



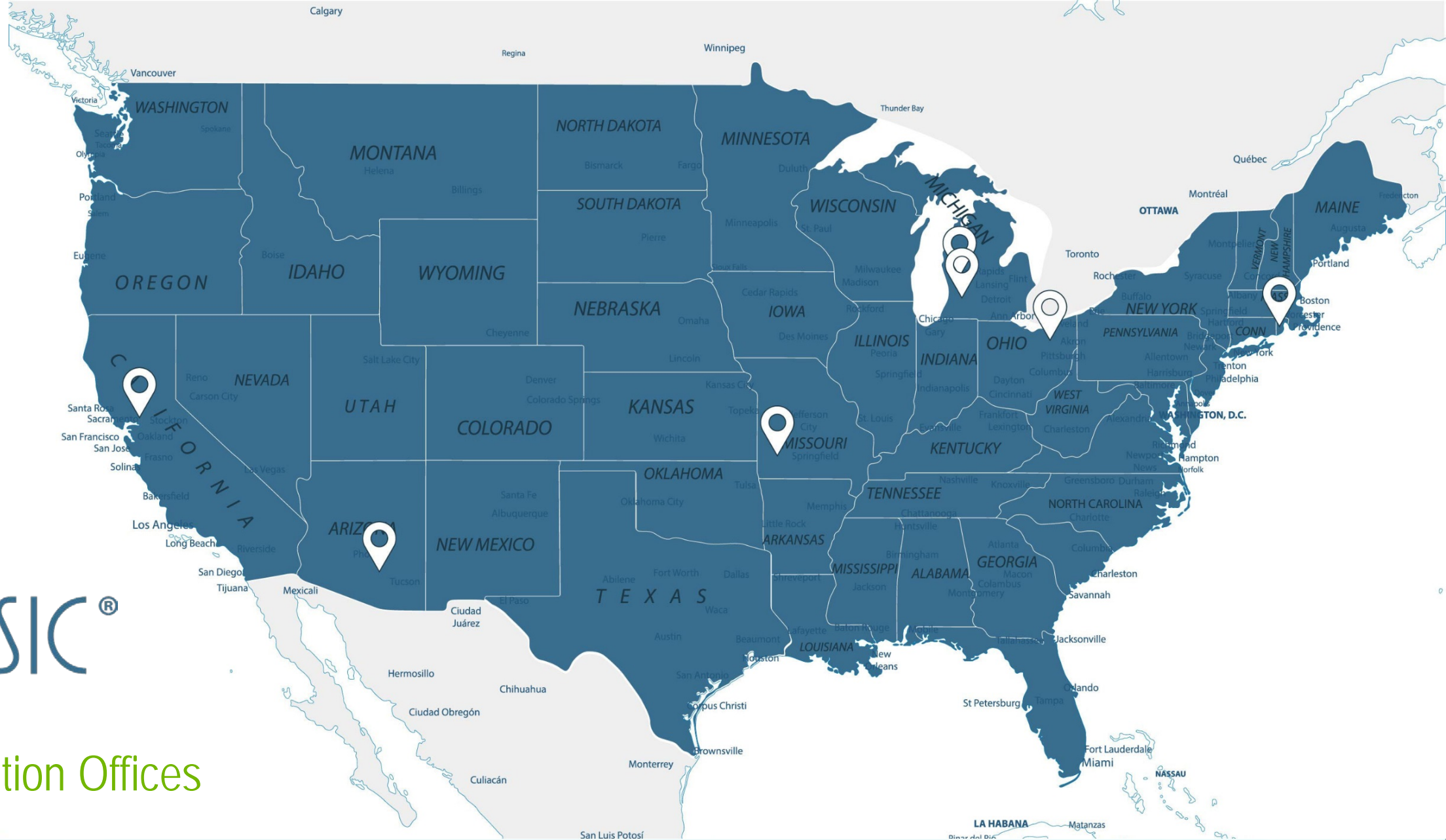
BASIC®

HR Compliance & Technology

EMPLOYMENT LAW 101: SUMMARY OF COMMON CLAIMS



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Administration Offices



BASIC family of companies includes;

- BASIC pacific
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Technology Driven HR Solutions to Take Your Company Further



HR Solutions should be simple. **Keep it BASIC.**

➤ Presented by

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➤ Title VII of Civil Rights Act

Prohibits discrimination based on

- Age
- Sex
- 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, some circuit courts prohibit discrimination based on failure to conform to gender stereotypes
 - (i.e., man acting “feminine” or vice versa).

➤ Best Practice

Treat LGBTQ as protected class.

➤ Types of Discrimination

- (1) Tangible employment action
- (2) “Hostile work environment.”

➤ Tangible Employment Action

- Termination
- Demotion
- Reduction in pay or benefits
- Undesirable transfer or reassignment
- Failing to promote or give pay raise

➤ Strict Liability

- Employer strictly liable when manager/ supervisor takes tangible employment action.



➤ Harassment

- Employer only liable for harassment (even harassment by supervisor) if it fails to take “prompt remedial action.”
- Must quickly investigate and stop harassment.

➤ Hostile Work Environment

- Objectively severe or pervasive.
- Must
 - alter terms and conditions of employment.
 - interfere with ability to work.
 - unwelcome.

➤ Hostile Work Environment

- Simple teasing, offhand comments, and isolated incidents insufficient.
- One incident may be enough, if severe.
- If harasser is supervisor, conduct considered more severe.
- Not easy for employee to prevail.

➤ All Forms of Harassment Prohibited

- Female v. male
- Male v. male
- Employee to supervisor
- Non-employee to employee

➤ No Intent Required

- Harassment can be based on comments not directed at victim.



➤ Quid Pro Quo

- Job benefits conditioned on submission to sexual advances.
- Employer strictly liable.

➤ Americans with Disabilities Act

- Prohibits discrimination based on
 - (i) disability,
 - (ii) record of disability, or
 - (iii) being regarded as having disability.

➤ 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.
- Depression, diabetes, ADD/ADHD, and temporary injuries are disabilities.

➤ Employer's Obligation

- (1) Meet and confer, and
- (2) Provide reasonable accommodation.
- Accommodation not reasonable if “unduly burdensome.”

➤ Extended Leave and Telecommuting

- Leave of absence for 12 weeks (in addition to 12 weeks of FMLA leave) may be reasonable.
- Telecommute may be reasonable.
- Depends on job duties and employer's resources and needs.

➤ Other Accommodations

- Modifying work schedules
- Granting breaks
- Altering how or when job duties are performed
- Removing or substituting marginal job function

➤ More Examples

- Assistive technology
- Reconfiguring work spaces
- Accessible parking
- Materials in alternative formats (e.g., Braille, large print)
- Reassignment to another job

➤ Employee Not Always Required to Ask for an Accommodation

- Generally, employee is supposed to request an accommodation.
- But, employer has obligation to meet and confer if it believes employee may need an accommodation.

➤ Job Applicants

- May ask whether they can perform job duties with a reasonable accommodation.
- Cannot ask applicant to answer medical questions, take medical exam, or if they have disability.
- Can provide conditional job offer and then ask for medical documentation supporting request for accommodation.
- Less you know, the better.



➤ Retaliation

- Cannot retaliate against employee who
- (1) complains about discrimination,
- (2) aids in investigation of discrimination, or
- (3) opposes discriminatory practices.

➤ Retaliation

- Employee may prevail on retaliation claim even if court finds no actual discrimination.
- 50% of all EEOC charges are retaliation claims.
- Plaintiff's attorneys love retal cases.

➤ Consequences

- Lost wages
- Damages for emotional distress
- Punitive damages
- Reinstatement, and
- Attorney fees (often wag the dog).

➤ Harasser Not Personally Liable

- Harasser not personally liable, except for other torts like assault, defamation, or intentional interference with contract.

➤ 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, front pay, or fees.
- Courts have awarded \$500,000 in fees when employee only recovers \$15,000 in damages.

➤ Most Common Mistake!

- Not communicating with victim!!!
- This is, by far, the biggest mistake employers make.

➤ Best Practice – Platinum Rule

- Ask employee how they feel and what they want to happen.
 - which witnesses should I interview?
 - Is written warning sufficient?
 - Can you continue working with harasser?
 - What information can I share with the harasser about your complaint?
 - Anything else I can do to address your concerns?

➤ Platinum Rule

- Are you concerned about other employees finding out about your complaint?
- What can I do to protect you while we investigate?
- Do you want me to separate you from the harasser during investigation?

➤ Document Everything!

- Send email summarizing what employee reported and what they want to happen.
- Keep employee updated.
- Tell employee about findings of investigation and discipline imposed.
- Be an open book!

➤ Bystander Training

- “Bystander training” = what to do when you witness discriminatory behavior.
- “That joke wasn't funny,” and change the subject.
- Ask victim (in private): “I noticed that xyz happened. Were you okay with that?”

➤ Bystander Training

- Ask harasser (in private): “Were you aware of how you came off in that conversation?”
- Studies show well-trained bystanders make a huge difference.

➤ Don't Let Small Things Slide

- Document all complaints, no matter how minor.
- Research shows letting small things slide opens door for more severe behaviors.

➤ Proportional Consequences

- Most victims of harassment don't want harasser fired.
 - They just want harassment to stop.
- Make clear that goal is to eliminate harassment - not fire everyone who makes a joke or comment in poor taste.
- Employees feel more comfortable complaining when they understand harasser won't lose their job.

➤ Fair Labor Standards Act (FLSA)

- Plaintiff's attorneys LOVE these cases because mandatory fees and black and white results.
- Be very careful.



➤ 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 7-day workweek.

➤ FLSA – Employee vs Independent Contractor

- “Economic realities test.”
- Test: where does the employee get their money?
- Most liberal test under any law, by far.
- If there is any doubt, worker = employee.

➤ FLSA

- Applies to all employers who have any contracts with the federal government or who are “engaged in interstate commerce.”
- Every employer, except all cash businesses, are engaged in interstate commerce.

➤ FLSA

- 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 as to # of hours worked are true.

➤ FLSA - Exemptions

- Applies only to non-exempt employees.
- LOTS of exemptions (at least 44).
- 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 business, and
- (c) primary component of which involves exercise of independent judgment and discretion about
- (d) matters of significance.

➤ Professional Exemption

- Those with specialized intellectual knowledge and instruction.
- Generally must have advanced degree.



➤ Executive Exemption

- Regularly supervises two or more employees,
- management as primary duty, and
- genuine input into hiring, promotion, and firing of other employees.

➤ 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 any work, and
- (3) employee is free to leave their work station.

➤ FLSA - Damages

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

➤ FLSA – Best Practices

- Keep all records for 4 years after last day of employment.
- Have employees sign timesheets.
- Legal advice.

➤ Family Medical Leave Act

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



➤ Family Medical Leave Act

3. care for spouse, child, or parent of employee with serious health condition;
4. 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, legal ward, or child of 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.
- Additional 12 weeks found by courts to be reasonable.

➤ FMLA – Who Qualifies?

- Employee must have worked 1,250 hours during 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 location where employee works.

➤ FMLA – 2 types of claims

- (1) Interference
- (2) Retaliation

➤ FMLA – Interference

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

➤ FMLA – Retaliation

- Employee suffered retaliation or a tangible employment action because they exercised FMLA rights.

➤ FMLA – Damages

- Mandatory fees,
- Liquidated damages on lost wages, and
- Increased cost of medical care due to no longer having insurance.

➤ 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 prohibit 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 complaint that raises concerns about potentially unlawful conduct....
 - Thank employee.
 - Investigate
 - Don't retaliate.
 - Seek legal counsel.
 - Provide thoughtful response.
 - Document everything.

QUESTIONS



Technology Driven HR Solutions to Take Your Company Further



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HSA
HRA
Parking & Transit



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