



# Employment Law 101: Summary of Common Claims

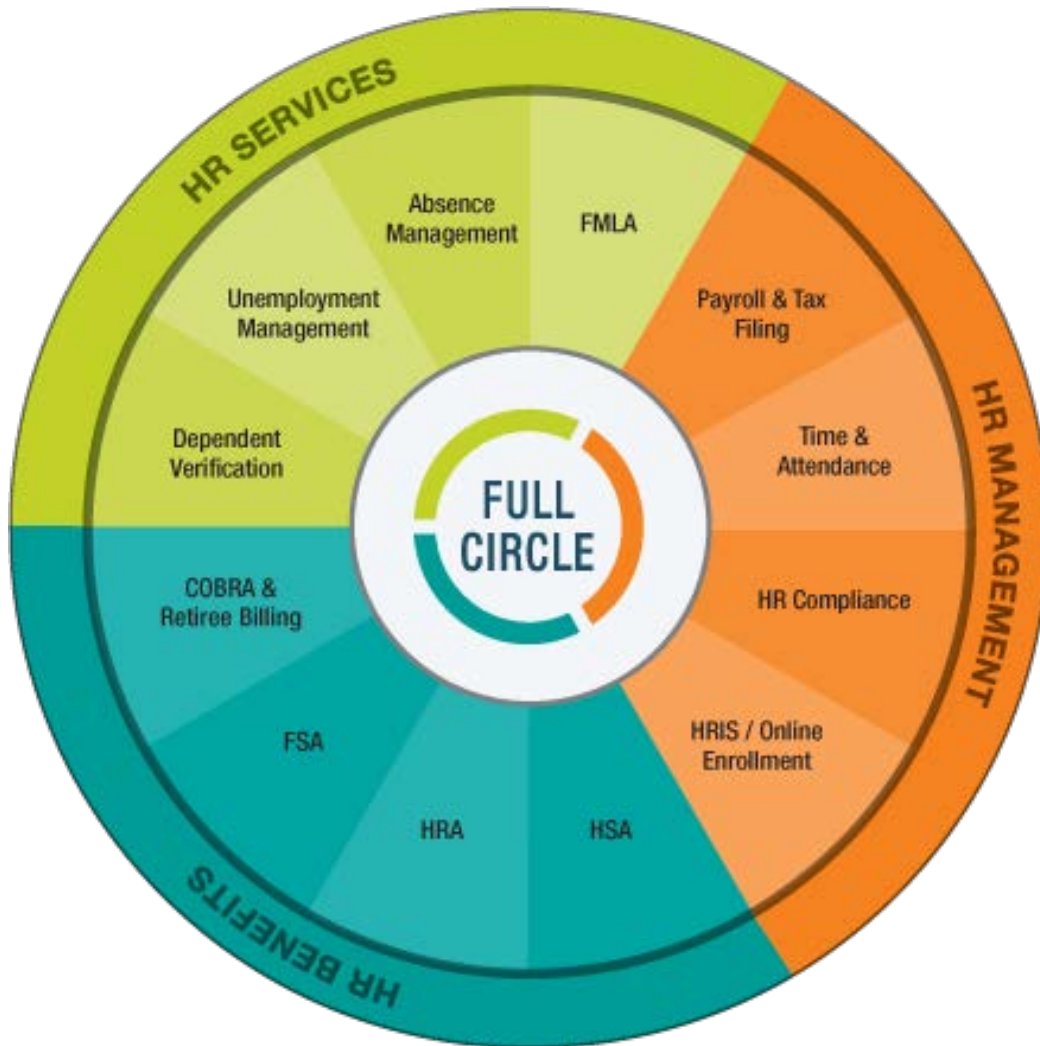
Presented by: Jeff Silence, Esq.



- HR Benefits
- HR Management
- HR Services

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# Discrimination – Title VII



Prohibits discrimination on the basis of

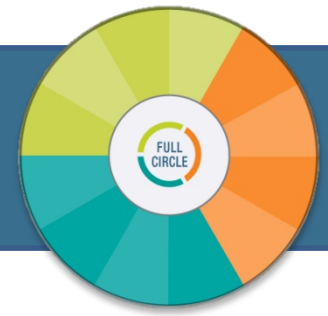
- Age
- Sex
- Pregnancy
- Race
- Color
- National origin
- Religion

# Title VII



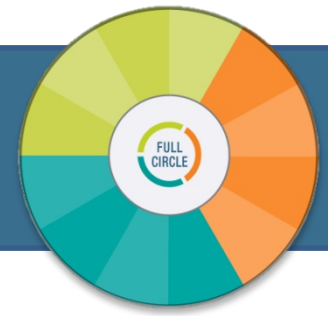
Applies to all state and federal agencies and employers with 15 or more employees.

# Sexual Orientation



- Title VII does not specifically prohibit discrimination based on sexual orientation or gender identity.
- But, courts prohibit discrimination based on the failure to conform to gender stereotypes (i.e., a man acting “feminine”).
- Also, recent 7<sup>th</sup> Circuit ruling.

# Best Practice



Treat LGBTQ as a protected class.

# Forms of Discrimination



- (1) Adverse employment action, and
- (2) “Hostile work environment.”



# Adverse Employment Action



Any action that is reasonably likely to deter employees from exercising their rights.



# Adverse Employment Action



- Obvious - termination, demotion, and reduction in pay.
- Not so obvious - paid leave, undesirable transfer, reduction in responsibilities, and even a written warning if it can later be used as basis for increased discipline.

# Adverse Employment Action



- Employer strictly liable when employer takes adverse employment action if based on protected class status.

# Hostile Work Environment



- Employer only liable if it was negligent in controlling working conditions (i.e., failed to investigate and take “prompt remedial action”)

# Hostile Work Environment



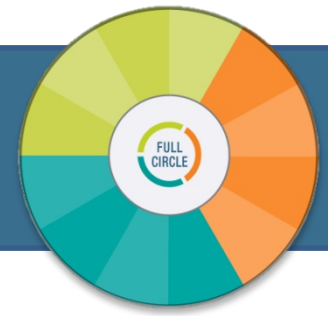
- Objectively and subjectively severe or pervasive.
- Must
  - alter the terms and conditions of employment.
  - interfere with victim's ability to work.
  - be unwelcome.

# Hostile Work Environment



- Simple teasing, offhand comments, and isolated incidents generally insufficient.
- One incident may be enough, if severe.
- If harasser is supervisor, then more severe.

# Harassment May Be:



- Female to male
- Female to female
- Employee to supervisor
- Non-employee to employee

# No Intent Required.



- Hostile work environment can be based on loose lips, pictures, and sexual comments or discussions that are not directed at the victim.

# Supervisor Harassment



- Employer strictly liable for harassment by supervisor *that results in an “adverse employment action.”*
- If not, then employer only liable if it failed to take prompt remedial action.



# Quid Pro Quo



- Employer also strictly liable for quid pro quo harassment – job benefits conditioned on submission to sexual advances.

# Americans with Disabilities Act, as Amended



- Prohibits discrimination because of a disability.
- Or, employee has a record of a physical or mental impairment or is regarded as having such an impairment.

# What is a Disability?



- “Any physical or mental impairment that substantially limits any life activity.”
- Any condition (temporary or permanent) that affects the employee’s ability to walk, think, sleep, talk, sit, etc.
- Courts have found that depression, diabetes, ADD/ADHD, and temporary physical injuries are disabilities.

# ADA – Employer’s Obligations



- (1) Meet and confer to discuss possible accommodations, and
- (2) Provide reasonable accommodation if not unduly burdensome.
- May have to grant the employee extended leave of absence or allow them to work from home if reasonable.
- What is “reasonable” depends on circumstances.

# Employee Not Always Required to Ask for an Accommodation



- Generally, employee is supposed to request an accommodation.
- But, employer may have obligation to schedule a meet and confer and offer accommodation if need for accommodation is obvious.

# Retaliation



- Illegal to retaliate against anyone who
- (1) complains about discrimination,
- (2) aids in the investigation of a complaint, or
- (3) opposes discriminatory practices.
- Can prevail on a retaliation claim even if court finds no actual violation of Title VII.

# Consequences of Discrimination



- Lost wages, damages for emotional distress, punitive damages, equitable relief (i.e., reinstatement), and permissive attorney fees.
- Harasser not liable, except for other torts like assault, defamation, or intentional interference with contract.
- Remedies under any state statutes or city ordinances.

# Title VII - Damage Caps



- Combined total of compensatory and punitive damages cannot exceed damage caps.
- 15 to 100 employees = \$50,000
- 101 to 200 employees = \$100,000
- 101 to 200 employees = \$200,000
- 201 to 500+ employees = \$300,000



# Title VII - Damage Caps



- No cap on back pay or front pay.
- Jury not told about caps.

## Common Mistakes in Discrimination and Retaliation Cases



- Not communicating with the victim.
- Not acting promptly.
- Retaliation.
- Confidentiality.
- Thorough investigation.

# Best Practices Generally



- Apply the golden rule.
- Act promptly and diligently when responding to any complaint.
- Immediately separate the victim from the harasser.

# Best Practices Generally



- Give written warnings and place on PIP before terminating.
- Tell employee in writing why they are being terminated if there is a good reason.
  - “We are terminating you, in part, because .....”

# Independent Contractor vs. Employee



Different factors depending on which claim alleged.

1. Most important factor under most of the tests is the extent of control the employer exercises over the individual.

Agreement of parties not controlling.



2. Whether the worker's efforts promote his own independent enterprise the employer's business

i..e, paperboy purchases newspapers and then sells them at a profit/loss versus being paid a salary or an hourly wage.

3. Specialization or skilled occupation.

Less skilled = more likely to be an employee.

# Other Factors



## 4. Materials and place of work

Using your own equipment or employer's?

## 5. Duration of employment;

One-time job or long term?

## 6. Method of payment.

More likely to be employee if paid hourly or salary than by completion of task.



## 7. Relationship of work done to the regular business of the employer;

Is work performed part of employer's regular business?

## 8. Belief of the parties.

1099 or W2?

Employment agreement?

Emails or other documents?



# Fair Labor Standards Act



- Unlike right to control test, FLSA employs the “economic realities test.”
- Most liberal test under any law.
- Test: where does the employee get their money?

# Fair Labor Standards Act



- Must pay federal minimum wage (\$7.25 per hour)
- Must also pay non-exempt employees 1.5x their regular rate for all time worked in excess of 40 hours in a 7-day workweek.



- Applies to all employers who have any contracts with the federal government or who are “engaged in interstate commerce.”
- (1) employees handle, sell, or otherwise work on goods that have been moved in or produced for commerce, and
- (2) annual gross volume of \$500,000 in sales.



- Must keep records showing rate and basis of pay, number of hours worked each day, overtime payments, total wages paid, date of each payment, and weekly work schedules.
- Failure to keep records creates a rebuttable presumption that employee's allegations are accurate.

# FLSA - Exemptions



- Applies only to non-exempt employees.
- LOTS of exemptions (at least 44).
- Truck drivers, railroad workers, babysitters, and outside sales.
- Primary exemptions:
  - (1) Administrative,
  - (2) Executive, and
  - (3) Professional.

# Administrative Exemption



- Administrative
- a) office or nonmanual work, which is
- (b) directly related to management of the business, and
- (c) a primary component of which involves the exercise of independent judgment and discretion about
- (d) matters of significance.

# Professional Exemption



- Those with specialized intellectual knowledge and instruction. Generally must have a college degree and in many cases an advanced degree.

# Executive Exemption



- Regularly supervises two or more other employees,
- has management as the primary duty of the position, and
- has some genuine input into the job status of other employees (such as hiring, firing, promotions, or assignments).



# FLSA – Work Week



Must be fixed.

7 consecutive days.

Must be paid for all hours worked.

# FLSA – Lunch Break



Lunch breaks are compensable unless

- (1) the breaks are generally 30 or more minutes,
- (2) Employee not obligated to answer phone or do anything else, and
- (3) Employees are free to leave their work station.

# FLSA - Damages



- Mandatory award of attorney fees and liquidated damages on amount of unpaid wages.



SOL – 2 years unless “willful,” in which case 3 years.

Willful is not a difficult burden to satisfy.

# FLSA – Best Practices



- Misclassification?
- Keep all records for 4 years after last day of employment.
- Have employees sign their timesheets.
- Get legal advice on exempt status.

# Family Medical Leave Act



- 12 weeks of unpaid leave during a 12-month period for any of the following:
- 1. the birth of a child and to care for the child after birth;
- 2. the placement of a child with the employee for adoption or foster care;

# Family Medical Leave Act



3. to care for the spouse, child, or parent of the employee who has a serious health condition;
4. the employee's own serious health condition; and
5. a "qualifying military exigency."

# Family Medical Leave Act



Applies to biological, adopted, and foster children.

Also stepchildren, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.



# FMLA – Employer's Obligation



- Must be restored to their same position or an equivalent position.
- Equivalent benefits, pay, and other terms and conditions of employment.

# Interplay Between FMLA and ADA



- Under ADA, may have to allow employee to take more than the minimum 12 weeks as a reasonable accommodation.

# FMLA – Who Qualifies?



- To qualify, employee must have worked at least 1,250 hours for the employer during the previous 12 months.
- Must work for
  - (1) a state or federal agency, or
  - (2) a private sector employer that employ 50 or more employees within a 75 mile radius of the location where the employee works.

# FMLA – 2 types of claims



- (1) Interference, and
- (2) Retaliation

# FMLA – Interference



- Employee made request for FMLA leave, and request was denied
- Or, employer failed to restore employee to same or equivalent position.
- Intent not required.

# FMLA – Retaliation



- Employee suffered an adverse employment action because they exercised their FMLA rights.

# FMLA – Damages



- Potentially severe consequences.
- Mandatory fees, liquidated damages on lost wages, and increased cost of medical care due to no longer being on employer's health plan.

# Whistleblower Statutes



- At least 44 federal statutes that protect whistleblowers.
    - Clean Air Act, Dodd Frank, Railway Safety Act, Sarbanes Oxley.
- Also, many state laws to consider.



# Sarbanes Oxley



Any publicly traded company or any company that is required to file reports under section 15(d) of the Securities Exchange Act may not “discriminate” against any employee who reports a violation of any SEC rule or regulation to their supervisor, federal law enforcement, or Congress.

# Broad Application and Favorable Remedies



Most federal whistleblower laws prohibits any form of discrimination because an employee blew the whistle.

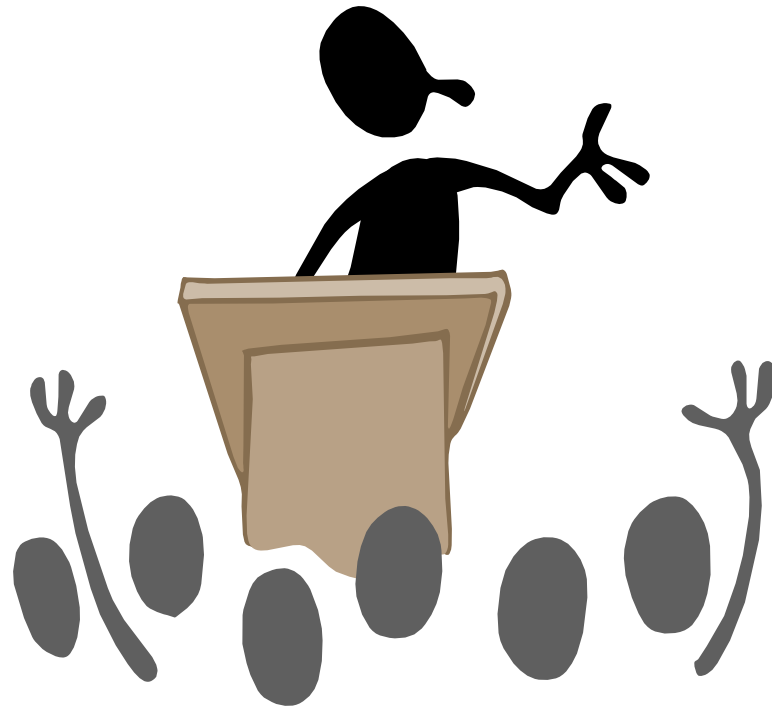
Employee can recover lost wages, punitive damages, damages for emotional distress, and fees. Also, right to reinstatement.

# Whistleblower – Best Practices



- If you receive a complain that raises concerns about potentially unlawful conduct, be very careful.
- Investigate and address the complaint.
- Don't retaliate against the employee.
- Provide a thoughtful response.
- Document everything.

# Thanks!





# Questions



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# Contact Us



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