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Human Resources and The Law CO111 V

Spring 2021

ILR Scheinman Institute
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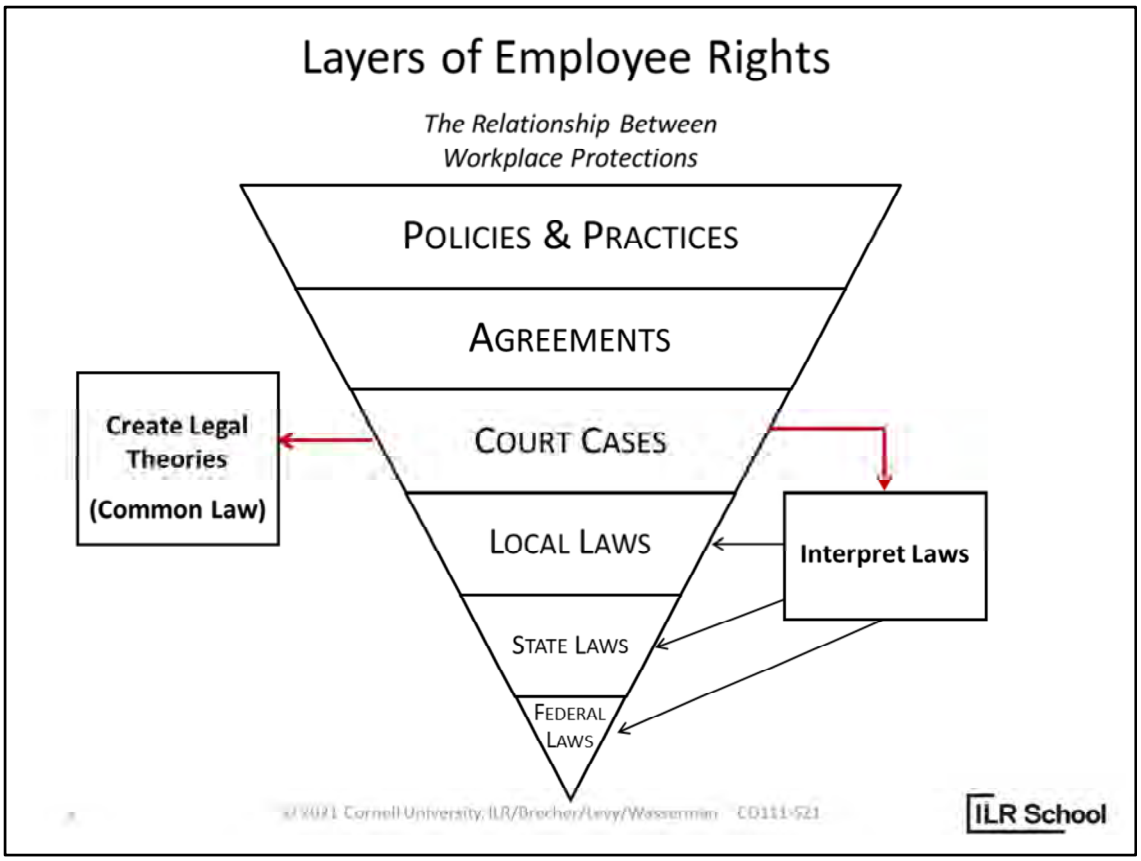
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EEO/FML
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Questions to Consider

- What are the potential legal and HR issues?

(Circle the key words that identify potential issues)

- What additional information would you like to know?

- What policies might apply?

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Title VII of the Civil Rights Act of 1964

- Prohibited Discrimination
  - Race
  - Color
  - National Origin
  - Religion
  - Sex
- Association
- No Retaliation
- Covered Employer: 15 or more employees
- Agency: EEOC

Age Discrimination in Employment Act (ADEA) of 1967

- Prohibited Discrimination
  - Age discrimination against persons who are at least age 40. Referred to as persons within the protected age group
- No Retaliation
- Covered Employer: 20 or more employees
- Agency: EEOC

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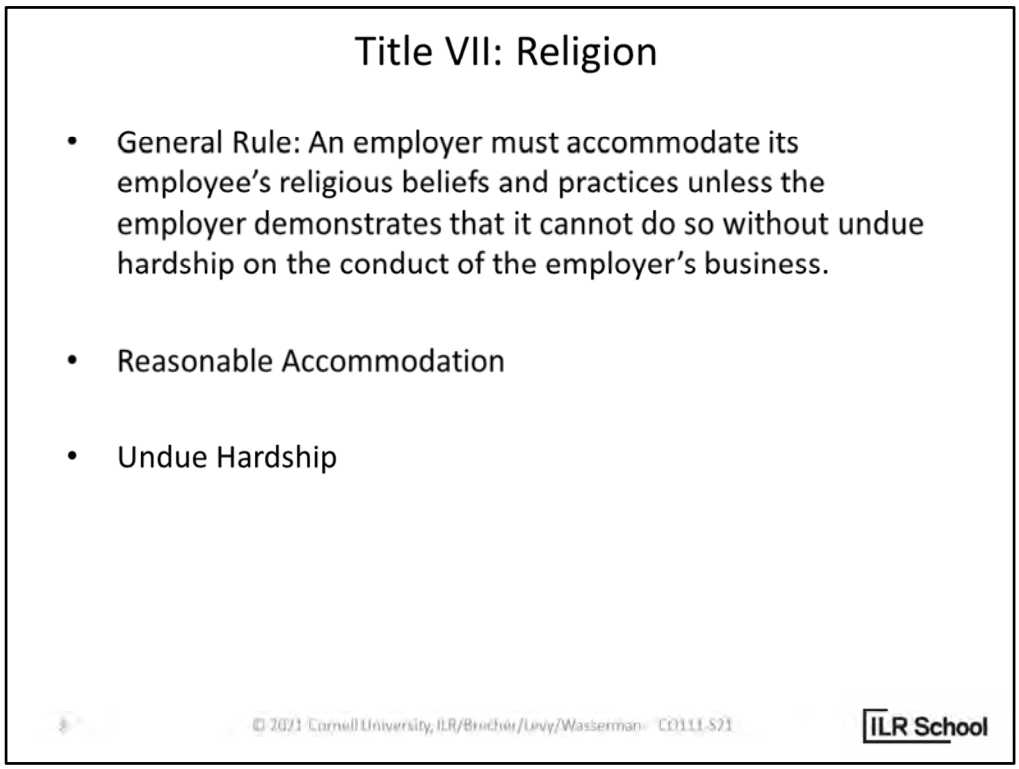
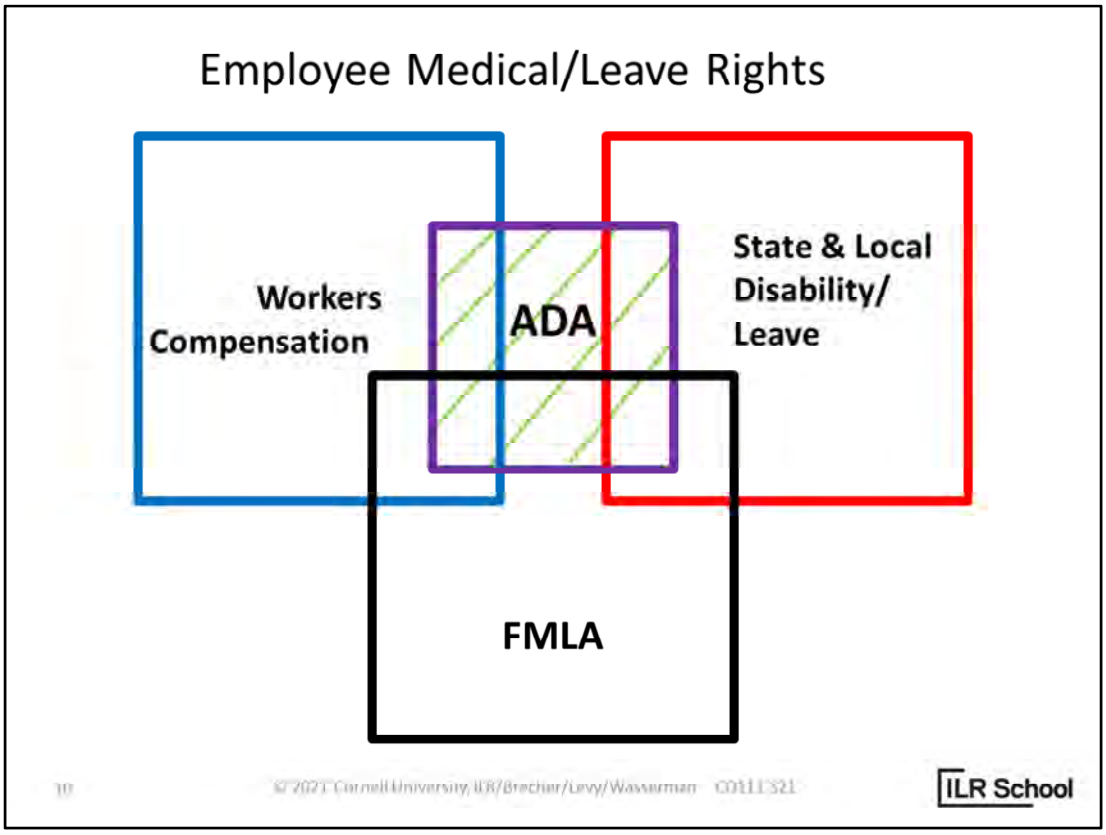


- Religion:
  - EEOC Guidelines: The definition of religion includes: religious beliefs that are, "new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unrecognizable to others."

EEO: State & Local Protected Classes Examples

- Sexual of Affectional Orientation
- Gender Identity/Expression
- Citizenship Status
- Age 18+
- Marital/Partnership/Family Responsibilities/Parenthood Status
- Personal Appearance
- Victims of Domestic Violence
- Victims of Stalking and Sex Offenses
- Reproductive Choices
- Arrest/Conviction Record
- Unemployment
- Political Affiliation


Employee Medical/Leave Rights
Workers Compensation
ADA
State & Local Disability/ Leave
FMLA
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Americans with Disabilities Act (ADA)

- Unlawful discrimination in any terms or conditions of employment against qualified individuals
  - With a disability
  - Record of a disability
  - Regarded as having a disability
  - With a relationship or association with someone with a disability
- No Retaliation
- Covered Employer: 20 or more employees
- Agency: EEOC

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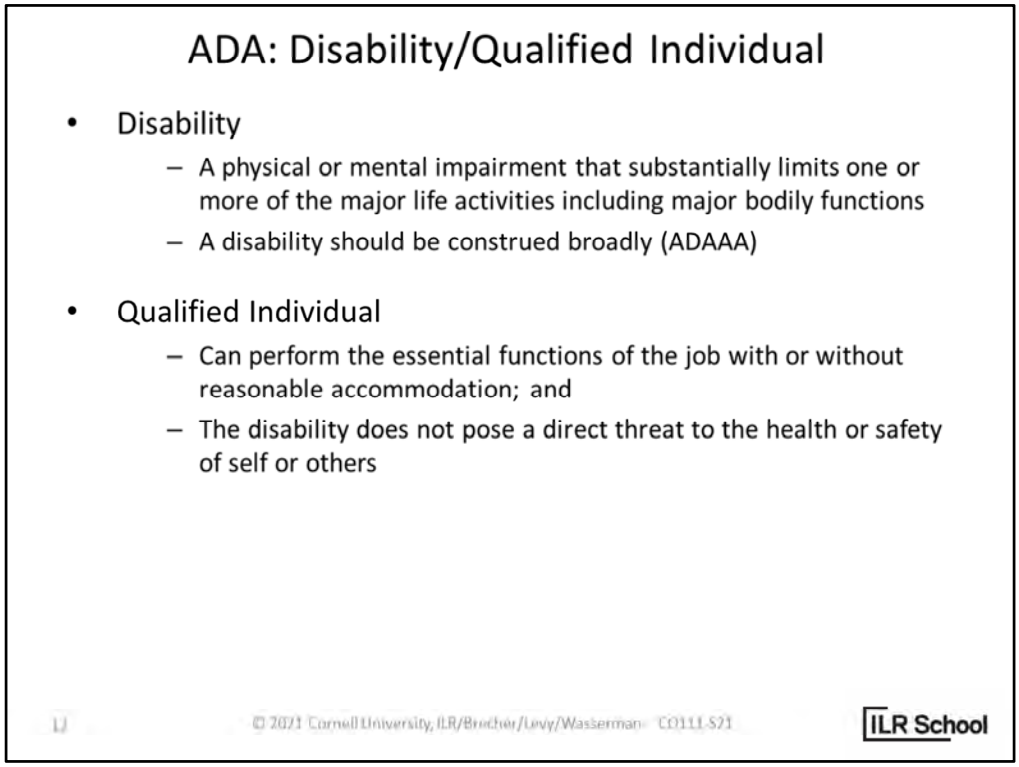


Examples of Major Life Activities

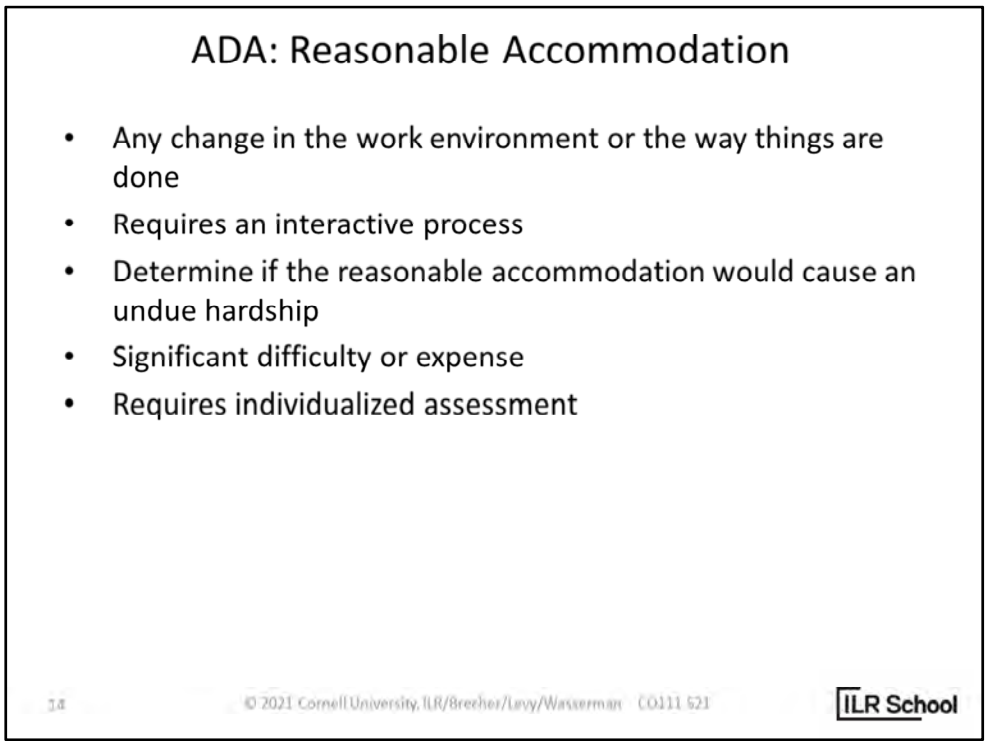
The ADA regulations

— Provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

— Also state that major life activities include the operation of *major bodily functions*, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

ADA: Considerations for Essential Functions

- What is in the job description? (Essential vs. Marginal)
  - How much time is spent on the task?
  - Can it be eliminated or altered?
  - What will be required of others?
- Would removing the function fundamentally change the job?



EEOC Information On Reasonable Accommodations

- 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. For example, reasonable accommodation may include:
  - acquiring or modifying equipment or devices,
  - job restructuring,
  - part-time or modified work schedules,
  - reassignment to a vacant position,
  - adjusting or modifying examinations, training materials or policies,
  - providing readers and interpreters, and
  - making the workplace readily accessible to and usable by people with disabilities.
- Reasonable accommodation also must be made to enable an individual with a disability to participate in the application process, and to enjoy benefits and privileges of employment equal to those available to other employees.

Family and Medical Leave Act (FMLA)

- FMLA
  - Entitles eligible employees with up to 12 weeks of unpaid, job protected leave per year
- Eligible Employee
  - 12 months
  - 1250 hours
  - 50 or more employees employed at the employee's worksite or within 75 mile radius of the employee's worksite
- Covered Employer:
  - 50 or more employees
  - All public agencies, all public and private elementary and secondary schools
- Agency: DOL Wage and Hour Division (WHD)

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Note: FMLA Military Family Leave Entitlement is discussed later in the presentation

FMLA: Entitlement

- Employee Entitlement
  - Must be eligible
  - Leave for a qualifying purpose
    - Unpaid up to 12 work-weeks within 12 months
    - Includes intermittent leave, if needed
  - Health insurance coverage "as if" actively working
  - Restores employee to same or equivalent job
- Paid FMLA
  - Employer may require employee to use accrued paid leave for some or all of the leave

FMLA: Qualifying Purpose

- Birth of a child and care of a child
- Placement of a child through adoption or foster care
- Serious health condition of
  - Covered family member (spouse, son, daughter or parent)
  - Employee, with the employee unable to perform the job

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FMLA: Serious Health Condition

- Illness, injury, impairment or physical or mental condition
  - Inpatient care
  - Continuing treatment by a healthcare provider relating to the same condition
  - Pregnancy or prenatal care
  - Treatment for chronic health condition
  - Multiple treatments to facilitate recovery from serious medical condition or surgery

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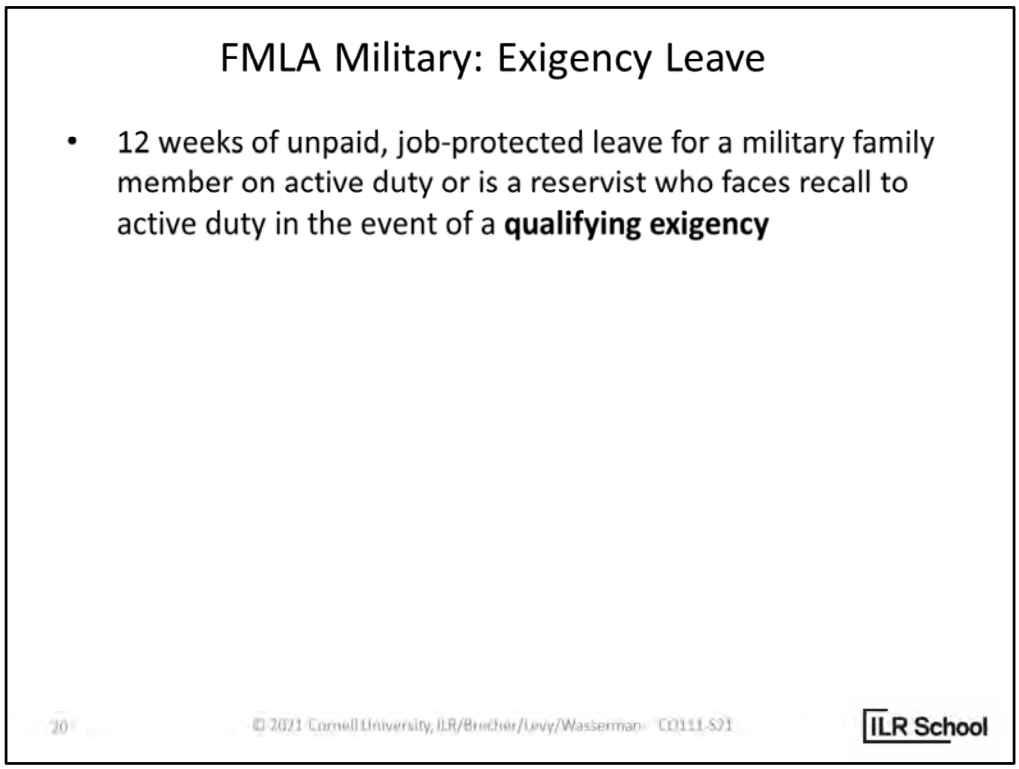
- Family member includes spouse, parent, "next of kin" and child
- Service member of the Armed Forces, including a member of the National Guard, Reserves or covered veterans



Qualifying Exigency

- Short notice deployment
- Military events/related activities
- Child care/school activities
- Financial/legal arrangements
- Counseling
- Rest/recuperation (15 calendar days)
- Post-deployment activities
- Activities agreed to by the employer and the employee

FMLA and FMLA Military

- Combined FMLA and Military Family leave is capped at a total of 26 weeks
- Prohibited from
  - Discrimination
  - Interfering with, restraining or denying FMLA rights
  - Retaliation

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Harassment: Types

- Sexual Harassment
  - Sexual advances
  - Request for sexual favors
  - Verbal or physical conduct of sexual nature
- Other Types of Harassment (Protected Characteristics)
  - Verbal or physical conduct

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Harassment: Defined

- Quid pro quo
  - Submission to unwelcome conduct is explicitly or implicitly a term or condition of employment
  - Submission to or rejection of unwelcome conduct is used as basis for employment decisions
- Hostile work environment
  - The conduct unreasonably interferes with job performance
  - The conduct creates a working environment
    - Intimidating
    - Hostile
    - Offensive

Harassment: HWE Perspective

- Subjective Standard
  - Conduct intimidating, hostile or offensive to the person affected

And

- Objective Standard
  - Creates a work environment that a reasonable person would find intimidating, hostile or offensive

Harassment: Work Environment

- Enduring the intimidating, hostile or offensive conduct becomes a condition of continued employment or
- Conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or offensive
- Constructive Discharge
  - Working conditions are so intolerable a reasonable person would feel compelled to resign

Harassment: Severe or Pervasive

- Frequency of the unwelcome conduct
- Severity of the conduct
- Was conduct physical threatening or humiliating or a mere offensive utterance
- Did conduct interfere with work performance
- Effect on the employee's psychological well-being
- Was supervisor involved

Retaliation: Legal Standards

- Definition
  - Unlawful to take adverse action against any employee, applicant, or member who has opposed or participated in protected activity
- The complained of discriminatory practice need not be illegal
  - Good faith belief by the employee
  - Employee may succeed on retaliation claim and lose on underlying discrimination claim

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Harassment/Retaliation: Best Practices

- Identify all related policies
- Recognize difference between policy/legal boundaries
- Identify responsibilities: HR, managers, employees
- Express commitment to protect employees against
  - Discrimination
  - Harassment
  - Retaliation
- Extend policies training to include protected classes
- The focus is on the impact/perception of conduct – even if no intent

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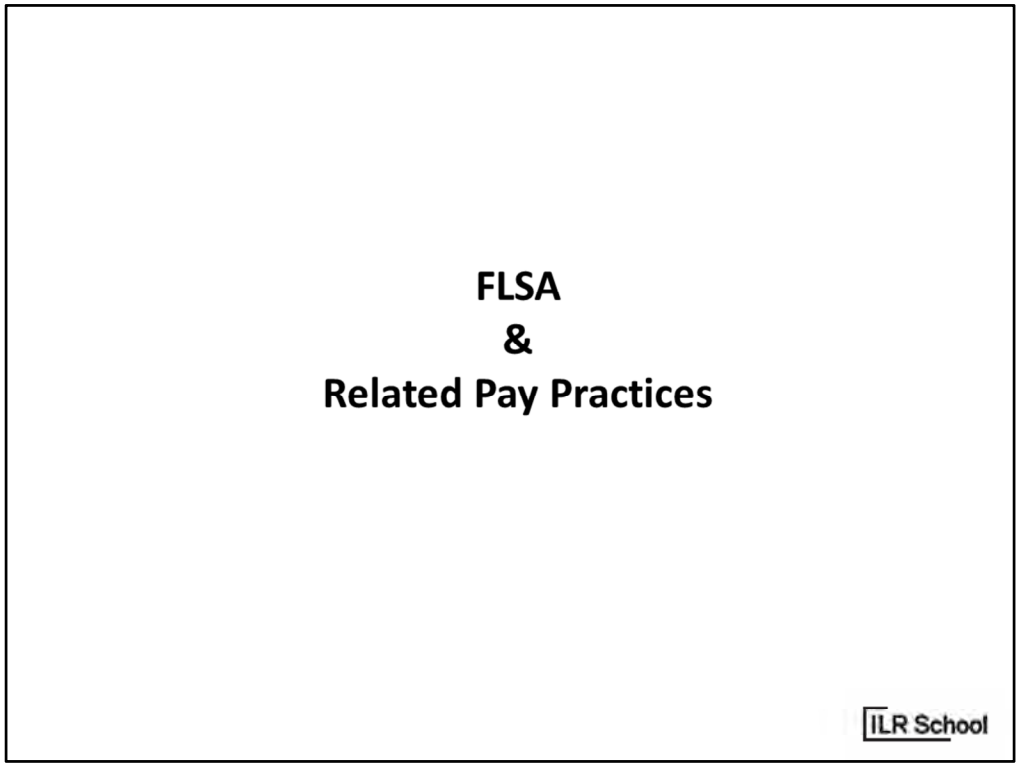

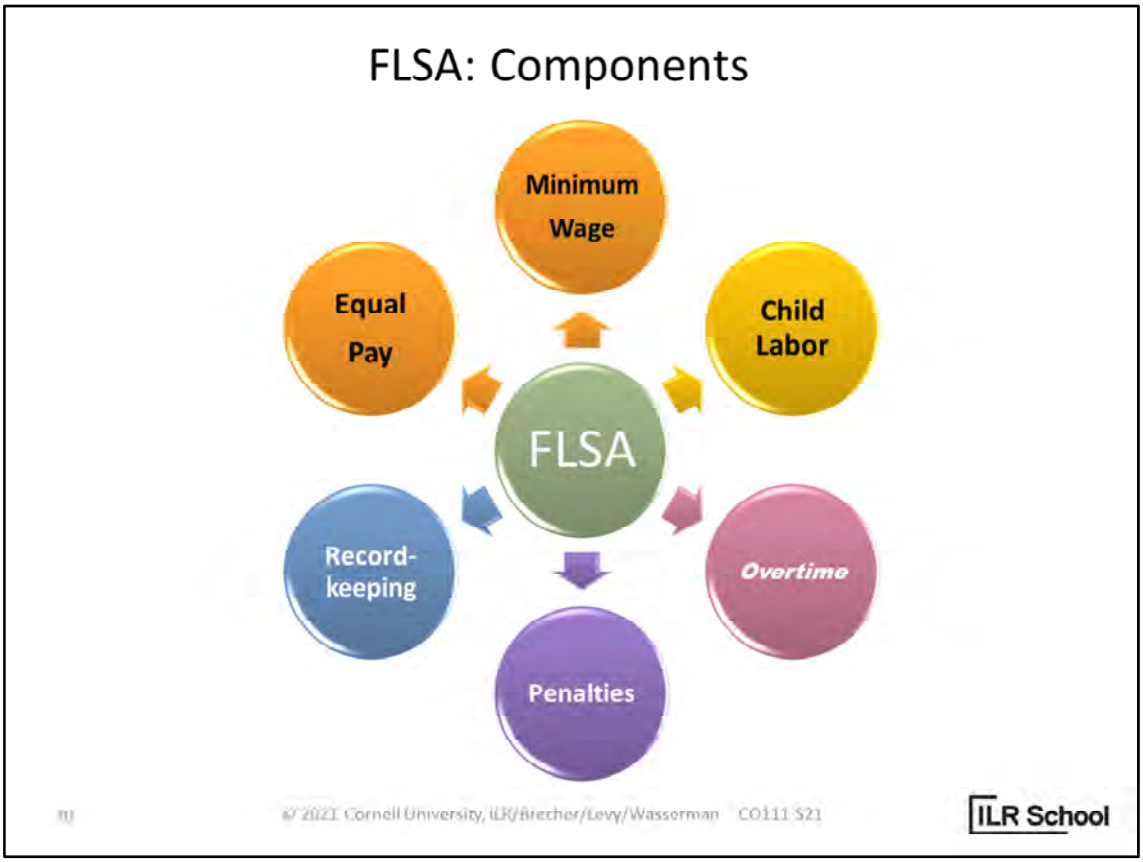
FLSA: Components
Minimum Wage
Equal Pay
Child Labor
FLSA
Record-keeping
Overtime
Penalties
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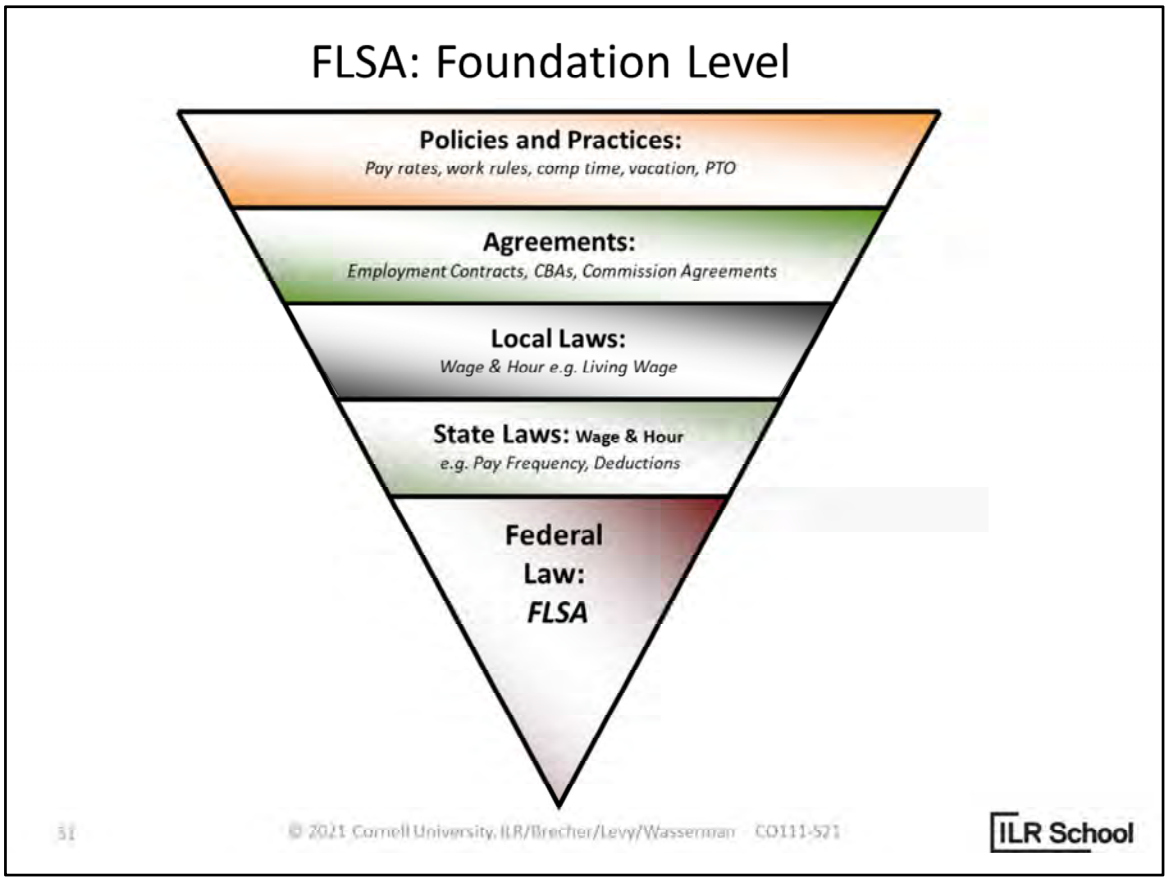
FLSA: Foundation Level
Policies and Practices:
Pay rates, work rules, comp time, vacation, PTO
Agreements:
Employment Contracts, CBAs, Commission Agreements
Local Laws:
Wage & Hour e.g. Living Wage
State Laws: Wage & Hour
e.g. Pay Frequency, Deductions
Federal Law:
FLSA
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FLSA: Classification: Non-Exempt/Exempt

- All employees are non-exempt unless the employer can establish an exemption
- "Exempt" is defined by law:
  - Executive
  - Professional
  - Administrative
  - Outside sales
  - Computer-related professional
  - Highly compensated worker short test ($107, 432)

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FLSA: Exempt vs. Non-Exempt - Key Questions

- How is the employee paid?
  - Salary vs. hourly
  - Partial day deductions
- How much is the employee paid?
  - Minimum base salary threshold - $684 per week
- What **duties** does the employee perform?

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FLSA: Exempt - Important Considerations I

- Focus on individual positions not job groups or titles
- Industry practice is not a defense
- Employee preference or agreement is not a defense
- Duties and classifications change
- **PRACTICAL TIPS:**
  - Update job descriptions/offer letters
  - Consider DOL guidance

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FLSA: Exempt - Important Considerations II

- Employees are not automatically exempt:
  - Salaried employees
  - Employees with a "manager" title
  - All sales employees
  - Employees with college or advanced degrees
  - Employees earning more than $100,000/year
- Resources: US DOL "Fact Sheets" #17A - 17H

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FLSA: Non-Exempt - Overtime

- "FLSA Overtime premium" is 1 ½ times the:
  - regular rate of pay for
  - all hours worked in excess of 40
  - in a work week
- State & Local laws and Collective Bargaining Agreements may be broader.

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FLSA: Communication/Training

- Communicate policy to comply with wage/hour laws
  - Creates a "safe harbor"
  - Defines complaint procedure
- Train front-line managers
- Post FLSA and State/Local notices
- **PRACTICAL TIP:** Conduct Periodic Audits
- **PRACTICAL TIP:** Review company incentive policies – do they inadvertently incentivize frontline managers to violate wage and hour laws?

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FLSA: Compliance Requires Collaboration

- Human Resources to collaborate with business units
- Laws, regulations, and policies change; new cases are decided
- Base decisions on current, actual job duties
- "Exempt" classification can change; document supporting information
- Regularly review, audit and update pay policies & practices
- Pay non-exempt employees for all time worked; discipline if needed

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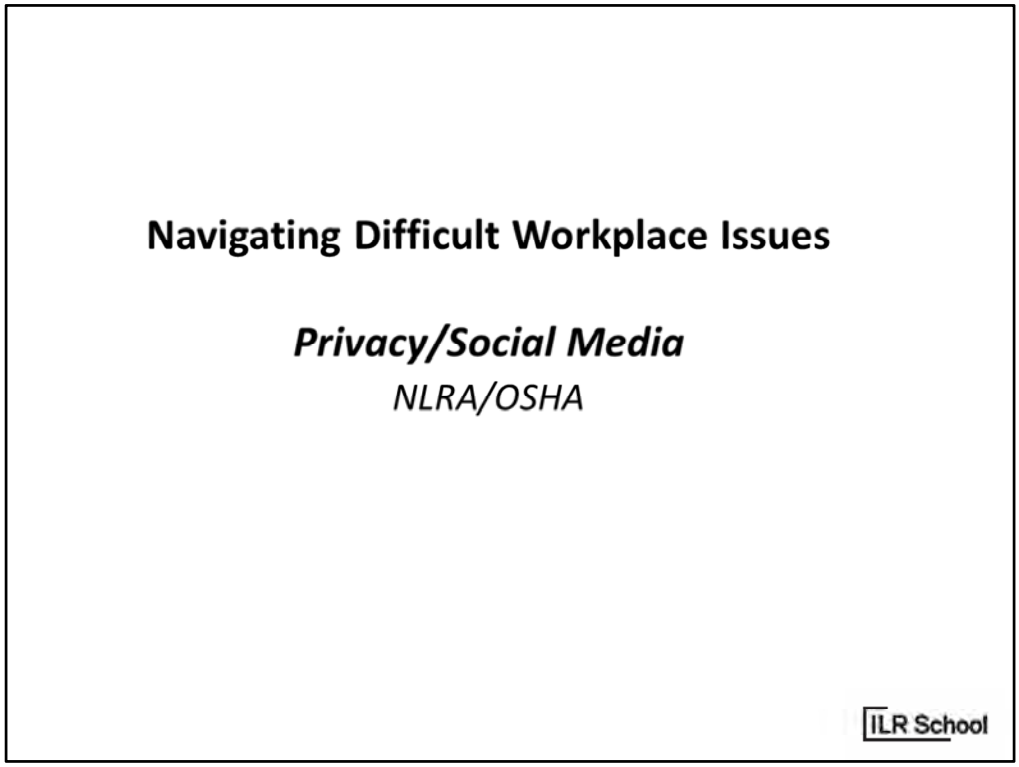

Navigating Difficult Workplace Issues

- Balancing of Interests
- Privacy
- Electronic Communications and Social Media
- NLRA and Unions
- OSHA and Safety

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Balancing of Interests

- An employer's legal obligations, right to operate its business and protect its assets/employees
- Safeguarding employee rights and interests from unreasonable intrusion

Employer Concerns

- Disclosure of confidential information
- Disloyalty, public criticism of business/organization and product/service, disparagement
- Branding, marketing and recruiting
- Legal violations
- Lost employee productivity – working time

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Employee Concerns

- Reasonable expectation of privacy
- Legal protections (e.g. discrimination, harassment, protected activities)
- Discipline for violation of employer policies (e.g. confidential information, communications, social media, safety)

Questions

- **WHY** is this a concern?
- **WHO** should handle it?
- **WHAT** information is needed?
  - Needs to be done?
- **WHEN** should it be done?
- **HOW** should it be done?

Legal Considerations

- Constitutional
  - Federal and State
- Statutory
  - Federal, State and Local
  - Administrative
- Court Case Theories (Common Law)
- Public vs. Private Sectors

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Invasion of Privacy Theories

- Interference with the right to be "let alone"
  - Reasonable person standard
- Unreasonable intrusion on seclusion
  - Highly offensive to the reasonable person
- Appropriation of a person's likeness
- Unreasonable publicity relating to a person's private life
  - Matters not a legitimate public concern
- Publicity placing a person in false light

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Arrest Records/Convictions/Background Checks

- Statutory prohibitions
- Unlawful discriminatory
- Pending arrests
- Failure to disclose

Fair Credit Reporting Act

- Consumer report
- Investigative consumer report

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Medical Inquiries

- Testing
- Medical Records

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Internal Search and Surveillance

- Physical Searches
- Video Surveillance

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Federal and State Prohibitions

- Wiretapping prohibitions
  - Telephone calls, voice mail & e-mail
- Stored communications
  - Interception vs. Access
- Biometrics
- Possible Exceptions
  - Business reason
  - Consent

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Electronic Communications/Social Media Information

- Computer information
- Internet research
- Social media access and use
  - Password protection laws
- Email/Phone/GPS
- Employer content used to generate business

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Information About General Reputation/Characteristics

- Personal Characteristics
- Inappropriate Conduct
- Associates
- Alcohol/Drug Use
- Spending/Credit History
- Health

NY Lawful Activities Law

- NYS Labor Law 201-d
- Discrimination based on protected off-duty conduct is prohibited
  - Political activities
  - Recreational activities
  - Legal use of consumable products
  - Union activities

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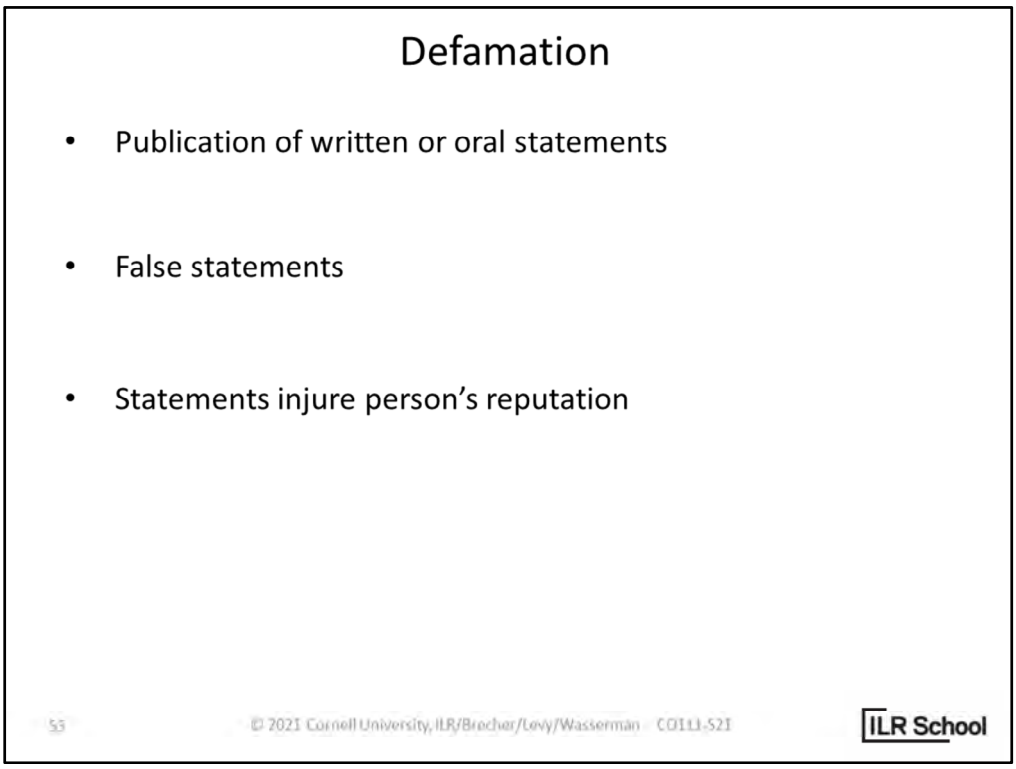
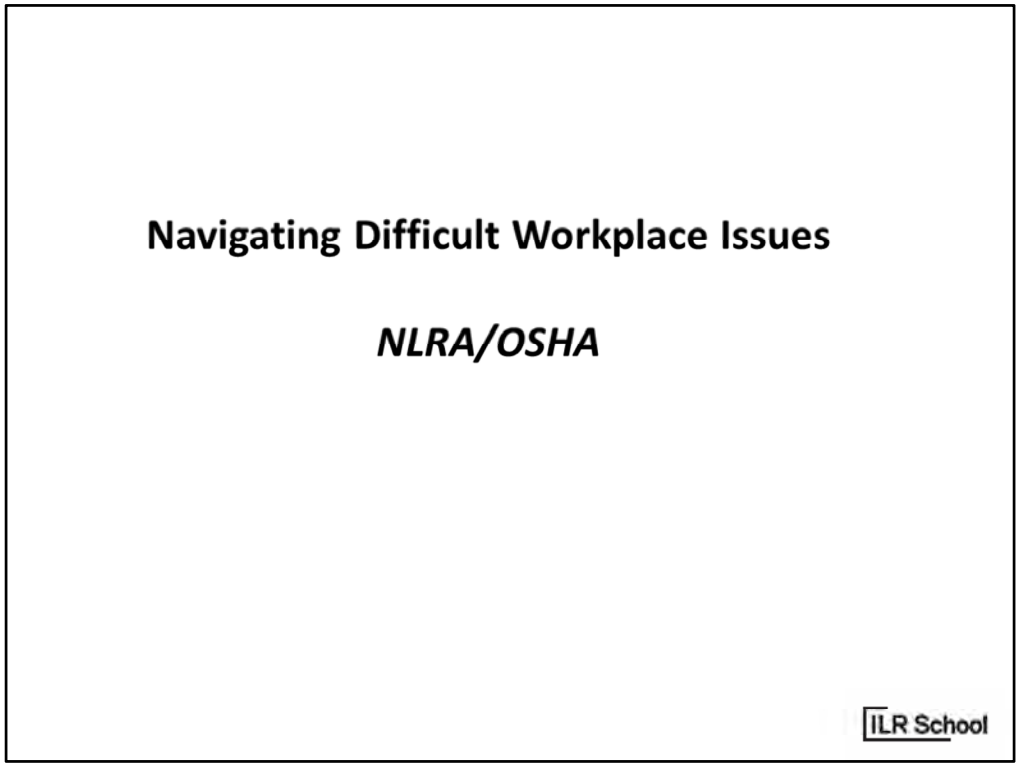
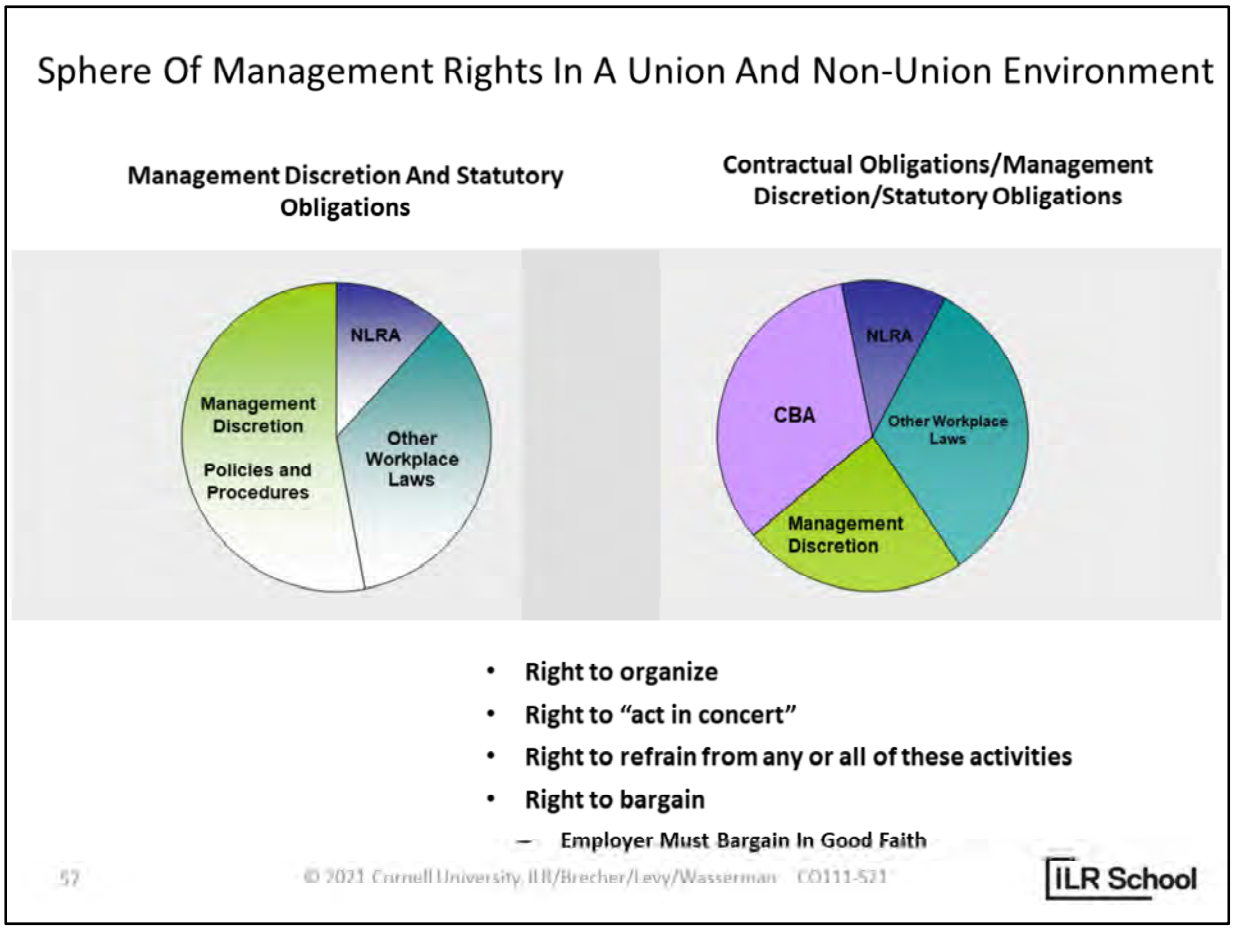


Defamation Concerns

- When are your statements "privileged?"
- Do you have an obligation to correct misinformation?
- Do you have an obligation to disclose?





NLRA: Concerted Activities

- Right to engage in activities for the purpose of collective bargaining or other mutual aid and protection.
  - Furthering the interests of other employees
  - Acting with or in the authority of fellow workers
  - Attempts to enforce the terms of the collective bargaining unity

The Relationship Between the NLRA and Collective Bargaining Agreements

NLRA

- Law
  - Concerted Activities
  - Duty to Bargain
- Violations of Unfair Labor Practices determined by National Labor Relations Board

COLLECTIVE BARGAINING AGREEMENTS

- Terms and Conditions of employment
- Grievances
  - Resolved
  - Determined by Arbitrator

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NLRA Current Issues: Exercising Section 7 Rights

- Employer Policies
- Conducting Investigations

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NLRA: Employee's Right to Representation

- Weingarten "Rights" – Union Employees
  - Investigatory interview that is believed may result in discipline
  - Employee must request
  - Must inform employee and representative of general subject matter being investigated
    - Representative may not answer questions for the employee
    - May ask for clarification and object to harassment question
  - The collective bargaining agreement can grant the employees greater rights
- Currently Non-Union Employees
  - Depends upon the organization's policy and/practices

Occupational Safety and Health Act: OSHA

- "General Duty" clause
- Specific occupational safety and health standards
- Report and record keeping
- No retaliation
- Inspections
- Penalties

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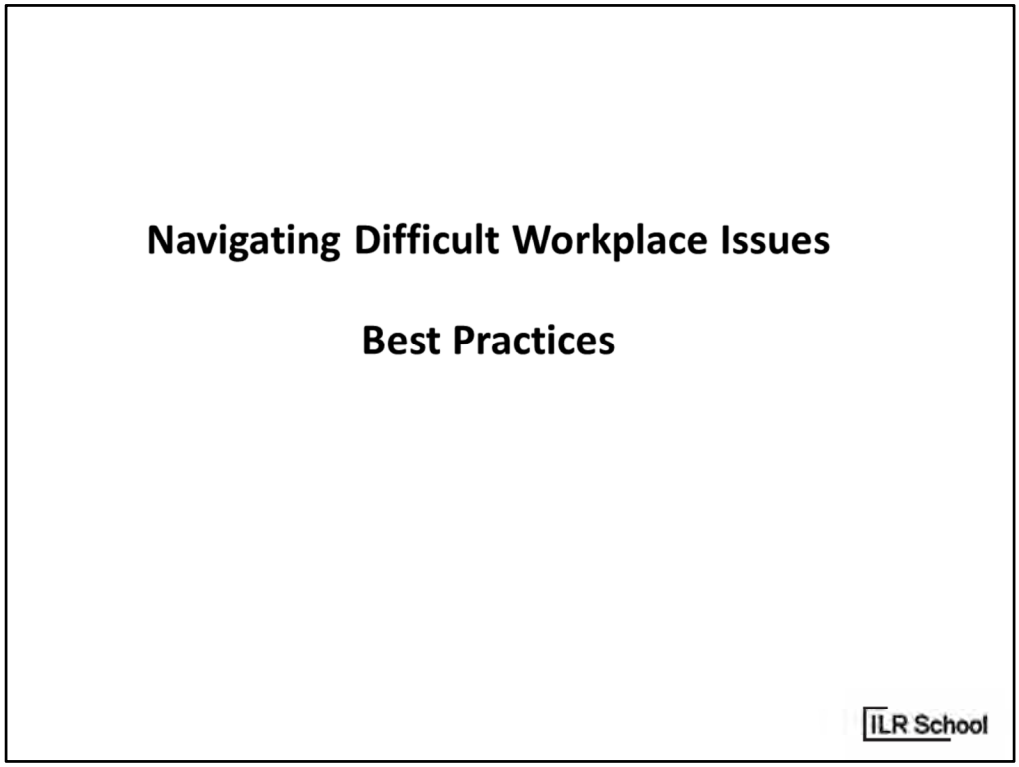
OSHA: Employer Obligations

- "General Duty" Clause: Employment and a place of employment which are free from recognized hazards which are causing or likely to cause death or serious physical harm to employees.
- Specific OSHA Standards: *e.g.,* air contaminants, fire protection

OSHA: Employer Obligations - No Retaliation

- No discrimination because of filing or assisting in complaints or proceedings against an employer
- No punishment for refusal to work in dangerous situations (risk of death or serious physical injury)


Navigating Difficult Workplace Issues
Best Practices
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Navigating Difficult Issues: Preventive Actions I

Privacy and Electronic Communications/Social Media Policies and Practices

- Are employees educated about the policies, including:
  - Expectations for professional communications
  - The scope of privacy protections
  - Limitations on:
    - Use of the internet e.g. social media, personal email
    - Identifying when speaking about self and not organization
    - Searching for information about employees
    - Disparaging products or services
    - Disclosing proprietary and confidential information

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Navigating Difficult Issues: Preventive Actions II

Privacy and Electronic Communications/Social Media Policies and Practices

- Are managers educated about:
  - Scope of NLRA protected activity (applies to union and non-union)
  - Responsibilities for reporting violations of policies
  - Seeking advice from HR
- Regularly review and integrate policies

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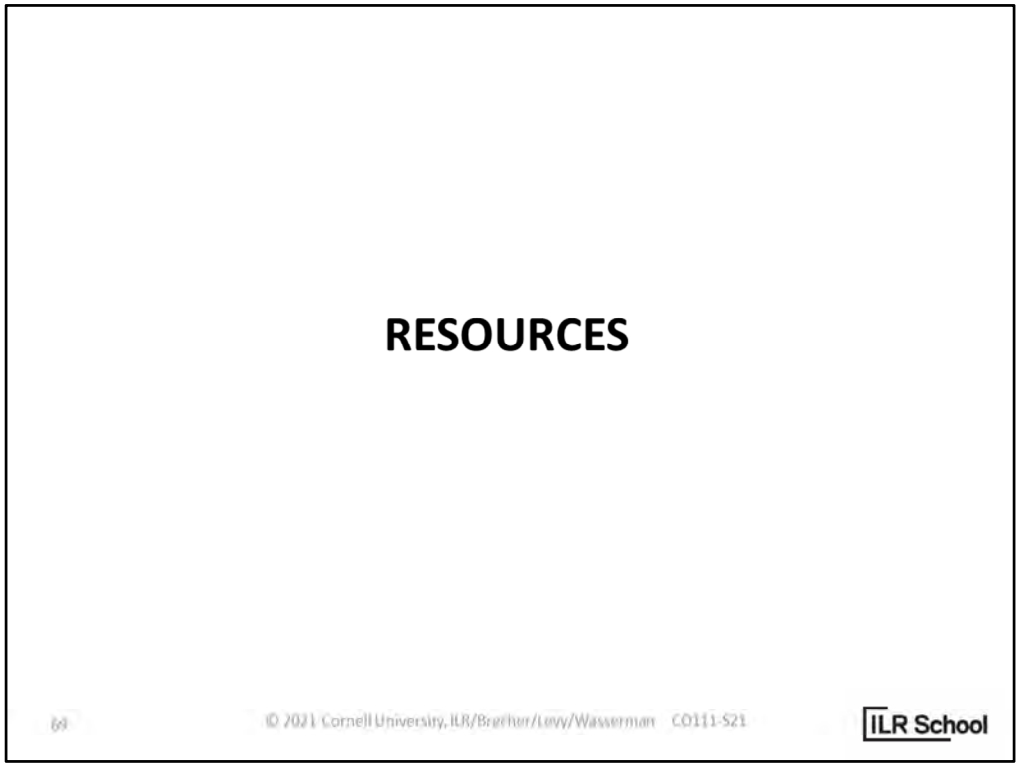
Policies: Review and Integrate

- EEO/Unlawful Harassment
- Code of Conduct
- Social Media
- Privacy
- Medical Information
- Communication
- Information Technology (including all equipment use)
- Workplace Violence
- Handbooks/Collective Bargaining Agreements

Policies: Considerations

- Not too broad
- Define terms
- Provide concrete examples
- No retaliation clauses where required by law
- Include disclaimers
- Manage employee expectations
- Consider supplementing policies with questions and answers format


RESOURCES
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EEO Protected Classes and Affirmative Action

EEO Protected Classes

- **Federal Protected EEO Classes (Non Discrimination)**
  - Equal Employment Opportunity Commission (EEOC) Agency
    - Sex (Title VII of the Civil Rights Act)
    - Race (Title VII)
    - Religion (Title VII)
    - National Origin (Title VII)
    - Color (Title VII)
    - Persons age 40 or older (Age Discrimination in Employment Act- ADEA)
    - Disabled Persons (Americans with Disabilities Act- ADA)
    - Sex-based Compensation (Equal Pay Act- EPA)
    - Genetic Information (Genetic Information Act – GINA)
- **State and Local Examples of Additional EEO Protected Classes***
  - Human Rights Division (HRD) or Fair Employment Practices (FED) Agency
    - Sexual or Affectional Orientation
    - Gender Identity/Expression
    - Citizenship Status
    - Age 18+
    - Marital/Civil Union/Partnership/Parenthood/Familiar Status
    - Personal Appearance
    - Atypical Hereditary Cellular/Blood trait
    - Victims of Domestic Violence
    - Victims of Stalking and Sex Offenses
    - Reproductive Choices
    - Arrest/Conviction Record
    - Unemployment
    - Political Affiliation
    - Nationality/Ancestry
- *** Some State/Local laws interpret more broadly the terms used in the Federal EEO laws**
  - For example: NYC HRL Title 8 Chapter 1
    - **§ 8-130 Construction.** The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title have been so construed.

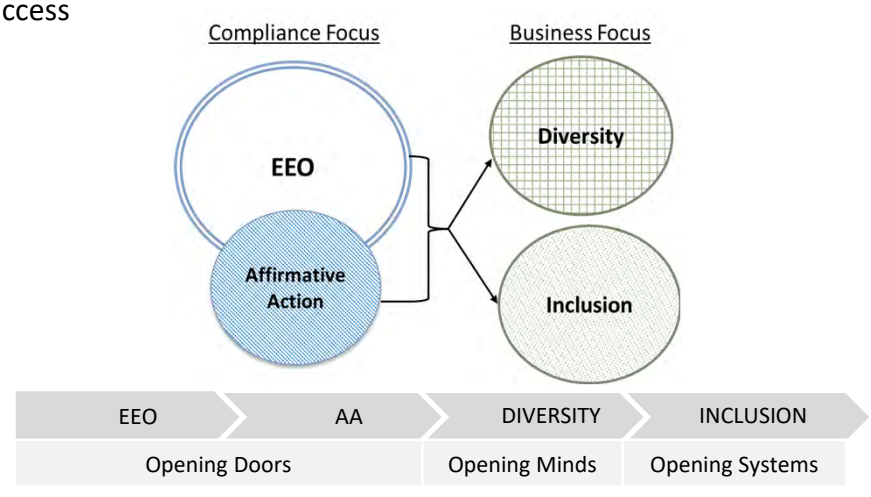
Affirmative Action

- **Affirmative Action Order and Laws (Government Contractors)**
  - Office of Federal Contract Compliance Programs (OFCCP)
    - Women and Minorities (Executive Order 11246)
    - Disabled (Rehabilitation Act)
    - Vietnam Era Veterans/ Disabled Veterans (Vietnam Era Veterans Readjustment Assistance Act)

Note: FMLA is an employment entitlement, not EEO/AA protection laws.

EEO/AA Compliance Focus and Diversity & Inclusion Business Focus

- EEO Anti-Discriminatory Compliance Focus
  - Unlawful discrimination against applicants and employees in identified protected classes for all terms and conditions of employment
    - Equal Employment Opportunities
    - Focuses on all the terms and conditions of employment including: Recruitment, Interviewing, Hiring, Dismissal, Discipline, Job Assignment, Training Opportunity, Shift Assignment, Transfer, Promotion, Demotion or Working Conditions
    - Treat people fairly
- Affirmative Action – Representation Compliance Focus
  - Proactive efforts to ensure non-discrimination
    - Applies to Federal Government Contractors and Subcontractors meeting certain employee and contract value thresholds
    - Non-Government contractors can voluntarily follow the regulations
  - May also include goals such as the number of minorities, women, and people with disabilities where underutilization exists
    - A systematized approach to ensuring non-discrimination in employment
    - Goals are not quotas and may not be used to discriminate; all employment decisions should be made on non-discriminatory factors
  - Promotes the employment of veterans and people with disabilities
- Diversity and Inclusion
  - Diversity – Business Focus
    - Is all of the ways in which we are all different and alike as individuals
      - Is defined broadly to include other dimensions beyond those identified in EEO and AA legal requirements
    - Encourages people to bring their unique differences, voices and perspectives into communication, problem-solving, decision-making, creativity and interpersonal relationships with internal/external constituents
  - Inclusion – Business Focus
    - Puts the concept and practice of Diversity into action by building a culture of engagement, respect, and perspective – leveraged for innovation and creativity to drive business success



Federal Employment Laws
Summary*

1. **Title VII of the Civil Rights Act of 1964 (Title VII)**
   - Agency: EEOC
   - Prohibits employment discrimination on the basis of race, color, sex, national origin and religion. Also requires reasonable accommodation for religious observance needs and prohibits retaliation.
   - https://www.eeoc.gov/laws/statutes/titlevii.cfm

2. **Age Discrimination in Employment Act of 1967 (ADEA)**
   - Agency: EEOC
   - Prohibits employment discrimination on the basis of age against employees who are forty (40) years of age and older.
   - https://www.eeoc.gov/laws/statutes/adea.cfm

3. **Americans with Disabilities Act (ADA)**
   - Agency: EEOC
   - Prohibits employment discrimination (1) against qualified individuals with disabilities who can perform essential job function with or without reasonable accommodation, (2) based on a record of a disability (3) based on perceived disability and (4) based on an individual's association with someone who has a disability.
   - https://www.eeoc.gov/laws/statutes/ada.cfm

4. **The Equal Pay Act of 1963 (EPA)**
   - Agency: EEOC
   - Requires that the equal pay be given to men and women doing the same or substantially similar work in terms of skill, effort, responsibility and working conditions in the same establishment.
   - https://www.eeoc.gov/laws/statutes/epa.cfm

5. **Executive Order 11246**
   - Agency: Office of Federal Contract Compliance Programs (OFCCP)
   - Requires government contractors and subcontractors that satisfy specific monetary and staffing thresholds to take affirmative action to ensure that minorities and women are not subject to workplace discrimination.
   - https://www.dol.gov/ofccp/regs/statutes/eo11246.htm

6. **Rehabilitation Act of 1973**
   - Agency: OFCCP/EEOC
   - Requires government contractors and subcontractors that satisfy specific monetary and staffing thresholds to take affirmative action to employ and advance in employment qualified individuals with disabilities. Also prohibits recipients of federal financial assistance from discriminating against qualified individuals with disabilities.
   - https://www.eeoc.gov/eeoc/history/50th/thelaw/rehab_act-1973.cfm
7. **Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA)**
   - Agency: OFCCP
   - Requires that covered government contractors and subcontractors take affirmative action to ensure that discrimination against certain veterans does not occur.
   - https://www.ecfr.gov/cgi-bin/text-idx?SID=b885fe75a1c4766ffab5c0316b13f11d&node=41:1.2.3.1.9&rgn=div5
8. **Genetic Information Nondiscrimination Act (GINA)**
   - Agencies: EEOC and U.S. Department of Labor
   - Prohibits discrimination in employment on the basis of genetic information and the use of genetic information to discriminate against participants in health care plans.
   - https://www.eeoc.gov/laws/statutes/gina.cfm
9. **Family and Medical Leave Act (FMLA)**
   - Agency: US Dept. of Labor, Wage & Hour Division
   - Employees who have been employed at least 12 months and have worked at least 1250 hours during that 12 months are entitled to twelve weeks of unpaid, job-protected leave every 12 months when the leave is taken in connection with the birth of a child, adoption of a child, becoming a foster parent, the serious health condition of the employee or the serious health condition of a statutorily-covered family member.
   - Provides 12 weeks of unpaid, job-protected leave if a covered employee's spouse, parent or child is on active duty in the military or is a reservist who faces recall to active duty in the event of specific qualifying exigencies.
   - Provides 26 weeks of unpaid, job-protected leave during a single 12-month period to care for family members injured while on active military duty.
   - https://www.dol.gov/whd/regs/statutes/fmla.htm
10. **The Fair Labor Standards Act (FLSA)**
    - Agency: US Dept. of Labor, Wage & Hour Division
    - Requires payment of minimum wage and enhanced pay (time and one-half the employee's regular rate of pay) for all hours worked over 40 in a workweek and restricts the employment of child labor.
    - https://www.dol.gov/whd/regs/statutes/FairLaborStandAct.pdf

11. **Occupational Safety And Health Act (OSHA)**
    - Agency: Occupational Safety and Health Administration (OSHA)
    - Establishes workplace safety and health standards.
    - https://www.osha.gov/laws-regs/oshact/completeoshact
12. **The Employee Retirement Income Security Act (ERISA)**
    - Agency: US Dept. of Labor, Employee Benefits Security Administration
    - Provides protections for participants and beneficiaries in employee benefit plans including access to plan information and imposes duties on individuals who manage benefit plans or otherwise act as fiduciaries with respect to benefit plans.
    - https://www.law.cornell.edu/uscode/text/29/chapter-18
13. **National Labor Relations Act (NLRA)**
    - Agency: National Labor Relations Board (NLRB)
    - Protects the rights of employees to organize and join unions, act in concert to protest or attempt to change working conditions and engage in collective bargaining.
    - https://www.nlrb.gov/resources/national-labor-relations-act-nlra
14. **Uniformed Service Employment and Reemployment Rights Act (USERRA)**
    - Agency: US Dept. of Labor, Veterans & Employment Training Service
    - Protects job reinstatement rights and advancement opportunities for employees who are absent from work due to military service.
    - https://www.dol.gov/vets/usc/vpl/usc38.htm
15. **Sabanes-Oxley Act of 2002 (SOX)**
    - Agency: Occupational Safety and Health Act (OSHA)
    - Prohibits retaliation against employees who participate in internal investigations or government investigations regarding shareholder fraud in publicly-traded companies.
    - https://www.whistleblowers.gov/statutes/sox_amended
16. **Worker Adjustment and Retraining Notification Act (WARN)**
    - Agency: US Dept. of Labor, Employment & Training Administration
    - Requires covered employers to provide advance notice of a plant closing or mass layoff to employees, labor organizations and local government officials.
    - https://www.dol.gov/general/topic/training/warn-reg-preamble

Workplace Law Resource List*

Law Firms

Many law firms provide free legal alerts and newsletters focusing on employment law issues and developments. These alerts and newsletters are available in electronic form and you can sign up to receive them. Below are samples of law firm online updates.

- **Epstein, Becker, Green:** News & Publications http://www.ebglaw.com/news/ (Subscribe at bottom of page)
- **Ford & Harrison:** Legal Alerts http://www.fordharrison.com/legal.aspx (Subscribe near the top of the page)
- **Jackson Lewis:** Publications http://www.jacksonlewis.com/publications (Subscribe at the top of the page)
- **Levy Employment Law, LLC:** Quarterly Newsletter https://www.levyemploymentlaw.com/takeaways/ (Subscribe on the right-hand of the page)
- **Littler Mendelson:** News & Analysis https://www.littler.com/news-analysis (Subscribe on the right side of the page)
- **Nixon Peabody:** Alerts/Articles https://www.nixonpeabody.com/ideas/articles (Subscribe near the top of the page)
- **Orrick:** Insights https://www.orrick.com/Insights (Subscribe on the right side of the page)
- **Paul Hastings:** Insights https://www.paulhastings.com/publications-items (Subscribe by clicking "sign-up" near the bottom of the page)
- **Proskauer Rose:** Publications http://www.proskauer.com/publications/ (Subscribe on the left side of the page)
- **Putney, Twombly, Hall & Hirson, LLP:** Client Updates http://www.putneylaw.com/clients_updates.html (Subscribe by clicking "Client Update Notification" on the right side of the page)
- **Schulte, Roth & Zabel**: Resources https://www.srz.com/resources/ (Subscribe on left side of the page)
- **Seyfarth Shaw:** Publications / Blog Posts http://www.seyfarth.com/Publications-Search (Subscribe near the top of the page)

Free Newsletters

There are email newsletters that provide links to a compilation of law firm updates and other articles on employment laws.

- **Employment Law Information Network:** http://www.elinfonet.com/ (Subscribe near the top of the page)
- **Lexology:** http://www.lexology.com/ (Subscribe at the top of the page)

Cornell does not necessarily endorse the publications and sources listed. We recommend that you review the materials to determine whether they are appropriate for your workplace and environment and to ensure that the information is up-to-date.

Federal Employment Agencies

Websites of Federal administrative agencies charged with administering and enforcing federal employment laws are a source of information. Through these sites, you are able to access summaries of relevant laws with links to the text of laws, regulations, and agency enforcement guidance, the text of proposed regulations, and information concerning recent case settlements and enforcement activity. The federal agencies also provide some links directing to state and local laws and agencies.

- **Equal Employment Opportunity Commission:** http://www.eeoc.gov
  - Discrimination by Type: http://www.eeoc.gov/laws/types/index.cfm

- **United States Department of Labor:** http://www.dol.gov
  - **Find It! By Topic:** https://www.dol.gov/dol/topic/index.htm
  - **Employment Laws Assistance for Workers & Small Businesses:** http://www.dol.gov/elaws/
  - **Department of Labor Updates:** http://www.dol.gov/dol/email.htm

- **Wage & Hour Division**: http://www.dol.gov/whd/
  - **Family and Medical Leave Act:** http://www.dol.gov/WHD/fmla/index.htm
  - **State Labor Law Topics:** http://www.dol.gov/whd/state/state.htm
    - State Minimum Wage and Pay Premiums http://www.dol.gov/whd/minwage/america.htm
    - State Minimum Rest Period http://www.dol.gov/whd/state/rest.htm
    - State Minimum Length of Meal Period http://www.dol.gov/whd/state/meal.htm
    - Selected State Child Labor Standards under 18 in Non-farm Employment http://www.dol.gov/whd/state/nonfarm.htm
    - State Payday Requirements http://www.dol.gov/whd/state/payday.htm

- **Occupational Safety and Health Administration:** http://www.osha.gov/index.html
  - Workplace Violence: http://www.osha.gov/SLTC/workplaceviolence/

- **National Labor Relations Board:** http://www.nlrb.gov

- **Office of Federal Contract Compliance Programs:** http://www.dol.gov/ofccp/

Web Resources

Some organizations provide free information about employment laws for non-members.

- **American Bar Association Section of Labor and Employment Law,** Source for labor and employment law articles, publications and developments. The information is designed for labor and employment lawyers, but articles and publications may be instructive for senior HR professionals. http://www.abajournal.com/topic/labor+employment
- **Society for Human Resource Management (SHRM),** Source for diverse products and information related to the field of human resources, including legal update information. http://www.shrm.org
- **Disability Management Employer Coalition (DMEC),** Source for knowledge, education, and professional networking in integrated disability, absence management, and return to work solutions. http://dmec.org/
- **Association for Talent Development (ATD, formerly ASTD),** Resource for anyone with an interest in developing the knowledge, skills, and abilities of others. http://www.td.org/

Additional Resources on Employee Disabilities

- **National Employee Technical Assistance Center:** http://www.askearn.com
- **Job Accommodation Network (JAN):** http://www.askjan.org
  - **Fact Sheet: The Interactive Process:** http://www.askjan.org/topics/interactive.htm
- **Office of Disability and Employment Policy (ODEP):** http://www.dol.gov/odep
  - **Employment Laws: Medical and Disability – Related Leave:** http://www.dol.gov/odep/pubs/fact/employ.htm
- **Cornell Yang-Tan Institute on Employment and Disability:** http://yti.cornell.edu/

Discrimination, Harassment and Retaliation: Legal Standards

Prohibited discrimination, harassment and retaliation are a matter of the law and policy.

Discrimination

Federal law and state laws prohibit discrimination based upon protected status including race, sex, color, national origin, religion, disability, age, genetic information, and veteran status.

Discriminatory decisions and practices that unlawfully affect employment or the compensation, terms, conditions or privileges of an individual's employment or potential employment includes unlawful decisions, actions and practices that occur in the course of recruitment, testing, hiring, work assignments, salary and benefits, working conditions, performance evaluations, promotions, training opportunities, career development and advancement, transfers, discipline, discharge or any other application or selection process relating to employment.

Harassment

Harassment is a form of discrimination which is prohibited by federal, state and local laws. The following are some highlights of the EEOC Guidelines and Policy Guidance prohibiting harassment and the interpretations of the US Supreme Court. [1]

I. Sexual Harassment

A. *Unwelcome*

- Sexual advanced *OR*
- Requests for sexual favors *OR*
- Verbal or physical conduct of a sexual nature ***AND***

B. When submission to the unwelcome conduct is made either explicitly or implicitly a term or condition of employment *OR*

When submission or rejection of the unwelcome conduct by an individual is used as a basis for employment decisions affecting the individual *OR*

Where the conduct unreasonably interferes with job performance *OR*

Where the conduct creates an intimidating, hostile or offensive working environment. [2]

[1] In its 1986 decision in *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court referenced the EEOC guidelines as a source for guidance. Based upon *Burlington Industries, Inc. v. Ellerth,* 524 US 742 (1998) and *Faragher v. City of Boca Raton,* 542US 775 (1998) and as discussed in the 1999 EEOC Enforcement Guidance all forms of unlawful harassment should be handled the same way. (See footnote 3.).

[2] See *Harris v. Forklift Systems, Inc., US Sup Ct, No.92-1168., Nov. 1993,* for a discussion that employees need not prove psychological damage

* State and local laws may grant greater protections, entitlements and requirements. They may also impose additional obligations on employers (*ie: training, policies, notice).*

II. Harassment Based On Other Protected Classes

Harassment toward a protected individual or that of his/her relatives, friends, or associates on the basis of any of the protected classes.

A. Verbal or physical conduct that:
- Denigrates *OR*
- Shows hostility *OR*
- Shows aversion ***AND***

B. (1) Has the purpose or effect of creating a work environment that is
- Intimidating *OR*
- Hostile *OR*
- Offensive; *OR*

(2) Has the purpose or effect of unreasonably interfering with an individual's work performance; *OR*

(3) Otherwise adversely affects an individual's employment opportunities.

III. Potential Liability for Prohibited Harassment or Discrimination [3]

A. Where the offending conduct is committed by a supervisor and the conduct is a tangible employment action the employer is always responsible for the supervisor's acts and will be held automatically liable even if the employer did not know about the acts.

B. Where the offending conduct is committed by a supervisor and the conduct is not a tangible employment action the employer is responsible for the supervisor's acts and will be held automatically liable even if the employer did not know about the acts unless:
- The employer exercised reasonable care to prevent and correct promptly any discrimination or harassment ***AND***
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

C. Where the offending conduct is committed by a co-employee the employer will be held liable if the employer:
- Knew or should have known of the conduct ***AND***
- Fails to take immediate and appropriate corrective action.

D. Where the offending conduct is committed by third parties (non-employees) the employer will be liable if the employer:
- Knew or should have known of the conduct *AND*
- Fails to take immediate and appropriate corrective action *AND*
- Has control or responsibility over the non-employee.

[3] *While the Supreme Court indicates in the Ellerth and Faragher cases that a determination of a tangible employment action is case specific, the Court specifically notes: "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In Vance v. Ball State University 133 S. Ct. 2434 (2013), the Supreme Court determined for any type of discrimination or harassment, a supervisor must be an employee empowered to effect a significant change in employment status. For a hostile work environment by co-workers, there would be liability if the employer was negligent in failing to prevent the actions.*

Retaliation [4]

I. Where actions are taken against any employee who has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing or who opposes any unlawful employment discrimination practice.

II. The actions must have been "materially adverse" so as to dissuade a reasonable worker from making or supporting a claim of discrimination and the employer's actions would not have taken place in the absence of the employee engaging in the protected activity.

[4] Related Supreme Court decisions regarding retaliation: *Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)* *Crawford v. Metropolitan Government of Nashville and Davidson County, Tenn*., 555 U.S. 271 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013).

FEDERAL LAWS: EEO, AA and FMLA
Summary*

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdiction and Coverage

Title VII of the Civil Rights Act, as amended, 42 U.S.C. Sections 2000e et seq. ("Title VII") prohibits discrimination against an employee or applicant on the basis of race, sex, national origin, religion and color. It also requires "reasonable accommodation" with respect to religion.

Title VII applies to all terms and conditions of employment including hiring, promotions, compensation, terminations and demotions.

"Race" includes the following racial groups: black or African American, Hispanic, Asian and Pacific Islanders, Native Americans, and white or Caucasian. "Sex" applies to men and women, and has also been interpreted by the EEOC as prohibiting discrimination based on gender identity or sexual orientation. "National origin" includes not only country of birth but ancestry. "Color" is skin tone. "Religion" is defined by the Equal Employment Opportunity Commission (EEOC) as "moral or ethical beliefs as to what is right and wrong, which are sincerely held with the strength of traditional religious views." The definition of religion also includes: religious beliefs that are, "new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unrecognizable to others."

Not only is discrimination against applicants and employees prohibited on the basis of their religious beliefs, employees are also entitled to be reasonably accommodated in the practice of their religions unless such accommodation would result in an "undue hardship" to an employer. Accommodations may include time off, a place and time to pray during the workday and dress.

The EEOC issued Enforcement Guidance on the Consideration of Arrest and Conviction Records, http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. The Guidance focuses on employment discrimination based upon race and national origin.

Employees may also file claims under Title VII when they believe they have been discriminated against because they associate with people of a race not their own. For example, a member of an interracial couple may allege discrimination based on that association.

Title VII applies to all employers that have 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding year. Title VII also applies to American citizens working abroad for American-owned and controlled companies.

To be timely, a complainant must file a charge of discrimination within 180 days of the occurrence of the alleged discrimination or, in states that have their own anti-discrimination agencies, within 300 days.

***** State and local laws may grant greater protections, entitlements and requirements.

B. Proving Discrimination

Generally, there are two methods for proving discrimination; disparate treatment and adverse impact.

1. *Disparate Treatment*

Disparate treatment occurs when an employee is treated differently on the basis of his or her membership in a protected class. Today's cases generally involve a member or members of a protected class who believe they are the victims of a pattern of discrimination.

The burden of proof is on the plaintiff to establish a *prima facie* case of employment discrimination. The Supreme Court, in McDonnell Douglas v. Green, 411 U.S. (1973), stated that a plaintiff may raise an inference of discrimination in a failure to hire or promote case by showing that he or she 1) is a member of a protected class; 2) applied for a job; 3) was qualified for the job; 4) an opening existed for that job; 5) was not hired for that job; and 6) the employer continued to seek applicants. This methodology can be adapted to apply to all employment decisions such as compensation and termination.

The best way to defend a claim of discrimination is to refute the plaintiff's proof – he or she is not a member of a protected class, he or she was not qualified for the sought position, the person selected was better qualified or that the successful candidate was of the same protected class. Employers may also show that the decision was job-related, and not based on protected class status.

Employers may also argue that the decision was based on a bona fide occupational qualification ("BFOQ"). The employer would have to show that a particular sex, religion, or national origin is a "real" qualification for a particular job. "However, courts have interpreted the BFOQ exception very narrowly."

2. *Adverse/Disparate Impact*

A *prima facie* case of adverse impact discrimination can be established by demonstrating, through the use of statistical analysis, that a particular standard or facially neutral policy has a greater negative effect on one group than another. Plaintiffs may use comparisons with either internal or external populations.

Adverse impact cases may be defended by a showing of statistical inaccuracy or that the standard is job-related.

In Ricci v. DeStefano, 557 U.S.557 (2009), the Supreme Court held that before an employer can engage in intentional discrimination, it must show a strong basis for believing that it would be subject to disparate impact liability if it failed to take action based on race. In this case, the City of New Haven gave a test to firefighters interested in being promoted to management.

Seventeen white firefighters and one Hispanic firefighter passed the test; none of the black employees who took the test had scores high enough to make them eligible for promotion. The City threw out the test stating that it feared a lawsuit by the black employees alleging disparate impact. The Court held that this fear alone was not enough for the city to discriminate against the white and Hispanic firefighters and that the decision violated Title VII.

C. Harassment

1. *Sexual Harassment and Other Types of Harassment*

Sexual harassment is a form of sex discrimination. Generally there are two types of sexual harassment: "*quid pro quo"* and "hostile work environment". In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court defined these terms. "*Quid pro quo"* ("this for that") harassment involves situations where an employee is denied a tangible economic benefit because the employee rejected the unwanted sexual advances of a supervisor. For example, a manager fires an employee because he refused to have a sexual relationship. "Hostile work environment" harassment exists where there is unwelcome sexual conduct that is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993). See also, the EEOC website at: http://www.eeoc.gov/laws/types/sexual_harassment.cfm.

Other types of harassment are based on race, color, religion, national origin, age (40 or older), disability or genetic information. Vance v. Ball State University, 133 S. Ct. 2434, 2443 (2013). See also, the EEOC website at: http://www.eeoc.gov/laws/types/harassment.cfm.

2. *Employer Liability for Supervisor Conduct*

Employers will be held liable for the conduct of their supervisors when an employee has suffered a tangible job detriment, regardless of whether the acts of the supervisor constituted *quid pro quo* or hostile work environment; Burlington Industries v. Ellerth, 524 U.S. 742 (1998) and Farragher v. City of Boca Raton, 524 U.S. 775 (1998). The term "supervisor" applies only to those who are empowered by the employer to take tangible employment actions against the victim; Vance v. Ball State University, 133 S. Ct. 2434, 2443 (2013) and Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). When the supervisor's conduct does not result in a tangible job detriment, employers will be held liable unless the employer can prove: that it exercised reasonable care to prevent and promptly correct any harassing behavior; and the victim failed to take advantage of any opportunities offered by the employer to correct or prevent the problem (Burlington and Farragher).

3. *Hostile Work Environment*

To prove a claim of hostile work environment harassment an employee must show that the conduct was unwelcome. In addition the conduct must be "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment'." Isolated acts will not be sufficient. The plaintiff's psychological well-being need not be affected to prove a claim. Sexual

harassment that is physical as opposed to verbal is considered more severe. In all cases the outcome will depend on the totality of the circumstances.

In McCavitt v. Swiss Reinsurance America Corp., 237 F.3d 166 (2d Cir 2001), the court held that an employer could regulate dating between co-workers. The court determined that dating was not a protected "recreational" activity.

Same sex harassment also violates Title VII. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

D. Religious Accommodations

In addition to prohibiting discrimination based upon religion, Title VII requires employers to provide reasonable accommodations for "all aspects of religious observance and practice, as well as belief, unless an employer demonstrates […] undue hardship on the conduct of the employer's business." In EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2028 (2015), the Supreme Court held that to prove religious discrimination, a job applicant only needs to show that the employer's decision not to hire him or her was based in part on a desire not to provide religious accommodations, not that the employer had actual knowledge of the need for religious accommodations. See also, the EEOC website at: http://www.eeoc.gov/laws/types/religion.cfm.

E. Pregnancy Discrimination Act

The Pregnancy Discrimination Act is an amendment to Title VII. It adds to the prohibition on sex discrimination a requirement that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes […] as other persons not so affected but similar in their ability or inability to work." See also, the EEOC website at: http://www.eeoc.gov/eeoc/publications/fs-preg.cfm.

In Young v. UPS, 135 S. Ct. 1338 (2015), the Supreme Court held that that an inference of intentional discrimination can be made where a policy or practice significantly burdens pregnant employees and the employer's reasons for its actions are not sufficiently strong to justify the burden. Applying that standard the Court held that employers may be required to give pregnant employees light-duty positions if they would do it for other employees with similar limitations on their ability to work.

F. Enforcement

The Equal Employment Opportunity Commission (EEOC) is the federal agency responsible for administering Title VII. The EEOC is required by law to investigate charges of discrimination and to try to use conference, conciliation and persuasion to eliminate unlawful discriminatory practices.

The EEOC is required to engage in good faith conciliation efforts with employers before suing. In Mach Mining, LLC v. EEOC, 135 S. Ct. 1645 (2015), the Supreme Court held that these efforts are

subject to judicial review. Good faith conciliation efforts include engaging the employers in a discussion, allowing employers to remedy alleged discriminatory practices and communicating the specific allegations to the employer. However, courts have not held the EEOC to a very high standard on the duty to conciliate.

The EEOC may file suit in federal court in "pattern and practice" cases. In other cases, an individual may file a case in federal court after the EEOC completed its investigation and issued a Right to Sue Letter. A complainant may also request the issuance of a Letter before the EEOC completes its investigation. A complainant may not file suit without a Right to Sue Letter and must file within 90 days of receipt of that letter. Plaintiffs may request a jury trial.

G. Damages

Before the passage of the Civil Rights Act of 1991 ("CRA 1991") plaintiffs were entitled only to "make-whole relief" (back pay, front pay, job-specific relief.) The CRA amended Title VII along with the other federal anti-discrimination statutes, allowing plaintiffs to also seek punitive and compensatory damages. The CRA did set caps for compensatory and punitive damages as follows: $50,000 for employers with 15-100 employees; $100,000 for employers with 101-200 employees; $200,000 for employers with 201-500 employees; and $300,000 for employers of more than 500 employees. Punitive damages are recoverable where the plaintiff demonstrates that the employer acted "with malice or with reckless indifference to the federally protected rights" of the plaintiff.

In Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843 (2001), the Court held that the $300,000 cap on compensatory damages did not apply to front pay. The Court held that front pay is an alternative to reinstatement and thus equitable relief rather than an element of compensatory damages.

In Cush-Crawford v. Adchem Corp., 271 F.3d 352 (2nd Cir. 2001), the Second Circuit held that an award of actual damages is not a prerequisite to an award of punitive damages. Thus where the fact finder has found in a plaintiff's favor that the defendant engaged in the prohibited discrimination, punitive damages might be awarded if the defendant has been shown to have acted with a state of mind that makes punitive damages appropriate. The defendant need not have committed egregious or outrageous acts. Rather, a plaintiff need only show that the defendant acted with malice or reckless indifference.

II. THE CIVIL RIGHTS ACTS OF 1866 AND 1871

A. Background

After the Civil War Congress passed legislation to bolster the newly passed 13th (abolished slavery), 14th (due process and equal protection) and the 15th (denied state and federal government the power to deprive citizens of the right to vote) Amendments to the Constitution. The statutes are codified as 42 U.S.C. Sections 1981-1986. Sections 1981 (guaranteeing equal rights to all "as is

enjoyed by white citizens") and 1983 (provides a civil action to deprivation of rights) have been used frequently in employment discrimination suits.

Plaintiffs may pursue claims of discrimination under both Title VII and Sections 1981 and 1983.

1. *Section 1981*

It is not necessary for Plaintiffs to have filed an EEOC charge to file a lawsuit under Section 1981. Compensatory damages for emotional distress are available except against state entities. There is also no cap on punitive damages. A four-year statute of limitations applies to Section 1981. Jones v. RR Donnelley & Sons Co., 541 US 369 (2004).

Section 1981 does not apply to federal workers.

2. *Section 1983*

Section 1983 prohibits state and local government officials from depriving people of rights "under color of state law." Section 1983 is often used in pursuing employment discrimination claims against state and local governments.

Private entities may be subject to Section 1983 suits when the institution is so involved with the state that state action is alleged to exist.

There is no federal statute of limitations for Section 1983. The state statute of limitations for personal injury claims is applied to Section 1983 actions.

The remedies available under Section 1983 are not enunciated in the statute. Courts allow many of the same remedies as are available under Title VII including, declaratory and injunctive relief, back pay, punitive damages (for conduct motivated by "evil intent" or when it involves "reckless or callous indifference") and attorney's fees.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Introduction

The Age Discrimination in Employment Act of 1967, as amended ("ADEA") 29 U.S.C. 621 was passed to promote employment of persons age 40 or older based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment. The ADEA makes it unlawful to discriminate against employees or applicants for employment at age 40 and over. The ADEA applies to employers with 20 or more employees.

B. Waivers

The ADEA, as amended by the Older Workers Benefit Protection Act ("OWBPA"), provides that an employer may ask an employee to waive his/her rights or claims under the ADEA. This would only apply if certain minimum standards are met to assure the waiver is "knowing and voluntary" and, therefore, valid. These waivers, sometimes referred to as releases, are common in settling ADEA discrimination claims and courts have also recognized waivers for other EEO federal laws. See also, "Understanding Waivers of Discrimination Claims in Employee Severance Agreements" at: http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html.

C. Enforcement

The ADEA is enforced by the EEOC at the agency level. A "charge" must be filed with the EEOC within 180 days of a violation of the Act (300 days in deferral states). Unlike Title VII, a charging party under the ADEA does not need a Right to Sue letter. Instead a suit must be filed at least 60 days after the charge was filed with the EEOC and within 90 days after receipt of the EEOC's notice of dismissal or termination.

D. Burden of Proof

Proof in an ADEA case follows the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) guidelines. A plaintiff must show that he/she is 40 or over; met the applicable job qualifications; was terminated, denied promotion, not hired or subject to some other detrimental employment decision; and the employer sought to replace or did replace the plaintiff with a younger person having similar qualifications. The employer must then articulate a legitimate reason for the decision other than age. The plaintiff must then prove that the explanation provided is a pretext for discrimination and that age was the determining factor. Many courts are allowing statistical evidence.

E. Defenses

Age may be a *bona fide* occupational qualification. Examples include: airline pilots, bus drivers, police and fire fighters. An employer does not violate the ADEA if the employment decision was based on reasonable factors other than age.

F. Remedies

A plaintiff is entitled to a jury trial under the ADEA. A plaintiff is entitled to recover equitable relief as well as monetary relief under the ADEA. A plaintiff may also recover reinstatement, promotion, back pay, front pay and liquidated damages (when a willful violation is proven) as well as attorney's fees.

IV. THE AMERICANS WITH DISABILITIES ACT, as amended

A. Introduction

The Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Sections 12101 et. seq. ("ADA"), prohibits discrimination in all terms and conditions of employment against qualified individuals 1) with a disability 2) who have record of a disability 3) are regarded as having a disability, or 4) who have a relationship or association with someone with a disability. It covers all employers with at least 15 employees. The Act was amended (ADAAA) in 2008.

B. Qualified Individual

A "qualified individual" is one who is able to perform the essential functions of the job, with or without a reasonable accommodation.

Essential functions are those that must be performed by the holder of the job, as distinguished from marginal functions. One way to look at this is to ask, "Would removing the function fundamentally change the position?"

C. Disability Defined

A disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities or major life functions of such individual; a record of such impairment; or being regarded as having an impairment." The intention of the Act is to provide for "broad coverage." People who associate with people with disabilities are also protected by the ADA.

Major life activities are defined as hearing, seeing, speaking, mobility, breathing, learning, working, caring for oneself, eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating, working, and performing manual tasks. Major life functions include functions of the immune system, cell growth, digestive, bladder and bowel functions, neurological and brain functions, respiratory and circulatory functions, endocrine functions and reproductive functions. Impairments that are episodic or in remission qualify as covered disabilities if they would substantially limit a major life activity when active.

"Substantially limits" means that a person is unable to perform a major life activity that an average person can perform or is significantly restricted as to the condition, manner or duration of that performance. This requires an individual assessment. The EEOC does not regard attendance as an essential job function, but overwhelmingly most courts do. Mitigating devices (such as medication or hearing aids) cannot be considered in determining whether an individual has a disability as defined by the law.

Impairments that "virtually always" meet the definition of disability include: deafness, blindness, intellectual disability, partially or completely missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV, multiple sclerosis,

muscular dystrophy, major depressive order, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder and schizophrenia.

Impairments that are episodic in nature or that are in remission also qualify as covered disabilities if they would substantially limit a major life activity when active.

The key is not to focus on whether a person has a disability, but rather on whether they are being discriminated against on the basis of an actual or perceived disability.

D. Alcohol and Drugs

Users of illegal drugs are not covered by the ADA; rehabilitated drug users are. Current alcoholics are protected by the ADA to the extent they are not under the influence of alcohol at work and can perform their jobs.

E. Regarded as Disabled

The Act extends its protection to people that have been discriminated against because of an actual impairment or a perceived impairment "whether or not the impairment limits or is perceived to limit a major life activity." This means that employees need only prove that an adverse action was taken because they were viewed as being impaired, even if the impairment would not rise to the level of a protected disability.

Impairments that are "transitory and minor" cannot be the basis for a "regarded as" claim. Generally, a transitory impairment is one that has an actual or expected duration of six months or less.

Someone who is regarded as disabled is not entitled to reasonable accommodation.

F. Reasonable Accommodation

"Reasonable accommodation" is broadly defined as any modification or adjustment to the work environment, the manner or the circumstances that enables a qualified employee with a disability to perform the essential job functions. It may include job restructuring, part-time work, making the workplace accessible, purchase of equipment, the provision of readers or interpreters and transfer to vacant positions. The duty of reasonable accommodation extends beyond the work area to benefits and privileges of employment, including but not limited to rest rooms, break rooms and locker rooms.

It is important to have an individualized response to any employee request for accommodation. Attention should be paid to the effect a given "disability" has on an employee's major life activities. In addition, some states, such as New York, do not require a substantial limitation in a major life activity to establish a claim of disability discrimination.

In US Airways v. Barnett, 535 U.S. 391 (2002), the Court ruled that an employer's seniority system, even in the absence of a union, would normally override an employee's request for a conflicting accommodation. Employees can still argue that special circumstances apply to the seniority rules.

G. Undue Hardship

Undue hardship defenses are narrowly construed. In general, undue hardship means "significant duty or expense." Undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. An employer may not claim undue hardship because the cost of an accommodation is high in relation to an employee's wage or salary. Consideration will be given to the size of the business, the size of the budget, the nature of its operation, the number of employees and the nature and cost of the accommodation.

Undue hardship refers not only to financial difficulty but to something that is unduly extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business.

H. Direct Threat

Employers may bar employees who by reason of their disabilities pose "a significant risk of substantial harm" to the individual or others when the risk cannot be minimized by reasonable accommodation. In Chevron U.S.A. Inc. v. Echazabal, 536 U.S. 73 (2002), the Court upheld the EEOC regulation that allows an employer to refuse to hire an individual if his disability would pose an on-the-job threat to the worker's own health. Employers must still make individualized assessments and not rely on unfounded stereotypes. In Echazabal, Chevron refused to hire Mr. Echazabal because the company's doctors said his hepatitis C would be aggravated by continued exposure to various toxins present in the refinery.

I. Process for Identifying a Reasonable Accommodation

In the usual course, an employee requests an accommodation for a reason related to a medical condition. The employee need not mention the ADA, disability or reasonable accommodation. Many times, the disability and the reasonable accommodation are obvious and require little discussion. On other occasions the person with the disability and the employer should engage in an informal process to clarify what the person needs and identify the appropriate reasonable accommodation (the interactive dialogue). If there are a number of reasonable accommodation options, the employer may select the accommodation. If the chosen accommodation is ineffective, the employer must try again.

J. Confidentiality of Medical Records

Under the ADA, all information from applicant and employee medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions. These conditions include where managers are informed about necessary restrictions on an employee's work/duties and necessary accommodations, safety personnel are informed if the disability might require emergency treatment, and government officials investigating ADA compliance.

VI. GENETIC INFORMATION NONDISCRIMINATION ACT

In addition to the requirements regarding confidentiality of medical records under the ADA, the Genetic Information Nondiscrimination Act ("GINA") prohibits employers from requesting, requiring, or purchasing genetic information (e.g., information about an individual's genetic tests, genetic tests of a family member, or family medical history) about job applicants and employees or their family members at any time, including during the post-offer stage of employment.

GINA is enforced by the EEOC.

VII. THE LILLY LEDBETTER FAIR PAY ACT

The Lilly Ledbetter Fair Pay Act was enacted in January 2009 to overturn a Supreme Court decision that impaired an employee's ability to prove discrimination in pay. The Supreme Court had held that the statute of limitations in pay cases began to run when the pay decision was initially made, not from the point at which the employee discovered the disparity. The Act amends Title VII, the ADEA, the ADA and the Rehabilitation Act stating that pay discrimination cases are timely if filed within the time periods prescribed by those acts from the issuance of the last discriminatory paycheck, regardless of how long before the compensation decision had been made. Essentially, the Act eliminates the statute of limitations in pay discrimination cases.

The Act has also been applied to otherwise stale failure to promote cases in which the plaintiffs allege that while the failure to promote may have been a discrete act, the pay differential is continuing.

The back pay recovery period is capped at two years from the filing of the charge of discrimination.

VIII. RETALIATION

Title VII, the ADEA, the ADA and GINA also prohibit retaliation against any employee or applicant for employment who complains about or opposes violations of the Acts or cooperates in an investigation of a complaint, regardless of the merits of the underlying charge of discrimination. "When an employee communicates to her employer a belief that the employer has engaged in … employment discrimination, that communication virtually always constitutes the employee's opposition to the activity." Crawford v. Metropolitan Government of Nashville, 555 U.S. 271 (2009) Unlawful retaliation in violation of the acts occurs where the employer, in retaliation for protected activity, takes any action that would have been "materially adverse" which means "it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington Northern v. White, 548 U.S. 53 (2006). Notably, Title VII's anti-retaliation prohibition is not limited to employer conduct that is related to employment or that occurs at the workplace. Id. at 2414.

In order to establish a claim of unlawful retaliation, an individual must prove that the employer took adverse action against him/her because of his or her opposition to unlawful discrimination/harassment or participation in a complaint, investigation or lawsuit about a complaint of unlawful discrimination/harassment. The claimant "must establish that his or her protected activity was a "but-for" cause of the alleged adverse action by the employer." University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. 2517 (2013) This means that the claimant must prove that the employer's action would not have taken place "in the absence of" the complainant's engagement in protected activity.

See also, the EEOC website at: http://www.eeoc.gov/.

IX. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") prohibits employment discrimination against a person on the basis of past military service, current military obligations, or intent to serve. An employer must not deny initial employment, reemployment, retention in employment, promotion, or any benefit of employment to a person on the basis of a past, present or future service obligation.

USERRA is enforced by the Department of Labor.

X. EXECUTIVE ORDER 11246, REHABILITATION ACT OF 1973 (Section 503), and VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974 (Section 402)

A. Background

Executive Order 11246 ("Order") requires "affirmative action". The Order requires that federal government contractors and subcontractors ("contractors") include an EEO clause in all their contracts for $10,000 or more and all construction projects using federal funds. The Order requires covered employers to refrain from discrimination on the basis of sex, race, religion, color, national origin, sexual orientation and gender identity; to take affirmative action in recruitment, hiring, promotions, and transfers to prevent discrimination; and to post notices setting forth the anti-discrimination clause. Contractors who do at least $50,000 worth of business with the federal government and have 50 or more employees must prepare a written affirmative action plan including an analysis for open positions of underutilization of women and minorities and setting goals where appropriate.

The Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (Section 402) perform a similar function as the Order, for people with disabilities and covered veterans respectively. New regulations provide goals for the employment of disabled individuals and a hiring benchmark for veterans.

B. Enforcement

The Office of Federal Contract Compliance Programs administers the Order and Acts. The Labor Department may impose penalties on non-complying employers including contract cancellation or suspension and debarment from future federal contracts.

See also, the Office of Federal Contract Compliance Programs (OFCCP) website at: http://www.dol.gov/ofccp/

SUMMARY OF THE FAMILY AND MEDICAL LEAVE ACT OF 1993 (FMLA)

A. Background

FMLA applies to eligible employees of companies/organizations with 50 or more employees, and all public agencies, and all public and private elementary and secondary schools. Eligible employees must have been working for the employer for 12 months or 1250 hours, and have 50 or more total employees working at the employees' exact worksite or within a 75 mile radius of the employees' worksite.

FMLA entitles eligible employees, both men and women, to take up to a total of 12 work weeks of unpaid, job-protected leave during any 12-month period (including intermittent leave if necessary). Employers may require employees to use accrued paid leave for some or all of the leave. The employee can take this leave for the birth of a child and care of the child, or for the placement of a child for adoption or foster care. In addition, the employee can request the leave for the care of a spouse (including same-sex spouses Obergefell v. Hodges, 576 U.S (2015)) or immediate family member who has a serious health condition, or when the employee is unable to work because of a serious health condition.

Employers covered by the law are required to maintain any preexisting group health coverage during the leave period and, once the leave period is concluded, to reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment.

The National Defense Authorization Act of 2008 (NDAA) amended the FMLA, expanding it to provide up to 12 weeks of leave for employees who have a family member called up to or engaged in active military duty, and up to 26 weeks of leave for employees who are serving as a caregiver to a family member who was injured or became ill while on active duty.

B. Enforcement*

Adherence to FMLA requirements is enforced by the Department of Labor Wage and Hour Division (WHD). http://www.dol.gov/WHD/fmla/index.htm.

* FMLA is an entitlement law and is not considered an EEO law.

THE EMPLOYMENT-AT-WILL DOCTRINE

I. INTRODUCTION

The employment-at-will doctrine has, for nearly a century, governed employment relationships in the United States. This doctrine provides that employers may, in the absence of some form of contractual, statutory or common law restriction, terminate their employees at any time, with or without cause and with or without notice. Conversely, employees may choose to end the employment relationship at any time. Notwithstanding the continued vitality of this policy in theory, it has been tremendously weakened in practice. The contractual, statutory or common law exceptions have, in recent years, significantly limited the scope of the at-will doctrine.

This outline sets forth the bases upon which the nation's legislatures and courts have justified eroding the traditional employment-at-will doctrine.

I. LEGISLATION RESTRICTING THE EMPLOYMENT AT WILL RULE

Legislation Further Erodes At-Will Doctrine

Since the 1960's the trend has been towards the enactment of numerous statutes and regulations at the federal, state and local levels, placing important and well warranted restrictions on the right of employers to discharge their employees at will. At the federal level, for example, these statutes and laws include:

- Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (prohibits discrimination on the basis of race, color, sex, religion, or national origin);
- The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a) (prohibits discrimination on the basis of age against persons over 40 years old);
- The Rehabilitation Act of 1973, 29 U.S.C. §§ 793 and 794 (prohibits discrimination on the basis of disability by government contractors and recipients of federal financial assistance, respectively);
- The Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. § 4301 et seq. (prohibits employers from denying reemployment to employees on the basis of their activities with a uniformed service, and protects returning service members from discharge without cause for 180 days (following a military leave of at least 30 days) or one year (following a military leave of at least 181 days));
- Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1140 (prohibits discharge of a participant in an employee benefit plan for exercising any rights under the plan or for the purpose of interfering with the attainment of any right under the plan);
- The Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (prohibits discharge of an employee for a single wage garnishment);

- The Jury System Improvement Act of 1974, 28 U.S.C. § 1875 (prohibits discharge of an employee for performing jury service in a federal court);

- Executive Order 11246, 41 C.F.R. § 60 1.40 (1965) (prohibits discrimination by certain federal contractors or subcontractors on the basis of race, color, religion, sex or national origin, and requires that affirmative action be taken);

- The United States Bankruptcy Code, 11 U.S.C. § 525(b) (prohibits the discharge of any employee on the basis of his having been adjudicated bankrupt);

- The Civil Rights Act of 1866, 42 U.S.C. § 1981 (guarantees persons of all races the same right to make and enforce contracts, including contracts of employment, as that enjoyed by "white citizens"; it prohibits, among other things, the discharge of employees based on race, which includes " any identifiable ethnic group");

- The Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (2008) (prohibits discrimination on the basis of a job applicant's or employee's genetic information).

"Whistle blower" provisions are also contained in a number of federal, state and local statutes. They protect employees from retaliation for reporting employer violations of statutory safety, environmental and other standards. These statutes include:

- The Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c);

- The Federal Water Pollution Control Act, 33 U.S.C. § 1367;

- The Railroad Safety Act, 45 U.S.C. § 441(a);

- The Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3);

- The Sarbanes-Oxley Act of 2002, 15 U.S.C. §7201

III. JUDICIAL EROSION OF THE EMPLOYMENT AT WILL RULE

A. Introduction

The analysis that follows examines the various theories and the bases cited in support of actions by discharged employees to attempt to escape the at-will doctrine.

B. Contract Theories

1. Implied Contracts

Courts have held that a contract of employment limiting the right to discharge an at-will employee may be implied from certain oral or written assurances from the employer. This legal theory allows employees to claim that an enforceable employment agreement requiring termination for cause can be created from the existence of factors such as length of employment, a positive

salary, evaluation and promotional history, commendations, company policies and procedures that confer limits on discharge, and the like. See, e.g., Boule v. Pike Indus., 2013 U.S. Dist. LEXIS 26588 (employment manual created an implied contract providing for disciplinary procedures); Peru v. T-Mobile USA, Inc., 897 F.Supp.2d 1078 (D. Col. 2012) (an employee handbook or an employee policy can be construed to create an implied contract between an employer and employee absent a disclaimer). Hartnett v. Papa John's Pizza USA, Inc., 912 F. Supp. 2d 1066, 1093 (D.N.M. 2012) ("A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct").

Background/Employment-at-Will in New York

In New York, it has long been settled that absent an agreement establishing a fixed duration of employment, an employment relationship is presumed to be a hiring 'at-will,' terminable by either party at any time, for any reason or no reason; provided, of course, that the reasons for the termination are not otherwise related to factors prohibited by law (for example, laws prohibiting discrimination on the basis of race, sex, age, etc.).

In the early 1980's, a narrow exception to this general rule was carved out by the New York State Court of Appeals in Weiner v. McGraw Hill, Inc., 57 N.Y.2d 458 (1982). In Weiner, the Court found that the existence of several factors, taken together, evidenced an express limitation on the employer's right to discharge. Weiner, at 466. The Court identified four significant factors from which the existence of an express contractual limitation on the employer's right to discharge could be inferred: (1) Weiner was induced to leave his former employer with the assurance that McGraw-Hill would not terminate his employment without just cause; (2) this assurance was incorporated into his job application; (3) Weiner rejected other offers of employment in reliance on the assurance; and (4) McGraw-Hill's handbook or manual contained a provision that employees would be discharged only for just cause and such provision was strictly enforced by the company. Id. at 465-66. Taken together, these factors, the Court concluded, established the existence of an express contract limiting the employer's right to discharge. Id. at 466-67.

In the years following Weiner, New York courts have construed the Weiner exception extremely narrowly, often noting that plaintiffs alleging wrongful discharge under this exception have not fared well because of "the explicit and difficult pleading burden" imposed by Weiner. See Sabetay v. Sterling Drug, Inc., 69 N.Y.2d 329, 334-335 (1987). Indeed, court decisions in New York construing Weiner consistently have held that where the discharged employee could not demonstrate that any specific representations had been made to him or her limiting the right to discharge, coupled with an express limitation of the employer's right to discharge contained in the employer's handbook or some other written document, and could not submit evidence that these factors were relied upon by the employee to his or her detriment, the employee will have failed to establish a breach of contract claim of wrongful discharge *as a matter of law*; thereby obviating the need for a trial.

In Rooney v. Tyson, the Court of Appeals once again was presented with an opportunity to revisit the at-will employment doctrine. At issue in the case was Rooney's claim that he had an enforceable oral agreement with Tyson to receive 10% of Tyson's earnings as a professional fighter

in return for his personal training services "for as long as [Tyson] fights professionally." Rooney, 91 N.Y.2d at 687. A jury in federal district court returned a verdict in favor of Rooney and awarded him $4.4 million in damages. Id.

However, the trial judge agreed with Tyson's post-trial argument that the parties' agreement was for an indefinite duration and, therefore, was terminable at will under New York law. Id. Accordingly, the court granted Mr. Tyson's motion for judgment notwithstanding the jury's verdict and dismissed the lawsuit. Mr. Rooney filed an appeal in the Second Circuit Court of Appeals. Id.

The Second Circuit Court of Appeals sought guidance from the New York Court of Appeals, via a certified question, as to "whether the oral personal services contract [at issue, which was] to last 'for as long as the boxer fights professionally' provides a definite, legally cognizable [employment] duration" or, conversely, whether it "constitutes employment for an indefinite duration" (i.e., at-will employment).[1] Id. In answer to this question, the New York Court of Appeals, with one judge dissenting, held that an oral contract between the fight trainer and the professional boxer to train that boxer "for as long as the boxer fights professionally" is in fact a contract for a definite duration, and thus was enforceable. Id. at 688.

In Criado v. ITT Corp., 1993 U.S. Dist. LEXIS 11359, 1993 WL 322837 (S.D.N.Y. Aug. 13, 1993), a federal district court in New York upheld a jury's determination of an express modification of the at-will doctrine based on statements contained in the company's Code of Ethics, an accompanying letter from the company president, and certain oral statements from a senior vice-president to plaintiff. Criado, 1993 WL 322837, at *2. Plaintiff, a former pilot for ITT, alleged that he was fired in retaliation for reporting suspected unethical and illegal conduct occurring in ITT's flight department to the senior vice-president. The Code, upon which plaintiff claimed that he relied in reporting the violations in question, states in pertinent part:

- If you know or have good grounds for suspecting that any illegal or unethical conduct has occurred or is planned by anyone, you are expected to report it. That report, which may be anonymous, will be treated confidentially, and one will not be penalized for making such a report.

Criado, 1993 WL 322837, at *2 (emphasis added). Like the Code, the company president's letter urged employees to report unethical or illegal conduct to their supervisors or the legal department. The letter also stated that ITT employees would not be penalized for reporting alleged violations. Criado also alleged that he was given oral assurances by an ITT senior vice-president that he would not be penalized for reporting the suspected conduct. Id.

After a jury trial, Criado was awarded $250,000 in compensatory damages for ITT's wrongful termination. Indeed, the court found that although Criado was an at-will employee, ITT had created an express limitation on its right to fire any employee who followed the Code and reported unethical or illegal activities. Criado, 1993 WL 322837, at *4.

1 It should be noted that the existence of the oral agreement was conceded and thus it was not an issue in the case. Rather, the sole issue was whether the oral agreement was sufficiently definite in duration to overcome the at-will presumption.

A promise of lifetime employment was at issue in Ohanian v. Avis Rent A Car Sys., Inc., 779 F.2d 101 (2d Cir. 1985). The plaintiff, a longtime employee of defendants, agreed to relocate himself and his family from the West Coast to New York, despite strong misgivings, based on oral assurances from senior corporate employees of "lifetime employment." A jury found that the promises made were more than just "casual comments or puffery"; rather, they constituted the inducements that convinced the plaintiff to relocate and attempt to revive a flagging company division. On appeal, the court agreed that the evidence supported the jury's verdict and that there was sufficient consideration to enforce the agreement for lifetime employment.

C. Implied Covenant of Good Faith and Fair Dealing

Courts in a number of jurisdictions, have held that employers have a duty to deal with employees "fairly and in good faith", in other words, in deciding to end the employment relationship, employers cannot act "arbitrarily or capriciously".

In Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977), the Supreme Judicial Court of Massachusetts found that a salesman with 40 years of service could not be fired by his employer simply to avoid paying commissions otherwise due on a large sale. Despite a written contract apparently permitting dismissal without cause, the court found that the employer's commission system necessarily implied a promise not to discharge except in good faith..

New York law holds that no implied covenant of good faith and fair dealing attaches to at-will employment relationships. See Hecht v. Nextel of New York, 2012 WL 2421874 (S.D.N.Y. June 27, 2012). For example, in Thompson v. Bosswick, 855 F. Supp. 2d 67, 84 (S.D.N.Y. February 27, 2012), a former at-will trust employee claimed, among other things, that his employer violated the covenant of good faith and fair dealing with respect to his employment contract. However, the District Court held that the employee could not maintain a claim for breach of covenant of good faith and fair dealing because his employment was at-will, acknowledging that employers have an "unfettered right to terminate an at-will employee."

D. Tort Theories

1. Introduction - Breach of Important Public Policy

Courts in a number or jurisdictions also recognize a so-called "public policy" exception to the "at-will" rule. In order for a termination to violate the public policy of a state, the courts generally look to see if the employee's termination "harms the interests of society as a whole".

Under this theory, an employee may recover in tort for a discharge in violation of public policy. Although courts are not in agreement as to what constitutes "public policy," there is general agreement that employers may not discharge employees for reasons that are contrary to law. Some jurisdictions rely on statutory or constitutional bases exclusively, whereas others find sources of public policy outside the legislative arena. The most frequent public policy violations are based on opposition to illegal conduct, exercise of a legal right, satisfying a legal obligation and termination based on an employer's unlawful motive. Where the reason for the termination is repugnant to public policy, courts have carved an exception to the "at-will" rule.

The District of Columbia Court of Appeals first recognized a narrow public policy exception to the at-will doctrine in Adams v. George W. Cochran & Co., 597 A.2d 28 (D.C. 1991). In Adams, the plaintiff was discharged from his position as a truck driver for refusing to drive a truck that did not have an inspection sticker on its windshield. District of Columbia law rendered it illegal to drive without a sticker. The Court held that it was unacceptable for an employer to force an employee to choose between breaking the law and keeping his job. Thus, the Court stated that "a discharged at-will employee may sue his or her former employer for wrongful discharge when the sole reason for the discharge is the employee's refusal to violate the law, as expressed in a statute or municipal regulation." Id. at 34.

The Arkansas Supreme Court sustained a cause of action alleging that the plaintiff was discharged because she refused to falsify information regarding Medicaid patients' charts. Webb v. HCA Health Services of Midwest, Inc., 780 S.W.2d 571 (Ark. 1989). In an earlier case, Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380 (Ark. 1988), the Court first recognized the public policy cause of action where an employee was discharged for exercising a statutory right or for performing a duty required by law.

The termination of a senior employee following his internal complaints concerning violations of city building codes and liquor laws supported a cause of action for wrongful discharge. Morishige v. Spencecliff Corp., 720 F. Supp. 829 (D. Haw. 1989). Although the employee's complaints were directed to management, they addressed matters of the public's safety, health, and welfare, and as such, were protected.

A sales representative who alleged that his superior ordered him to engage in a price fixing conspiracy in violation of state and federal antitrust laws was held to have stated a public policy claim. Tameny v. Atlantic Richfield Co., 164 Cal. Rptr. 839 (Cal. 1980). The California Supreme Court held that termination of an employee for refusal to commit a criminal act constitutes grounds for a cause of action in tort for wrongful discharge against the employer.

See also Petermann v. International Brotherhood of Teamsters, 29 Cal. Rptr. 399 (Cal. App. 2d Dist. 1963) (refusal to commit perjury); O'Sullivan v. Mallon, 160 N.J. Super. 416 (Law Div. 1978) (discharge for refusal to administer improper medical treatment); See Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985) (discharge for refusal to perform an illegal act). See Becker v. Cmty. Health Sys., 2015 Wash. LEXIS 1046 (Sept. 17, 2015) (refusing to criminally misrepresent the EBIDTA report of employers operating losses).

Discharges for Performing a Statutory Duty

Courts have protected workers from termination for performing duties required by statute.

In Dunwoody v. Handskill Corp., 185 Ore. App. 605 (Or. Ct. App. 2003), the Oregon Court of Appeals held that a woman terminated by her employer after she missed work in order to comply with a subpoena and assist in the prosecution of her husband's murderers violated public policy. The court held that this employee was entitled to bring an action for common law wrongful discharge since she had a duty to testify in criminal proceedings when compelled to do so by subpoena.

Questions to Assess Potential Legal Issues in the Workplace

Company Policy

- Is the subject matter of your decision addressed in your company policies?
- If so, is your decision explicitly authorized under company policy?
- If not, is your decision consistent with company policy?

Impact of Your Decision

- How could your decision impact an employee's …
  - Compensation or benefits?
  - Promotion or transfer?
  - Opportunity for promotion or transfer?
  - Job duties?
  - Nature or scope of an employees work assignments?
  - Opportunity for training?
  - Hours of work?
  - Physical workspace?
  - Work environment tenor or quality?
  - Reputation or status within the organization, or external to it, such as with clients or vendors?
  - Time off / away from work?

Who is Affected

- Who are the employees that are or could be affected by your decision?
- Do any of these employees fall into a protected class under federal EEO law based on their race, color, national origin, religion, gender, disability, or age?
- Do any of these employees fall into a protected class under state or local EEO laws based on their race, color, national origin, religion, gender, disability, age, sexual orientation, marital status, or other protected class?
- Have these employees requested an accommodation, exemption, or exception to policy, practice, or terms and conditions of employment because of their religion, disability or pregnancy related condition?
- Have any of the affected employees filed an internal or external complaint alleging the employer or its agents have violated an employment related law or any other law regulating the employer's business?

Employee History Considerations

- The years of service of the employee(s)
- Performance history of the employee(s)
- Has the employee filed an internal or external complaint alleging that the employer or agent committed a violation of the law?

* Seek advice; there may be amendments /interpretations of federal law, or state or local laws that should be considered.

Misconduct Issues

- Is the employee's behavior/conduct addressed in company policies?
- Have you had prior conversations with this employee regarding similar or related misconduct?
- Have you documented your discussions with the employee?
- Have you dealt with similar misconduct by other employees?
  - What course of action did you take in those instances?
  - What corrective action was taken against the employee(s)?
  - Are you responding in the same way in this instance?
  - If not, do you have a reasonable, business-related reason for responding differently?

Performance Issues

- Are you applying the same performance standards to similarly-situated employees?
- If not, do you have a reasonable, business-related reason for applying different performance standards to this employee?
- Have you clearly communicated your performance expectations to the employee?
- Have you had any prior conversations with this employee regarding similar performance issues?
- Have you documented your prior discussions with the employee?

Hiring, Promotion, or Transfer Decisions

- What criteria are you using to make this hiring, promotion, or transfer decision?
  - Are the criteria job related?
  - Have you made hiring, promotion, and transfer decisions or recommendations in the past?
  - Have you followed a similar process in making this hiring, promotion, or transfer decision?
  - If not, why are you following a different process in connection with this decision?
  - Is your decision based on the employee/candidate's ability, qualifications, and experience?
  - Do you have a business-related reason for rejecting the other candidates?
  - Does your organization have affirmative action obligations under federal, state, or local law?
  - Is there an underutilization of women or minorities in the job group/category that is the subject of your hiring, transfer, or promotion decision?
  - Has the employee requested a transfer or reassignment as a reasonable accommodation on the basis of disability or religion?

Compensation

- Does your decision impact employee compensation?
- Are you making deductions from an employee's wages?
  - Why is the deduction from wages being made?
  - What is the federal/state/local minimum wage rate in the state/city where the employee works?
    - Does the employee's hourly rate fall below the legally required minimum wage rate (state, federal or local) when the deduction is subtracted from his/her wages?
  - Are you making a decision that impacts the hours/time for which an employee is paid?
    - Could your decision/action result in an employee not being paid for time he/she is present at the workplace?
    - Could your decision/action result in an employee not being paid for time or effort that benefits the organization?
  - Could your decision/action result in an employee working more than 40 hours per workweek?
  - If so, would the employee be paid at a rate of one and one-half times his/her regular rate of pay for hours worked in excess of 40?
  - If not, has Human Resources/Legal determined that the employee/position is exempt from overtime requirements under state and federal wage and hour laws?

Absences from Work

- Has an employee indicated that he/she will need to be absent from work…
  - For obligations related to military service or reservist duties?
  - Because the employee or his/her spouse, parent, or child are ill?*
    - Has an employee indicated that the absence will exceed 3 consecutive business days?
    - Has the employee indicated that the employee/spouse/parent or child will be or has been hospitalized?
    - Has the employee indicated that multiple (full or partial days) absences are associated with the same chronic, recurring or terminal health condition?
  - Because of the birth of their child, the adoption of a child, or because they have become foster parents?
  - To care for a military service member undergoing medical treatment, recuperation, therapy, etc.?
  - Due to religious observance?
  - In connection with the employee's voluntary or involuntary military/reservist service?
  - Due to pregnancy, childbirth or related medical conditions?

*****You may become aware of such information directly from the employee or colleagues, but do not probe for such information without first seeking guidance from your manager or legal counsel.

- Has an employee been absent from work…
  - For more than 3 consecutive business days?
  - Because the employee or his/her parent/child/spouse was hospitalized or received treatment from a health care provider?
  - Because the employee was hospitalized or received treatment from a health care provider?
  - Because of a chronic, recurring or terminal health condition of him/herself or his/her child, spouse or parent?
  - Due to the birth or adoption of a child or placement of a foster child?
  - Or care for a military service member undergoing medical treatment, recuperation, therapy, etc.?
  - Due to religious observance?
  - In connection with the employee's voluntary or involuntary military/reservist service?
  - Due to pregnancy, childbirth or related medical conditions?

Concerted Employee Activity

- Are 2 or more non-supervisory employees acting together …
  - To protest, change or question company practices, policies, or operations?
  - To unionize the workforce?
  - To form a representative organization of employees?
- Is one or more non-supervisory employees . . .
  - Attempting to unionize employees?
  - Assisting a union in organizing the workforce?
  - Attempting to form a representative organization of employees?
  - Asking that a co-worker be present during an investigation interview that they reasonably believe may result in disciplinary action?
  - Acting on behalf of other employees to protest, change or question company practices, policies or operations?
  - Filing a grievance under a collective bargaining agreement?

Workplace Safety

- Does the decision/action relate to workplace safety?
- Could your decision/action create a condition in the workplace that could result in injury to employees?
- Has an employee suffered a work-related injury?
- Does your decision/action impact an employee who is currently on or has returned from a work-related injury leave?
- Has an employee requested an exception to / exemption from a safety-related practice/rule on religious or disability related grounds?
- Does the employee pose a direct threat to him/herself or others in light of his/her disability / medical condition?

Individual Employee Rights

- Does your decision/action impact…
  - An employee's personal belongings?
  - An employee's physical "person"?
- Would your decision/action result in monitoring or surveillance of employees or their activities at work?
- Are you attempting to regulate an employee's off-duty conduct?
- Does your decision/action result in the disclosure of information concerning the employee to individuals who do not have a business need to know the information?
- Does your decision/action result in the disclosure of information concerning the employee to individuals outside the organization?
- Is an employee participating in or assisting an enforcement agency or a current or former co-worker in connection with a proceeding before the . . .
  - National Labor Relations Board
  - Occupational Safety and Health Administration
  - US Department of Labor in connection with a wage dispute
  - US Department of Labor in connection with a dispute over an employee's treatment at work before, during or after a military leave or leave from work for reservist duty
  - State workers' compensation boards/agencies
  - Federal, state, or local equal employment opportunity agencies
  - Government agencies responsible for regulatory enforcement in the employer's business/industry

ER and Legal Considerations

Management Action	Employee Relations Issues	Legal Issues
Corporate Policy & Practice	Are company policies/practices reasonable? Are company policies/practices consistently enforced?	Do company policies & practices meet or exceed employment law requirements? Does enforcement of/adherence to company policy turn on an employee's race, color, national origin, religion, disability, sex or other protected class? Does enforcement of/adherence to company policy adversely impact members of a protected class? Is the employer required to adapt its policies/practices in order to reasonably accommodate an employee's disability or religious observance, pregnancy needs?
Compensation	Are employees compensated competitively in comparison to market and industry standards? Do fringe benefits reflect market and industry standards? Are compensation, bonuses and "perks" awarded based on merit, achievement or other legitimate, business-related criteria and <u>not</u> favoritism or arbitrary standards?	Are employees paid minimum wage for all hours worked? Is an employee's job classification correctly classified as a position that is exempt from overtime requirements? Are employees in non-exempt positions paid overtime at a rate of time and one-half for all hours worked over 40 in a workweek? Are employees paid equal pay for equal work, regardless of their sex? Does an employee's race, color, national origin, sex, religion, disability or other protected status under EEO laws impact his/her compensation, benefits or "perks?" Are wages paid (scheduling, timing, method, etc.) in accordance with state and local law mandates?

ER and Legal Considerations

Management Action	Employee Relations Issues	Legal Issues
Leaves of Absence and Alternative Scheduling	Do leave options/benefits afforded to employees reflect industry and market standards? Are leave options extended to employees consistent with company policy? Are manager's decisions with respect to the granting and denial of leave tied to operational needs? Are flexible or alternative work schedules made available to employees on a consistent, business-related basis?	Is an employee seeking time off because of an illness, injury or medical condition of him/herself, a spouse, child or parent? Is an employee seeking time off from work or duty-free time while at work for religious observance? Is the employee seeking time off from work to care for a newborn or a newly adopted child, or a newly placed foster child? Is an employee requesting flexible scheduling to seek medical treatment necessitated by an illness, injury or medical condition of him/herself, a spouse, child or parent? Is an employee being denied or granted leave, flexible schedule or alternative work schedule based on his/her sex, race, color, national origin, religion, disability or other protected status under EEO laws. Is an employee seeking time off from work or flexible scheduling due to pregnancy, childbirth or related medical conditions?

ER and Legal Considerations

Management Action	Employee Relations Issues	Legal Issues
An Employee's "Voice" in the Workplace	Are employees comfortable raising issues or concerns with management? Do employees have informal or formal mechanisms for raising concerns/issues to management about working conditions? Are employees encouraged to participate in meetings, voice ideas and propose innovation and change?	Are two or more non-supervisory employees joining together to protest working conditions, prompt management action, etc.? Is an employee alleging unlawful discrimination in the workplace? Is an employee alleging a violation of an employment law? Is an employee complaining about a company policy or practice that could be prohibited under regulatory or industry laws? Has an employee filed a grievance pursuant to a collective bargaining agreement? Has an employee filed a lawsuit or a complaint with an administrative agency alleging a violation of an employment law? Has an employee complained about working conditions on social media or "liked" or commented on another employee's posting?
Workplace Safety & Well-Being	Is the employer concerned with employee well-being and development? Does the employer offer support to the employee to ensure his/her well-being (Employee Assistance Programs, on-site health club, etc.)?	Has an employee suffered a work-related injury? Is the organization complying with workplace safety standards?

ER and Legal Considerations

Management Action	Employee Relations Issues	Legal Issues
Individual Employee Rights	Do employees feel empowered within the organization and with respect to their own career paths? Does management treat employees with respect? Does the organization require and promote respect for all employees? Are differences among employees respected and valued? Is the organization committed to promoting diversity and inclusion? Do employee's respect and trust management?	Is the organization monitoring employees' telephone, voice mail, e-mail usage or internet usage? Are an employee's personal belongings or physical person subject to search? Is a representative of the organization disclosing information about the employee to a third party? Is the employer inquiring about employees' off-site, off-duty conduct that is unrelated to their job?
Corrective Action	Do employees receive timely, regular feedback (both positive and corrective) from their managers? Is the corrective action the same for similarly-situated employees? Is corrective action proportional to the performance or misconduct issue presented?	Is corrective action (when it is taken, what action is taken) impacted by the employee's race, color, national origin, sex, religion, disability or other protected status? Is the employer taking (or not taking) corrective action in response to inappropriate behavior that is sexually, racially or ethnically charged or in any way discriminatory?
Hiring/ Promotion/ Transfer	Are hiring, transfer and promotion decisions based on merit and other business-related criteria? Are employees aware of promotion and transfer opportunities? Are employees supported (through mentoring, training opportunities, development plans, etc.) to ensure they develop and become qualified for other career opportunities within the organization?	Is the hiring, transfer and promotion decision being made by an employer that is a government contractor with affirmative action responsibilities? Are hiring/transfer/promotion procedures adapted when required to reasonably accommodate individuals with disabilities?

Reference Guide – Interview Questions

The sample interview questions should be discussed with HR before using them

Don't Ask	Alternative Inquiry
Gender, Marital Status, Sexual Preference	
Are you married, single divorced, separated?	This job requires 30% overnight travel. Can you meet this requirement of the position?
Are you addressed as Miss? Mrs.? Ms.? What is your spouse's name, occupation, and employer?	
What is your gender?	
Are you planning on starting a family? How many children do you have? Do you have family responsibilities?	What are your career goals? Would you be willing to relocate?
How will your spouse feel about your traveling overnight 50% of the time?	This position requires 30% overnight travel. Can you meet this requirement of the position? Have you had to travel that much before?
What childcare arrangements have you made?	Our hours are ___ AM to ___ PM. Can you meet this requirement of the position? This position requires approximately ___ hours of overtime per week, often with little or no notice. Can you meet this requirement of the position? This position requires you to work shifts that can rotate on a weekly or monthly basis with little or no notice. Can you meet this position requirement?

Reference Guide – Interview Questions

The sample interview questions should be discussed with HR before using them

Don't Ask	Alternative Inquiry
Age	
How old are you? What is your date of birth?	Tell me about your experience in this area. Tell me about your work history. Are you 18 or older?
Inquiries concerning retirement plans, retirement timelines, etc.	What are your short and long-term career goals?
Inquiries/statements regarding the older candidate being "overqualified" for the job.	The salary for this position is X. Are you willing to accept the salary level for this position?
Ethnical Origins/Nationality	
Where are you from? Where were you born? Are you a citizen of the United States?	If hired, can you furnish proof you are eligible to work in the United States?
What languages do you speak?	Ask about specific language skills only if used on the job for which you are interviewing. If job related: What languages can you read, speak, or write fluently? Can you read, speak or write (specific language) fluently?
Do you own your home, or rent? How long have you lived in this country?	What is your address?
What kind of name is that?	
Questions regarding an applicant's (or the applicant's spouse's) lineage, ancestry, parentage or nationality	

Reference Guide – Interview Questions

The sample interview questions should be discussed with HR before using them

Don't Ask	Alternative Inquiry
Health-Related Inquiries	
Is there a health-related reason you may not be able to perform the job for which you are applying? Have you ever had or been treated for any of the following conditions or diseases? Have you ever been treated for a mental condition? Are you taking prescription drugs?	Describe or demonstrate how you will perform certain job-related functions or tasks. (May be asked only if <u>all</u> candidates for the job are asked)
Tell me about any restriction you have that would prevent you from lifting 30-pound metal sheets onto a conveyor belt for about four hours each day.	Are you able to perform all the essential functions of the job?

Transfer and Apply What You Learned

Based on what you learned, select one skill/concept that you would like to commit to transfer and apply in your work over the next 4 weeks.

Examples of ways to transfer the information:

- Teach it to others
- Notice when it is used/not used by others or yourself
- Practice using it

Measuring How I Applied the Concept/Used the Skill

- When and how often have you used it?
- What are some examples of ways you could have used it?
- Have you noticed others doing it or times they could have done it?
- What else can I do to help you apply this at work?

Insight/Skill/Concept for Myself

Insight/Skill/Concept for the Organization

Key Concepts/Skills to Apply At Work

Learning should be transferred and used in a way that improves results

Insights/Concepts/Skills to Transfer And Apply