

EMPLOYMENT LAW BASICS

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Employment Law in 50 minutes?

- An impossible task.
- Rocket science?
- Employment Law – a highly technical area.
When in doubt, ask a specialist in employment law.
 - Do you do your own electrical work?
 - Who needs a lawyer?
 - Everyone: Employees *and* Employers

Useful Internet Sites:

- Texas Workforce Commission:
www.twc.state.tx.us
- U.S. Department of Labor:
www.dol.gov
- EEOC:
www.eeoc.gov
- Texas Association of Business:
www.txbiz.org

Just a Few of the Laws That Apply to Employment:

- Title VII
- Americans With Disabilities Act (ADA)
- Fair Labor Standards Act (FLSA)
- Family Medical Leave Act (FMLA)
- Pregnancy Discrimination Act (PDA)
- Age Discrimination In Employment (ADEA)
- Fair Credit Reporting Act
- Equal Pay Act
- Uniformed Services Employment and Re-employment Rights (USERRA)
- ERISA
- Occupational Health and Safety Act (OSHA)
- COBRA
- HIPAA
- Texas Payday Law
- Texas Commission on Human Rights Act
- Texas Unemployment Compensation Act

At-Will Employment

- **Texas is an “At-Will Employment” State:**

“...absent a specific agreement to the contrary employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”

At Will Employment, cont.

- **Some Restrictions to Termination of Employment, including:**
 - Discrimination
 - Retaliation for filing a claim or asserting rights
 - Refusal to do an illegal act

At Will Employment, cont.

- **Written Contract**
 - A contract is almost the only way to prove that an employer has restricted the ability to terminate an employee at will.
 - Not so fast employers: even without a contract, if employer has used particular procedures or standards in the past terminations of others, might face liability if you don't follow them in the future...
 - Employee Handbook is generally not enough to support a "contract" argument.

Texas Pay Day Law

- **Pay employees in full and on time**
 - Terminated Employees must be paid no later than 6th day after termination
- **Employer may only withhold wages from employee if:**
 - Court order
 - written authorization from employee
 - State or federal law authorizes withholding
 - No Texas state law allows "garnishment" of wages
 - Federal law – ex: U.S. Dept. of Education authorized to withhold for student loan payments

Fair Labor Standards Act (FLSA)

- National Policy on minimum wages and overtime payments for “covered” employers and employees.
- What Does FLSA Provide?
 - Federal Minimum Wage: \$6.55/hour (\$7.25/hour effective July 24, 2009) (Texas law mirrors federal wage.)
 - Overtime: 1 ½ times the regular rate of pay for all hours worked over 40 in a work week
 - If Texas law or union agreement provided greater protection or pay to the employee, those provisions apply.

FLSA, cont.

- What Employers are Covered?
 - Businesses with \$500K annual sales/revenue – almost certainly covered
 - Public agencies, schools, hospitals, etc – covered even if revenue below \$500K
 - Businesses with employees “engaged in interstate commerce” such as:
 - Communications – regular use of mails or telephones in interstate commerce.
 - Transportation – handle, ship, or receive goods in interstate commerce

FLSA, cont.

- Exempt v. nonexempt status is the most litigated issue in federal courts.
 - The FLSA has approximately 30 separate exemptions from minimum wage and/or overtime requirements – If you have any doubts, you probably need a lawyer to help you find the answer.
- Complex, case-by-case, analysis:
 - Texas Fireworks Stands held to be covered by FLSA because they do not fall under “seasonal amusement or recreational establishment” exemption.

FLSA, cont

What Types of Employees are Covered?

- “Blue collar” employees
 - Employees who regularly perform manual labor (such as carpenters, electricians, mechanics, plumbers, construction workers, etc.) or law enforcement and emergency personnel.
- Anyone earning less than \$23,660/year.

FLSA, cont.

- What Types of Employees are exempt?
 - “white collar” employees - executives, administrators, professionals, computer employees, etc., earning salary of more than \$23,660/year.
 - “highly compensated employees” earning \$100K/year or more

FLSA, cont.

- Penalties for Violating the FLSA:
 - Amount of unpaid minimum wages and overtime:
 - Additional “liquidated damages” equal to the unpaid wages and overtime:
 - If “good faith” and “reasonable grounds” to believe FLSA was not being violated, court could set aside liquidated damage award.
 - Attorneys fees; and
 - Costs of the lawsuit
- Employers are presumed to know the law
- 2 year statute of limitations; 3 years if “willful” violation

Family Medical Leave Act

- U.S. policy that qualifying employees be granted family or medical leave.
- Applies to employers with 50+ employees working each work day during 20 or more calendar weeks (including “temporary” workers)
- Applies to employees who:
 - Worked at employer at least 12 months, and
 - Worked at least 1,250 hours (25hours/week) during last 12 months, and
 - Lives within 75 miles of at least 50 people working for the same employer

FMLA, cont.

- Qualified Family Leave:
 - Birth of son or daughter
 - Placement of child with employee for adoption/foster care
 - “Exigencies” relating to a family member who is on active military duty (waiting for Dept. of Labor definitions...)

FMLA, cont.

- Qualified Medical Leave – to care for a “serious health condition” for:
 - son, daughter, spouse, or parent
 - the employee herself or himself, if the employee is unable to perform the functions of the job or position
 - next of kin, if the relative is in the Armed Forces
- Documentation – Employer may require documentation of the condition that is the basis of the request.

FMLA, cont.

- Act provides for up to 12 weeks of leave per 12-month period for eligible employees with valid medical or family reasons for leave.
- Employer is generally ***not responsible*** for pay to employee on leave (though may use accrued sick time, vacation, or personal leave during this time).

FMLA, cont.

- Violations of Act – employee may sue and recover:
 - Economic damages such as lost wages or salary, benefits, out-of-pocket expenses, interest;
 - Liquidated damages equal to actual damages;
 - Reinstatement, promotion, or other equitable relief;
 - Attorneys fees, and court costs.

Health Insurance Portability and Accountability Act (HIPAA)

- Law designed to make it easier for employees who change jobs to become insured with new employers without breaks in coverage, and provides protections related to confidentiality and security of health data.

HIPPA, cont.

- Pre-Existing Conditions – HIPPA generally limits exclusion of coverage for pre-existing conditions to 12 months (18 month for those with breaks in coverage).
 - Month for month credit for prior “continuous coverage” means employees who have had coverage for the previous 12 months should have no period of exclusion at all.
 - Not “continuous” if break of 63 days or more in coverage
 - Pregnancy is condition which **may not** be excluded from coverage.

HIPPA, cont.

- Privacy Protections – Law limits the release of private health care information, provides safeguards for that information, requires disclosures by providers of privacy policies, and allows patients access to their own medical records.
 - That form you have to sign at the doctor’s office...

HIPPA, cont.

- Non-Discrimination Provisions – Prohibits group health plans from discriminating (in determining eligibility or setting premiums) against those seeking coverage based upon:
 - Health status
 - Medical condition (physical or mental)
 - Genetic information
 - Evidence of Insurability
- But, discounts can be provided for “wellness” programs or incentives to promote health and prevent disease. (such as non-smokers, etc.)

COBRA

- Law does not require employers to offer group medical insurance coverage, but if the employer does offer such coverage law allows employee to elect to keep coverage at their own expense if they leave employment
- Covered Employers: 20+ employees and group health plan

COBRA, cont.

- Qualifying Events for Employee:
 - Employee leaves job
 - Employee is fired (as long as not “gross misconduct”)
 - Reduced hours result in loss of coverage
 - Employer’s bankruptcy
 - Employee become entitled to medicare

COBRA, cont.

- Qualifying Events for Spouse/Dependents of Employee:
 - Employee dies
 - Divorce/legal separation
 - Dependent child ceases to be dependant based upon age, marriage, or completion of schooling

COBRA, cont.

- Required COBRA Notifications to covered employees and beneficiaries:
 - Initial Notice of COBRA Rights – Plan administrator (usually employer) must send model notice of COBRA benefits within 90 days of the employee or beneficiary becoming covered by COBRA
 - Qualifying Event Notice - Plan administrator (usually employer) must send model notice of “qualifying event” with 14 days of receiving notice of the event.

COBRA, cont.

- Employee Election – Employee must make election within 60 days, and begin making payments with 45 days of election if employee elects to continue coverage.
- Generally, employee can continue COBRA coverage for 18 months.

Discrimination and Harassment

- Three main types of prohibited conduct:
 - Discrimination
 - Harassment
 - Retaliation

Discrimination

Discrimination – generally unlawful to refuse to hire, to fire, or to treat differently in compensation or work conditions based upon a protected classification:

- Race, color, national origin, gender, disability, age, religion, etc.
- Disparate treatment vs. disparate impact
- Defense: legitimate non-discriminatory business reasons.

Harassment

- ha-rass [huh-ras, har-uh s] –verb (used with object)
 1. to disturb persistently; torment, as with troubles or cares; bother continually; pester; persecute.
 2. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid.

Employment Harassment

- Harassment – forget the dictionary definition.
- Harassment is prohibited conduct distinct from hiring and firing decisions.
- Two Types of Harassment:
 - Quid quo pro (sexual harassment)
 - Hostile Work Environment

“Quid quo pro” sexual harassment

- Unwelcome sexual advances, requests, or conduct where submission to the conduct is used as the basis for an “employment decision” or is explicitly or implicitly made a condition of employment.
 - Forced to choose between submission to sexual advances and employment benefits.

Hostile Work Environment

- Looks to the general atmosphere of the workplace, such as verbal and/or physical conduct that “unreasonably interferes with an individual’s work or performance” or creates an “intimidating, hostile, or offensive working environment.”
- This theory is not just restricted to “sexual” or gender based harassment. Possible to have a hostile work environment based upon race, age, disability, etc...
 - “...not a general civility code.”

Hostile Work Environment, cont.

- Must prove “severe and pervasive” conduct.
 - Reasonable person standard – would the conduct substantially affect the work environment of a reasonable person?
 - not the “hyper-sensitive person” standard...
 - But it is the reasonable person view from the victim’s perspective:
 - Ex: only woman in an all male office may find something offensive that her male co-workers believe to be fine.

Hostile Work Environment, cont.

- Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.
 - The “N-word” – is once enough?
 - The Supreme Court says no: “...mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to a sufficiently significant degree to violate Title VII.”
 - Could one incident suffice?
 - The EEOC says yes: “The Commission will presume that the unwelcome, intentional touching of a charging party’s intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII.”

Hostile Work Environment, cont.

- Factors in the *severe or pervasive* determination:
 - the frequency of the conduct,
 - the severity of the conduct,
 - whether or not the conduct is physically threatening or humiliating,
 - whether or not the conduct interferes with the employee's job performance,
 - what context the conduct occurs in, and
 - the totality of all the circumstances.

Retaliation

- Retaliation – when an employer takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**.
 - **Covered Individual** - people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability.

Retaliation, cont.

- **Adverse Action** - is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding, such as:
 - employment actions such as termination, refusal to hire, and denial of promotion,
 - other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
 - any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.
 - Not petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Retaliation, cont.

- **Protected activity** includes:
 - Opposition to a practice reasonably believed to be unlawful discrimination, such as:
 - Complaining to anyone about alleged discrimination against oneself or others;
 - Threatening to file a charge of discrimination;
 - Picketing in opposition to discrimination; or
 - Refusing to obey an order reasonably believed to be discriminatory.

Retaliation, cont.

- **Protected activity** includes:
 - Participation in an employment discrimination proceeding.
 - even if the proceeding involved claims that ultimately were found to be invalid.
 - Examples of participation include:
 - Filing a charge of employment discrimination;
 - Cooperating with an internal investigation of alleged discriminatory practices; or
 - Serving as a witness in an EEO investigation or litigation.
 - A protected activity can also include requesting a reasonable accommodation based on religion or disability.

Title VII – The 1964 Civil Rights Act

- **Basic Source for Modern Employment Law**
 - Texas Commission on Human Rights Act essentially mirrors Title VII – similar procedures for state court law suits with minor changes.
 - Applies to all employers with 15 or more employees.
 - Prohibits discrimination and harassment based upon race, color, national origin, gender, or religion
 - In 1964, this was all about race, gender was an afterthought

Title VII, cont.

- Exhaustion of Administrative Remedies
 - Must file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 300 days, because Texas state law also prohibits the conduct
 - Texas law: must file a charge with the Texas Commission on Human Rights Act within 180 days if you want to sue under state law.
 - EEOC has a form – check the boxes

Title VII, cont.

- EEOC may investigate your claim, or merely issue you a “right-to-sue” letter.
 - You may also request a right to sue letter immediately upon filing.
- Must file Title VII suit in Federal Court within 90 days of receiving the “right-to-sue” letter.
 - Texas law - Must file within 60 days from receipt of “right-to-sue” letter if you want to sue under state law instead of Title VII.

Title VII Remedies

- If you prevail in court, you may recover damages for:
 - lost pay, promotions
 - mental anguish,
 - attorney's fees and expert and court costs.
- The court may also find you entitled to be hired, promoted, or reinstated.
- If the conduct was intentional, or if the employer acted with malice or reckless indifference, the court may also award punitive damages.

Age Discrimination in Employment Act (ADEA)

- May not discriminate against employees on the basis of age (40 and over).
 - Covers employers with 20+ employees for each working day for 20 weeks in current or preceding year.
 - Bona Fide Occupational Qualifications
 - Law recognizes that with age some physical abilities are diminished – allows mandatory retirement ages for certain occupations such as pilots, law enforcement, firefighters, etc.
 - Generally uses Title VII standards and procedures.

Americans With Disabilities Act (ADA)

- Protects “qualified individual with a disability” from discrimination.
- An individual with a disability is a person who:
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment.
- **Major life activities** include things like caring for oneself, walking, seeing, hearing, speaking, working, sitting, standing, lifting, sleeping, thinking or concentrating, interacting with others, etc.
 - Temporary, non-chronic conditions are not disabilities.
 - The question of who is “disabled” under the law is a case-by-case and fact intensive analysis.

ADA, cont.

- “**Qualified individual with a disability**” is a person who meets the fundamental qualifications of the job, and can perform the job with or without reasonable accommodations.
- **Reasonable accommodation** may include, but is not limited to:
 - Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
 - Job restructuring, modifying work schedules, reassignment to a vacant position;
 - Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

ADA, cont.

- An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business.
 - Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

ADA, cont.

- But, there are limits:
 - An employer is not required to lower quality or production standards to make an accommodation;
 - Not obligated to provide personal use items such as glasses or hearing aids:
 - not required to appoint the disabled person to a new job that does not already exist.
- *Warning to employers:* with technology and medical advances, things change quickly in this area of the law.
 - the insulin dependent police officer.