance with the provision would impose an undue hardship.

The Pregnant Workers Fairness Act and the Pump Act

The Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act:

- Under the FLSA, when an employee is using break time at work to express breast milk, they either:

- Must be completely relieved from duty or be paid for the break time.

- When employers provide paid breaks, an employee who uses such break time to pump breast milk must be compensated in the same way that other employees are compensated for break time.

The Pregnant Workers Fairness Act and the Pump Act

Pump Act basics:

- Provides most employees who are nursing with reasonable time and private space, other than a bathroom, to express breast milk.
- Unlimited breaks to pump milk as often as the need arises, completely relieved of work duties while doing so.
- For **one year after the child's birth**, covered employees may take reasonable break time "**each time such employee has need to express the milk.**" An employer may not deny a covered employee a needed break to pump.

The Pregnant Workers Fairness Act and the Pump Act

Space required:

- A place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."
- A space must contain a place for the nursing employee to sit, and a flat surface, other than the floor, on which to place the pump.
- Employees must be able to safely store milk while at work, such as in an insulated food container, personal cooler, or refrigerator.

The Pregnant Workers Fairness Act and the Pump Act

Space required:

- The DOL recommends that the space provide access to electricity. This is to accommodate more efficient electric pump setups rather than battery-operated pumps or pumps the new parent must manually operate.
- Employers provide a location close to a sink to make it easier for employees to wash their hands and clean pump parts.
- Workers who telework must also be free from observation by any employer-provided or required video system, including computer camera, security camera, or web conferencing platform.
- Employers need to make sure the same is true for any space set aside for milk expression breaks – i.e. no cameras.

Title VII of the Civil Rights Act of 1964

National origin as a protected characteristic

National origin is a protected characteristic under Title VII. Employers cannot discriminate based on:

- Where a person was born or where their ancestors came from
- Whether the applicant or employee has a foreign accent unless the accent seriously interferes with the employee's job performance
- Because the applicant or employee is associated with someone born outside the U.S.
- Because the applicant or employee was born in the U.S.

Title VII of the Civil Rights Act of 1964

National origin as a protected characteristic

National origin is a protected characteristic under Title VII. Employers cannot discriminate based on:

- An employer can only require an employee to speak fluent English if fluency in English is necessary to perform the job effectively. An "English-only rule", which requires employees to speak only English on the job, is only allowed if it is needed to ensure the safe or efficient operation of the employer's business and is put in place for nondiscriminatory reasons.
- The Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for an employer to discriminate with respect to hiring, firing, or recruitment or referral for a fee, based upon an individual's citizenship or immigration status - i.e. national origin

The Americans with Disabilities Act

The ADA and disability

The ADA outlaws discrimination based on disability.

- The ADA makes it unlawful to discriminate in all employment practices such as recruitment, pay, hiring, firing, promotion, assignments, training, leave, lay-offs, benefits and all other employment related activities.

- Under the ADA, a person has a disability if he has a physical or mental impairment that substantially limits a major life activity. The ADA also protects individuals who have a record of a substantially limiting impairment, and people who are regarded as having a substantially limiting impairment.

The Americans with Disabilities Act

The ADA and disability

An individual with a disability must also be qualified to perform the essential functions of the job with or without reasonable accommodation, in order to be protected by the ADA. This means that the applicant or employee must:

- Satisfy your job requirements for educational background, employment experience, skills, licenses, and any other qualification standards that are job-related
- Be able to perform those tasks that are essential to the job, with or without reasonable accommodation.

The Americans with Disabilities Act

The ADA and disability

Factors to consider in determining if 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
- The degree of expertise or skill required to perform the function

The Americans with Disabilities Act

The ADA and disability

Your judgment as to which functions are essential, and a written job description prepared before advertising or interviewing for a job will be considered by EEOC as evidence of essential functions. Other kinds of evidence that EEOC will consider include:

- The actual work experience of present or past employees in the job
- The time spent performing a function
- The consequences of not requiring that an employee perform a function
- The terms of a collective bargaining agreement

The Americans with Disabilities Act

Reasonable Accommodations and the ADA

Reasonable accommodations include:

- Changing start and end times
- Extended leave of absence
- Ergonomic modifications, devices and software
- Work at home permission
- Modifying ‘no fault’ attendance rules
- Transfer to other available position, adjusting or modifying examinations, training materials or policies
- Providing readers and interpreters
- Making the workplace readily accessible to and usable by people with disabilities

The Americans with Disabilities Act

Reasonable Accommodations and the ADA

Reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of a job, or to enjoy benefits and privileges of employment equal to those enjoyed by employees without disabilities.

May include:

- Acquiring or modifying equipment or devices, and job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Being able to access facilities other workers enjoy, including lunch and break rooms bathrooms and off-premises activities like trainings and holiday/employee appreciation events

The Americans with Disabilities Act

“Unreasonable Accommodations”

Some requests that don’t typically need to be accommodated:

- Less stressful job
- New supervisor
- At-home work with no contact from home office
- Creation of a new job
- Promotion
- Displacing another worker
- Extended leave of absence with either no return date or that does not allow employee to eventually perform the essential functions of the job

Age Discrimination in Employment Act

Older workers are protected from discrimination in employment

The Age Discrimination in Employment Act (ADEA) is enforced by the EEOC.

It shall be unlawful for an employer-
(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age
(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age
(3) to reduce the wage rate of any employee in order to comply with this chapter

Age Discrimination in Employment Act

Older workers are protected from discrimination in employment

Age-based harassment and hostile environment

- It is unlawful to harass a person because of his or her age.

- Harassment can include, for example, offensive or derogatory remarks about a person's age. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

- The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Age Discrimination in Employment Act

Older workers are protected from discrimination in employment

Who is protected?

- Those who are over age 40. No federal protection for applicants and workers under age 40

- Protection is also relative – that is someone who is treated worse than a significantly younger person also has an ADEA claim. (For example, refusing to promote a 65-year-old but promoting a 55-year-old can be age discrimination.)

- Even facially neutral decisions can be age discrimination if there's a disparate impact on older workers generally. For example, a layoff in which the workforce that isn't impacted is substantially younger after the layoff than before can be an ADEA violation.

Age Discrimination in Employment Act

Older workers also covered by the OWBPA

The Older Workers Benefits Protection Act requires additional steps before getting the employee to accept a buyout or payment in exchange for a promise not to sue.

In that case:

- Must not use undue pressure to get the worker to sign a waiver
- The waiver must be succinct, accurate, and clear to an ordinary person
- Any release of claims must be in writing
- The waiver must explicitly state that the employee is releasing ADEA claims
- The employer must tell the employee they can consult with an attorney before signing
- The employee has 21 days to consider the offer or 45 days if a layoff plus 7 days to change their mind

Genetic Information Nondiscrimination Act (GINA)

Gina protects employees from discrimination based on genetic information

Employers may not require genetic information be disclosed and if they do acquire such information, may not base any employment decisions on that knowledge.

- Employers may not require employees to provide DNA, for example
- Employers who come across information – for example, in FMLA certifications – must segregate such information.
- Case example: Warehouse mischief where employer required cheek swabs for DNA to see who left human feces. Multimillion dollar jury award for GINA violation.

PART 3

Discipline, Discharge, and RIFs

Discipline, discharge, and RIFs

Disciplinary systems

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 being 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)

Discipline, discharge, and RIFs

Disciplinary systems

Common (legitimate) reasons to fire workers include:

- Worker wrongdoing necessitating discipline – commonly after either egregious misbehavior/error or 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)

Discipline, discharge, and RIFs

Disciplinary systems

Common (legitimate) reasons to fire workers include:

- 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

Discipline, discharge, and RIFs

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
- Supreme Court ruling says USERRA applies to public employers too

Be ready to show you would have fired regardless of service

Discipline, discharge, and RIFs

Probation and termination

Newly hired not a good match after all? 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.

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

Discipline, discharge, and RIFs

Probation and termination

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?
- What are the consequences of not completing probation?

Discipline, discharge, and RIFs

Probation and termination

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

- What are the consequences of completing probation successfully?
- 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.

Discipline, discharge, and RIFs

Probation and termination

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.

Discipline, discharge, and RIFs

Probation and termination

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."

Discipline, discharge, and RIFs

Probation and termination

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."

Discipline, discharge, and RIFs

Discipline

The job description. Every position should have a job description that includes:

- **A list of essential functions.** These are the job duties and expectations that are fundamental to the job. **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.
- **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.

Discipline, discharge, and RIFs

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.
- 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?

Discipline, discharge, and RIFs

Structuring discipline

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

- Progressive discipline versus ad-hoc discipline. Progressive widely 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

Discipline, discharge, and RIFs

Structuring discipline

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

- Always require review before final decision.
- Beware 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 decision too.

Discipline, discharge, and RIFs

Structuring discipline

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

- Conduct frequent self-audit of discipline for hidden bias. Difference discovered during an informal audit? It may be okay if different supervisors – but aim for organization-wide consistency.
- Be ready to admit mistake and fix it fast including rehire offer to cut liability. How? It cuts lost income moving forward if former employee rejects offer.

Discipline, discharge, and RIFs

Structuring discipline

How to discipline to discharge:

- Clear rules with built it exceptions for exceptional circumstances
- Always include an out
- Always document each step of the way with as much objective information as possible
- Always look for ways to distinguish discipline. Why? Because when suing, employee will argue he or she was treated more harshly than other workers who belong to a different protected class.

Discipline, discharge, and RIFs

Structuring discipline

How to discipline to discharge – distinguishing workers from each other:

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

Discipline, discharge, and RIFs

Structuring 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

Discipline, discharge, and RIFs

Structuring 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/behavior.
- May culminate in a last chance agreement/PIP/probation before discharge.

Discipline, discharge, and RIFs

Structuring discipline

Should include discipline policy aimed at co-worker conflict too. Why?

- Personality conflicts can escalate into loud arguments and eventually become physical.
- Particularly important during contentious elections or world events.
- 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.

Discipline, discharge, and RIFs

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.

Discipline, discharge, and RIFs

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:

- **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.

Discipline, discharge, and RIFs

Discharge and workplace violence

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

- 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.
- April 11, 2025 A Walmart employee killed one co-worker and injured another in an after-hours shooting spree that started at the store and ended with the individual killing another co-worker at a nearby home.

Discipline, discharge, and RIFs

Discharge and 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 as does California

Discipline, discharge, and RIFs

Discharge and workplace violence

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
- **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

Discipline, discharge, and RIFs

Practical aspects of termination

Consider these steps:

- 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

Discipline, discharge, and RIFs

Practical aspects of termination

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
- Meeting should be in private setting, away from prying eyes
- Always at least one additional neutral witness
- Include any pay due even if not pay day (required in many states and recommended for all)

Discipline, discharge, and RIFs

Practical aspects of termination

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

- No shouting, no recriminations, no 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

Employment Law Master Class

Break and Questions

Discipline, discharge, and RIFs

Practical aspects of termination

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
- Tell employee you will pack up belongings and deliver and let employee retrieve purse/briefcase 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

Discipline, discharge, and RIFs

Practical aspects of termination

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

Discipline, discharge, and RIFs

Reductions in force and 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.

Discipline, discharge, and RIFs

Lessons from recent 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.

Discipline, discharge, and RIFs

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.
- 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.

Discipline, discharge, and RIFs

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.
- 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.

Discipline, discharge, and RIFs

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?)

Discipline, discharge, and RIFs

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.

Discipline, discharge, and RIFs

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.”

Discipline, discharge, and RIFs

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

Discipline, discharge, and RIFs

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)

Discipline, discharge, and RIFs

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.

Discipline, discharge, and RIFs

Severance?

OWBPA requirements:

- Employees aged 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.

Discipline, discharge, and RIFs

Severance?

OWBPA requirements:

- The waiver must be knowing and voluntary. EEOC regulations specifically state that an OWBPA waiver must expressly spell out the Age Discrimination in Employment Act (ADEA) by name.
- Waiver must advise the employee in writing to consult an attorney before accepting the agreement. Must give an employee seven days to revoke signature. The seven-day revocation period cannot be changed or waived by either party for any reason.

Discipline, discharge, and RIFs

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.

Discipline, discharge, and RIFs

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.

Discipline, discharge, and RIFs

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

Discipline, discharge, and RIFs

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.

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.

Discipline, discharge, and RIFs

WARN triggers

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.

Discipline, discharge, and RIFs

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

PART 4

The FLSA, Exempt Status, and Overtime

The FLSA

The Fair Labor Standards Act

- Passed in 1938 in response to the Great Depression and general labor unrest.
- Provides for overtime for hours in excess of 40 per week in lieu of standard 40-hour workweek.
- Provides for a minimum wage for hourly employees.
- Created a series of exemptions for so-called “white collar employees” perceived as having greater bargaining power than “common laborers.”
- Created “hourly” and “exempt” employees and allowed employers to classify employees accordingly.

The FLSA

The Fair Labor Standards Act

- Congress originally created exempt administrative, executive, professional (learned and creative) and outside sales employee categories.
- Congress authorized the Department of Labor (DOL) to define the terms used in the statute and clarify what tests should be used to determine into which category a white-collar employee might fit.
- Congress added another class of employees in 1996 as exempt – the computer professional.

The FLSA

The Fair Labor Standards Act

The DOL has issued regulations over the years that define how employers must treat employees who are exempt and can be made to work as long and as hard as is required to get their jobs done. There are three considerations:

- The worker's salary level
- Payment on salary basis
- What duties the employee performs

The FLSA

The Fair Labor Standards Act

Salary basis test = The employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed.

Salary level test = The amount of salary paid must meet a specified minimum amount – $684 per week currently after the last completed round of revisions under the first Trump administration. This was after the Biden administration tried to raise it to $844 per week.

The FLSA

The Fair Labor Standards Act

- Pay workers less than the standard salary level, and you will have to pay time-and-a-half in overtime if they work more than 40 hours in a workweek.
- You cannot pay a daily rate for exempt workers even if that daily rate is higher than the weekly rate.

The FLSA

The Fair Labor Standards Act – current rules

The current salary level applies to the following exempt classifications:

- Administrative.
- Executive.
- Professional (Some exceptions like doctors, lawyers, teachers).

The FLSA

The Fair Labor Standards Act – Myths

- Job Title “Magic” – NOT TRUE
- Salary equals exempt – NOT TRUE
- Highly paid equals exempt – NOT TRUE

The FLSA

The Fair Labor Standards Act – Salary Basis

- Regularly receives a predetermined amount of compensation each pay period (on a weekly or less frequent basis).
- The compensation cannot be reduced because of variations in the quality or quantity of the work performed.
- Must be paid the full salary for any week in which the employee performs *any* work.
- Need not be paid for any workweek when no work is performed.
- Cannot be paid a daily rate!

The FLSA

The Fair Labor Standards Act – Duties tests

The principal, main, major or most important duty that the employee performs.

Factors to consider include, but are not limited to:

- Relative importance of the exempt duties
- Amount of time spent performing exempt work
- Relative freedom from direct supervision
- Relationship between the employee's salary and the wages paid to other employees for the same kind of non-exempt work

The FLSA

The Fair Labor Standards Act – Executive Duties

- Management of enterprise/department
- Directs work of two or more employees
- Authority to hire or fire other employees, or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status are given “particular weight.”

The FLSA

The Fair Labor Standards Act – Administrative Duties

- Office non-manual work directly related to management policies or general business operations
- Exercises independent discretion and judgment
- Production vs. administration

The FLSA

The Fair Labor Standards Act – Learned Professional Duties

- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment.

- The advanced knowledge must be in a field of science or learning.

- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

The FLSA

The Fair Labor Standards Act – Creative Professional Duties

The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

The FLSA

The Fair Labor Standards Act – Hourly (Blue Collar) Workers

- Minimum wage ($7.25)

- Overtime at a rate of not less than 1½ times their “regular rate” for all “hours worked” over 40 hours in any “workweek.”

The FLSA

The Fair Labor Standards Act – Hourly (Blue Collar) Workers

Hourly workers must be paid for all time worked including:

- All time not fully relieved from duty.
- Time required to set up in the morning and shut down at night.
- Time spend working before or after clocking out whether required or volunteered and whether the employer knows its happening or not.
- Time spent in compulsory meetings, award ceremonies, training sessions.

The FLSA

The Fair Labor Standards Act – Hourly (Blue Collar) Workers

Hourly workers must be paid for all time worked including:

- Time spend checking messages, responding to texts, reviewing work, composing and sending emails, answering after hour phone calls.
- All non-commute time spend traveling between sites.
- Attendance at lectures, meetings, training programs and similar activities need not be counted as working time **only if** it is outside normal hours, voluntary, not job related, and no other work is concurrently performed.

The FLSA

Recent Supreme Court decision

Highly Compensated Employees (HCE):

HCE status allows employers to classify some highly paid workers whose duties don't fit neatly into standard exemptions into the HCE classification.

It requires:

- Salary in excess of $107,432

The FLSA

Recent Supreme Court decision

- Case involved exempt employees under the Fair Labor Standards Act (FLSA). Exempt employees aren't entitled to overtime for hours worked in excess of 40 per week.

- But employers that designate some workers as exempt from overtime must follow strict rules or may lose the exemption and have to pay overtime for past work – going back up to three years.

- In addition, misclassification means the employer owes back pay – *doubled as a penalty.*

The FLSA

Recent Supreme Court decision

Under FLSA DOL regulations, the executive exemption is divided into two separate sections.

The second – and the one at issue in the case – is the Highly Compensated employee:

- Compensation must be at least $132,964 (was $100K at time of case).
- Employee need only perform one of the duties listed for the executive exemption – relaxed duties test. That is, they need only perform one of the listed duties on the last slide.

The FLSA

Recent Supreme Court decision

Facts of the Helix Energy case:

- Hewitt was an oil rig supervisor.
- Hewitt was paid a daily rate that totaled nearly $250K some years.
- He sued, alleging he was entitled to overtime for most of the weeks during which he worked a few days because the shifts were long, and he worked more than 40 hours during those weeks.

The FLSA

Recent Supreme Court decision

Facts of the Helix Energy case:

- The employer argued that Hewitt was an executive exempt worker, and his daily rate far exceeded the minimum weekly salary level set by regulation ($455 per week at the time and $684 currently).

- The employer also argued Hewitt fit the highly compensated category – which was $100K per year at the time.

The FLSA

Recent Supreme Court decision

Facts of the Helix Energy case:

- The trial court tossed the case out, reasoning that Hewitt was paid far over the minimum for the classification even if it was a day rate.
- The 5th Circuit Court of Appeals reversed, concluding that because Hewitt wasn't paid on a salary basis, he wasn't exempt and was due overtime.

Issue for the Supreme Court:
Whether the highly compensated employee exemption under the FLSA applies to supervisors who perform executive duties and satisfy the annual earnings threshold but are paid on a daily rate basis.

The FLSA

Recent Supreme Court decision

Answer:
No. Employees paid a daily rate don't qualify as being paid on a salary basis under these circumstances.

Trap avoidance:
Don't deviate from a strict interpretation of the various FLSA classification rules – like paying on a salary basis rather than on a daily basis even if a day rate may make more sense.

PART 5

Unions, The NLRA, and Workplace Rules

The National Labor Relations Act

NLRA and Unions

NLRA governs how unions are organized and run but also much more. It applies to most private sector employers. Basic concept is that workers are permitted to engage in concerted activity to better working conditions.

Examples include:

- Criticizing supervisors and managers or the employer
- Discussing pay and other working conditions freely with others
- Documenting working conditions
- Supporting other employees
- Organizing into a union
- Striking or walkouts

The National Labor Relations Act

NLRA and Unions

"Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

The National Labor Relations Act

NLRA and Unions

The NLRA is administered by the National Labor Relations Board (NLRB), which investigates unfair labor practices, holds and manages union elections and provides guidance on the NLRA.

It has actively:

- Reviewed common employer rules (often in handbooks) to determine whether they interfere with the right to concerted activity.
- Ruled that numerous employers have violated the NLRA by quashing dissent, enforcing handbook rules restricting employee rights and punished workers engaged in various forms of protected concerted activity.

The National Labor Relations Act

NLRA and Unions

Some basics:

- Get expert labor relations counsel if workers say they are organizing, or union reps show up in the workplace. Do not wait. Do not punish workers. Let counsel guide you.

- Review handbooks and company policies for rules that might violate the NLRA.

- You can get more information from these sources: https://www.nlrb.gov/guidance/memos-research/advice-memos/advice-memoranda-dealing-handbook-rules-post-boeing

Union Activity on the Rise

2025 – Labor strife continues

Summer 2023 is now known as the Summer of Strikes. And employees across industries are no doubt paid attention the eye-popping wage increases. 2024 that continued with dockworker and Boeing strikes – all with hefty increases.

"Hundreds of thousands of New Jersey commuters may be caught up in the state's first transit strike in more than 40 years as soon as Friday morning.
The engineers who drive New Jersey Transit's commuter trains have threatened to walk out after midnight Thursday if the union that represents them cannot reach an agreement with the agency on a contract that has been under negotiation for many months" NYT, May 13, 2025

How Easy is it to Create a Union

Easier and Easier

The NLRA only requires that an employer have more than one worker. If a majority of workers wants to form a union, they can select a union in one of two ways:

- If at least 30 percent of non-management workers sign cards or a petition saying they want a union, the NLRB will conduct an election. If a majority of those who vote choose the union, the NLRB will certify the union as the workers' representative for collective bargaining.
- An election is not the only way a union can form. An employer may voluntarily recognize a union based on evidence - typically signed union-authorization cards - that a majority of employees want it to represent them.
- Once a union has been certified or recognized, the employer is required to bargain over your terms and conditions of employment with the newly formed union.

NLRA and Unfair Labor Practices

NLRA isn't just for unions

The NLRA applies to employers, whether they have a union or not. And the NLRA has the power to process unfair labor practice (ULP) charges with or without a union.

- ULPs are essentially anything an employer does that would dissuade a worker from exercising rights under the NLRA – like engaging in concerted activities to improve working conditions.
- NLRB has charged numerous small employers with ULPs in recent years and months.

NLRA and Unfair Labor Practices

Sample unfair labor practice charges

- Shutting down a location in order to prevent workers from organizing into a union is an ULP *if* the employer can't show a good un-related business reason for doing so. That's a lesson Starbucks learned when it shut down several upstate New York shops. The NLRB ordered the chain to reopen the stores.

- On the other hand, employers that elect to shut down *all* operations entirely and leave them closed did not commit an unfair labor practice. That's what happened when workers at two related Harrisburg PA pizza shops tried to unionize. As long as the business dissolved and did not reopen in another iteration, that does not violate the NLRA.

NLRA and Unfair Labor Practices

Sample unfair labor practice charges

- Firing or demoting workers for supporting an organizing drive
- Telling workers that if they organize, they will be fired
- Threatening to fire workers who strike or walk out
- Refusing to hire someone because they support the concept of unionizing
- Refusing to allow workers to wear pro-union buttons
- Changing the terms and conditions of employment during a union election

NLRA and Unfair Labor Practices

Trump Administration Changes

- Fired/replaces several board members and currently has no quorum to actually overturn big decisions
- Rescinded several memos including one that expanded greatly awards for workers whose employers violate the NLRA
- Rescinded memo on handbook rules that may chill employee rights.

Employment Law Master Class

Questions?

More Questions?

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