



ahead of the curve

Getting Started
Employment Law Basics for New Companies

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Agenda

- **The At-Will Employment Relationship**
- **Exceptions to the At-Will Doctrine**
- **Proving a Wrongful Discharge Case**
- **Performance Management**
- **Disabilities**
- **Anti-Harassment Primer**
- **Questions & Answers**



Important Safety Tip: Don't be Mean

- **Employees go to see lawyers when they feel they have been treated unfairly.**
- **Juries and even judges like to punish bad actors, regardless of the law.**
- **Unnecessary rudeness, callousness, or insensitivity can undermine an otherwise strong defense.**
- **Style matters!**



Lessons from 2021

Don't Be a Jerk!

- **Social norms are changing.**
- **Old precedents are of less value in the context of novel circumstances (COVID-19).**
- **One thing that hasn't changed—judges, juries, and investigators like to punish jerks.**
- **Employment law frequently incorporates concepts like “reasonableness” and “good faith.”**
- **These concepts give judges and juries a lot of discretion.**
- **Don't give decision makers an excuse to exercise that discretion against you and your company.**

When does this apply to me?

- **1 or More Employees**
 - **Fair Labor Standards Act (minimum wage, overtime, etc.)**
 - **Equal Pay Act (equal pay regardless of gender)**
 - **National Labor Relations Act (right to collectively bargain)**

When does this apply to me?

- **15 or More Employees**
 - Title VII (discrimination based on race, color, religion, sex and national origin)
 - Pregnancy Discrimination Act
 - Americans with Disabilities Act
- **20 or More Employees**
 - Age Discrimination in Employment Act
- **50 or More Employees**
 - Family and Medical Leave Act

At-Will Employment

- In most states, employees can be fired or quit without cause or notice,
- **UNLESS**, the termination is for a wrongful reason, or
- The parties have agreed otherwise, either verbally or in writing.



How the At-Will Relationship Can Be Lost

- **Verbal Assurances:**
 - **“We always follow progressive discipline.”**
 - **“Everyone gets a performance improvement plan first.”**
 - **“You’ll be in charge of marketing for at least the next 5 years.”**
 - **“Here’s your compensation plan for the next 5 years.”**
(without an accompanying at-will disclaimer)

How the At-Will Relationship Can Be Lost

- **Written terms:**
 - Any of the above put in an email
 - A “for cause” provision in an agreement
 - Employment policies without an accompanying at-will disclaimer
 - Always include at-will disclaimers in:
 - Offer letters and employment agreements
 - Compensation plans
 - Advancement/promotion documentation
 - Performance improvement plans
 - Any document that in any way touches upon or presumes an anticipated length of employment

How the At-Will Relationship Can Be Lost

- **At-Will In Theory – You better have a good reason in practice.**
 - **As we will discuss later – multitude of protected classes.**
 - **Fact finders will find a basis for you to be sued if you don't have a reason or your given reason is fishy.**
 - **Juries and judges want to punish companies who fire people for unfair reasons or whose reasons don't make sense.**

Discrimination & Retaliation

- **Employers can fire employees for no reason, but not for a BAD reason (and see caveat on previous slides).**
- **Bad reasons include:**
 - **Discrimination on the basis of a protected class**
 - **Retaliation against an employee's protected conduct**
- **Hard to defend against without strong evidence of a proper reason for the termination**

Discrimination & Protected Classes

- **Race**
- **Gender (and often, gender identity)**
- **National Origin**
- **Religion**
- **Marital Status**
- **Sexual Orientation**
- **Age**
- **Disability**
- **Past Illegal Drug Use**
- **Domestic Violence Survivor**
- **And Many, Many More**



Intentional Discrimination

- **Plaintiff first has to put on minimal evidence of discrimination.**
 - Little more than, “I’m in a protected class, I was doing minimally acceptable work, and I was fired.”
- **Employer then has to provide a legitimate, non-discriminatory reason for the termination.**
 - Here is documented evidence of the employee’s poor performance.
- **Employee then has to present evidence that the employer’s reason is pretext.**

Disparate Impact Discrimination

- **Facially neutral practice that has a Discriminatory impact.**
- **Statistics often used to prove the Plaintiff's case.**
- **Discrimination can be unintentional, yet courts may still hold the employer liable.**

Retaliation

- **All laws against discrimination also have anti-retaliation provisions.**
- **Retaliation typically involves disciplinary action and/or termination taken against an employee who has filed a complaint or assisted another employee in filing a complaint.**
- **Employee who files complaint can be counseled or disciplined for legitimate reasons, BUT ...**
- **Timing is important. Inference that discipline shortly after a complaint is retaliatory.**
- **Be aware of and respond to possible retaliation by co-workers**

Retaliation

- **Hardest type of claim to defend against.**
- **Co-workers can naturally have a negative response to employees who have complained – especially formal complaints to government agencies.**
- **Weak discrimination claims turn into strong retaliation claims.**



Terminations Against Public Policy

- **Catch-All Style Claims**
- **Arise when an employee is fired for a reason that is not specifically illegal, but which goes against an important government policy.**
- **Examples:**
 - **Whistleblowing (even if there is not applicable whistleblowing statute)**
 - **Arguing against illegal conduct internally**
 - **Safety complaints**

Legal Ways To Screen Applicants

- **Complete and effective interview**
- **Work history**
- **References**
- **Educational records**
- **Background Checks (criminal and financial)**
 - **Consider requesting a release from applicant to “free up” background check**
 - **Be aware of legal requirements for effective releases**
- **Remember your own company policies and procedures**

Employee Performance Management Documentation

- **Critical performance management tool**
- **Gives you credibility with the employee in question and other employees**
- **Signals to employee you are competent and serious**
- **Unlocks your ability to act (avoids lack of evidence paralysis)**
- **Protects against certain retaliation claims by documenting that the performance concern pre-dates the protected activity**

Employee Performance Management Documentation

- **Guidelines**
 - Documentation should be clear enough for a neutral third party to understand what happened (you may win lotto next weekend and be retired and traveling abroad when issues arise).
 - Who, What, When, Where, Why, Witnesses – **DETAIL!**
- **Performance plan should state**
 - The rule and violation
 - The expectation
 - Timetable for meeting the expectation
 - Consequences of not meeting the expectation in timetable
 - Timetable for follow up
- **But be wary of formal progressive discipline policies**

Employee Performance Management How to Document

- **Documentation must focus on facts, not opinions**
- **Exercise: Which is fact, which is opinion?**
 - “He was harassing her”
 - “She has a bad attitude”
 - “She was late this morning”
 - “She is a slow worker”
 - “It took him three hours to file those documents”
 - “He is insubordinate”
 - “I told him he needed to stay late, and he refused”
 - “She sent him an obscene email”



Americans With Disabilities Act “ADA”

A disability is a physical or mental impairment that substantially limits one or more major life activities; a record of such impairment; or is regarded as having such an impairment



Only some mitigating measures (e.g., eyeglasses) considered under ADA

ADA & Reasonable Accommodation

- **Disability Defined**

- If there is any chance an issue relates to employee's mental or physical health it's likely a disability issue
- Just about anything qualifies as a disability
- Even if someone isn't disabled, but people might think they are disabled (perceived as disabled), the Americans With Disabilities Act applies
- If there is any doubt, get legal assistance (HR Specialist or Attorney)

Disabilities & Employer Duties

- **Duty not to discriminate**
 - Disabled employees are entitled to the same benefits of employment.
- **Duty of reasonable accommodation**
 - What constitutes a reasonable accommodation is tricky and the process for figuring it out is even trickier. If you don't have an HR specialist, get outside help.
- **Duty not to make inquiries regarding “nature and severity” of disability**
 - Again, don't ask an employee questions about what might be wrong if it's a mental or physical health issue.

ADA & Reasonable Accommodation

- **Dealing With Disability Issues**
 - An HR specialist should take the lead role in accommodation dialogue or you should get assistance from employment law counsel.
 - Once you have noticed that an employee is disabled (because he or she told you or you otherwise should know), it is crucial to quickly begin the interactive dialogue.
 - Employee is entitled to a *reasonable* accommodation that does not constitute an undue hardship. This, again, is a complex question.
 - Accurately define “essential functions.” Calling a function “essential” does not make it so!

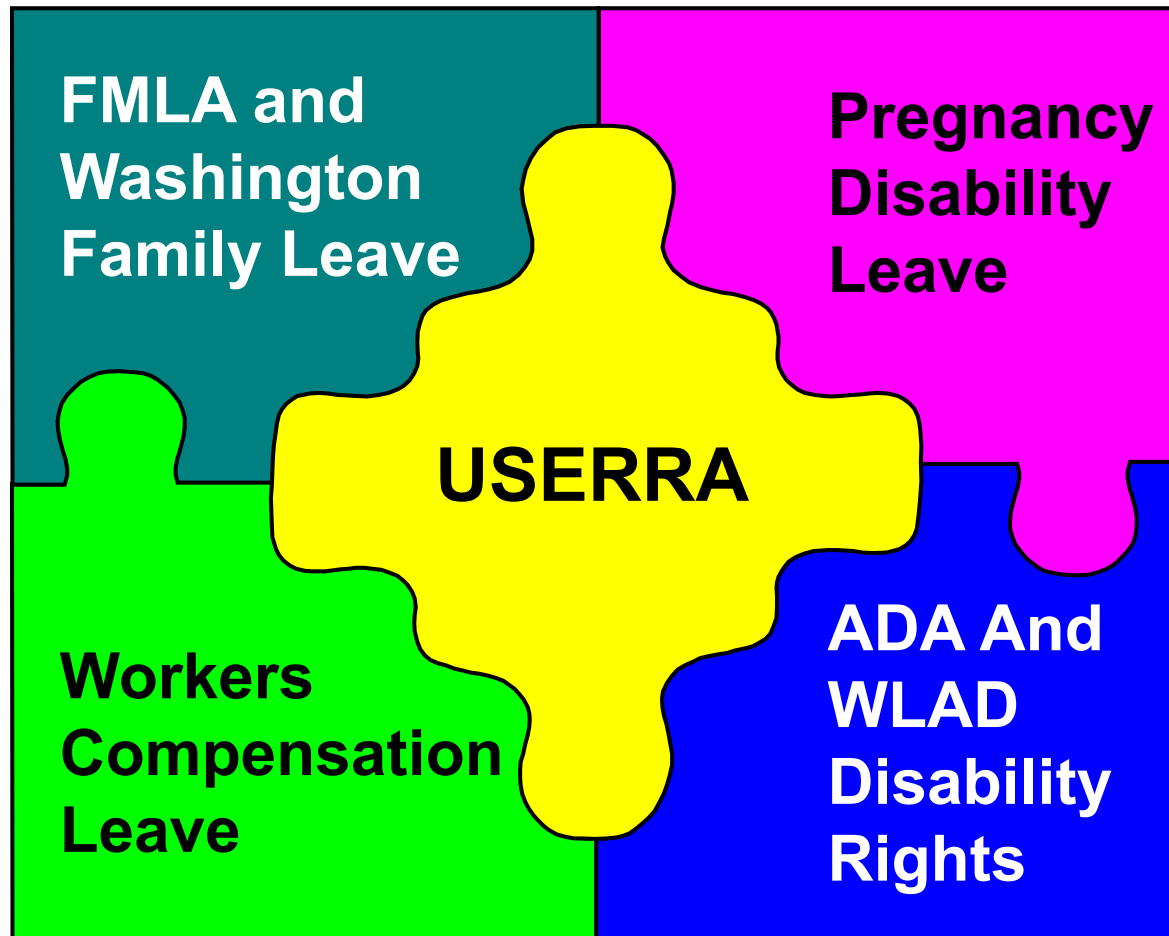
What To Do If Performance Could Be Related To Disability

- You can require a medical examination by an appropriate health care specialist with job description
- Remember the purpose: to identify the person's abilities, limitations, and health risks, NOT to define the nature or extent of the disability

What To Do If Performance Could Be Related To Disability (cont'd)

- **Healthcare practitioner's role:**
 - To define employee's abilities
 - To define limitations in relation to a particular job
 - To identify health and safety risks
- **Manager's role:**
 - To identify and make reasonable accommodations; including an analysis of essential functions
 - Remember your resources
- **Communicate with the physician in writing**
- **Get medical information by letter after obtaining a release/consent from employee**

Leave Laws



FMLA

- **Covered Employers**
 - 50 employees
 - Looks at number on payroll, not actual employment
- **Eligible Employees**
 - 12 months of service
 - Worked 1,250 hours in past 12 months
 - Works at location with 50 employees within 75 mile radius

Qualifying Reasons for FMLA Leave

- **Birth of a child**
- **Placement for adoption or foster care**
- **Care for child, spouse or parent with serious health condition**
- **Employee's own serious health condition**
- **Service member (or relative) leave**

Serious Health Condition

- Incapacity associated with inpatient care
- Incapacity requiring 3+ days of absence and continuing treatment by a health care provider
- Incapacity due to pregnancy
- Incapacity due to a chronic health condition

Terms of Leave

- **12 workweeks in 12-month period (up to 26 work weeks for service member leave)**
- **Unpaid leave of absence**
- **Continuation of benefits requirements**
- **Light duty or modified work instead of a medical leave**
- **May run concurrently with other leaves**
- **Reinstatement after leave**

Notice

- **Employee Notice**
 - **Need not mention family, medical or leave**
 - **Example: vacation planned for medical treatment**
 - **Must give sufficient information to put employer on “inquiry notice”**
 - **Employer should inquire further**
 - **Caveats: ADA, Privacy**
- **Employer Notice**
 - **Must provide notice of eligibility within five business days**
 - **Effect: if running leaves concurrently, may only be able to run prospectively**

Pregnancy Accommodation Requirements

- **Must accommodate as with other temporarily – disabled employees**
- **Must allow transfer based on doctor certification, if transfer can be reasonably accommodated**
- **Not required to create additional employment**

Wage & Hour Law

- **The Fair Labor Standards Act**
 - **General Rule = Time and a half for hours over 40**
 - **Exempt or Non-exempt? That is the question**
 - **Executive**
 - **Administrative**
 - **Professional**
 - **Computer professional**
 - **“Primary Duty” Rule**
 - **Salary Basis (currently \$23,660, DOL proposal to raise to \$35,308)**

Wage & Hour Law

- **Yes you have to pay your employees!**
- **No you cannot pay them in stock.**
- **Yes it must be cash, it must be at least bi-monthly, and it must be at least minimum wage.**
- **Very limited exceptions**
 - **Owners who own at least 20% of the company**
 - **Outside sales people (must be on the road 50% of the time)**

Key Exemptions

- **Executive**
 - Primary duties are supervisory
 - Supervises 2 or more full-time employees
- **Administrative**
 - Non-manual work related to management policies
- **Professional**
 - Education-based
 - Requires advanced knowledge
- All exemptions require **Independent Discretion**



Key Exemptions

- **Salespeople? Usually Not.**
 - Only if they work primarily from the road.
 - No “inside” sales exemption.
 - Massive potential liability given the way overtime works.



Wage & Hour Law

- **Meal & Rest Periods**

- **Meal periods:**

- **30 minutes or longer if work period is five hours or more**
 - **Must be taken between two and five hours after shift begins**
 - **Must be relieved of all duties**
 - **Must be free to leave work station**

Wage & Hour Law

- **Ways employers can destroy exempt status:**
 - Pay reduced for quality/quantity of work performed
 - Pay practices that effectively treat an employee as an “hourly” worker
 - Deductions in actual pay for less than one day’s absence
 - Reductions in pay that accompany suspensions must be in full week increments
- **Keep this in mind when managing exempt employees.**

Wage & Hour Law

- **Salary Basis Test**

- Federal law requires that employees be paid on a salary basis to be exempt from overtime laws
- Being paid a salary is not the same as being paid on a salary basis!
- The exempt employee must regularly receive, each pay period (usually weekly), a predetermined amount constituting all or part of his or her compensation
- Compensation cannot be subject to reduction for
 - Variations in quality of work
 - Variations in quantity of work
 - Exception: major safety violations
- Beware of discipline issues!

Non-Compete Agreements

- **Increasingly disfavored in many jurisdictions.**
- **In Washington:**
 - **Employee must earn more than \$100,000 per year (indexed for inflation)**
 - **Independent contractors must earn more than \$250,000 a year (indexed for inflation)**
 - **If employee is laid off, must be compensated during noncompete period.**
 - **Employers must disclose noncompete agreements before employee's first day of work.**
 - **Washington law must apply if employee is based in Washington.**

Sexual Harassment Prevention \

- **Sexual Harassment Prevention**
 - Understanding the law
 - Applying the law
 - Liability and Remedies
 - Implementing Your Policy

- **Questions & Answers**

Why Should We Care?

- **All forms of harassment:**
 - **Interfere significantly with a person's ability to work or learn**
 - **Cause lost productivity, absenteeism, and reduced morale**
 - **Force individuals off jobs since it is often easier to leave than to object or complain. This can permanently hurt the individual's career**

Why Should We Care?

- **Harassment and Discrimination:**
 - Devastate individuals and work groups
 - Cost millions of dollars in lawsuits
 - Cost employers an estimated average of \$379/year per employee. For an employer with 200 employees that is over \$75,000 a year – excluding the costs of investigating and resolving complaints.
- **Harassers may be personally liable for damages**

I. Understanding The Law – **Statutory Framework**

Protected Classifications – It's Not Just Gender!

- **Race**
- **Religious Creed**
- **Color**
- **National Origin**
- **Ancestry**
- **Physical Disability**
- **Mental Disability**
- **Medical Condition**
- **Marital Status**
- **Sex (incl. pregnancy)**
- **Age (40+)**
- **Sexual Orientation**
- **Gender Identity**

Gov't C. §12940(a)

I. Understanding The Law – Types of Claims

Three Types of Claims

- “Quid Pro Quo” (sexual harassment only)
- Hostile Work Environment
- Retaliation

I. Understanding The Law – Types of Claims – Quid Pro Quo

Quid Pro Quo

<u>This</u>	<u>In Exchange for</u>	<u>That</u>
Request for sexual favor or sexual advance	Submission	Promotion, raise, etc.
Request for sexual favor or sexual advance	Rejection	Termination, demotion, etc.

I. Understanding The Law – Types of Claims – Hostile Environment

HOSTILE ENVIRONMENT

- Includes Behavior That Is:
- Sexual in nature or directed at an individual solely because of his or her gender;
- Uninvited or unwelcome;
- Offensive to a reasonable person; and
- Severe or pervasive enough to adversely affect a person's work environment.

I. Understanding The Law – Types of Claims – Hostile Environment

Actions Constituting Harassment May Be:

- **Verbal**
- **Visual**
- **Physical**

I. Understanding The Law – Types of Claims – Hostile Environment

Hostile Work Environment Examples

- **Jokes/off-color humor**
- **Banter/flirting**
- **Obscenities/slurs**
- **Sexual abuse**
- **Physical contact**
- **Bullying**
- **Blocking movement**
- **Inappropriate “pranks” or gossip**
- **Inappropriate e-mails**
- **Cornering/staring**
- **Gender stereotyping**
- **Pornography/Visuals**
- **Repeated unwelcome behavior/compliments**
- **Sexual favoritism**

I. Understanding The Law – Types of Claims – Hostile Environment

Unwelcome Behavior

- Harassment is about unwelcome behavior
- In determining whether behavior was unwelcome, courts will consider whether:
 - The recipient told the perpetrator the conduct was unwelcome
 - The recipient indicated through body language, silence, etc. that the conduct was unwelcome
 - The recipient did not participate in the conduct (e.g., sexual joking)
 - The conduct was not solicited or invited
 - The recipient told someone else at the time that the conduct was unwelcome
 - The recipient says the behavior was unwelcome

I. Understanding The Law – Types of Claims – Hostile Environment

Intent Does Not Matter

- Harassment does not require the person engaging in the conduct to intend to harass. Harassment can occur even when a person intends the behavior to be friendly or funny. The law focuses on the conduct's impact on the victim.

I. Understanding The Law – Types of Claims – Hostile Environment

When Is Conduct “Severe or Pervasive”?

- **When it represents a pattern of conduct**
- **One incident is usually not sufficient to violate the law**
- **Exceptions:**
 - **Is a single proposition from company president enough?**
 - **Is a single ethnic slur by supervisor enough?**
 - **Is a single sexual assault by supervisor enough?**

I. Understanding The Law – Types of Claims – Hostile Environment

Who Can Be A Harasser?

- Managers and supervisors
- Executives
- Co-workers
- Clients or customers
- Vendors, contractors
- Members of the public
- Men or women
- YOU

I. Understanding The Law – Types of Claims – Hostile Environment

Who Can Claim Harassment?

Supervisors



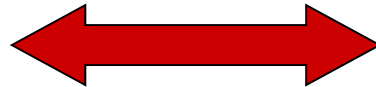
Employees

Co-Workers



Co-Workers

Men



Men

Women



Women

Women



Men

Heterosexual



Homosexual

Independent Contractor



Co-Worker

I. Understanding The Law – Types of Claims – Hostile Environment

Where Can Harassment Occur?

- **At the workplace**
- **Off-premises at employer-sponsored social events**
- **Off-premises at private sites (e.g. after-work drinks)**
- **ANYWHERE**

I. Understanding The Law – Types of Claims – Retaliation

General Elements of A Retaliation Claim

- **A Plaintiff must generally show:**
 - **Statutorily-protected activity**
 - **An adverse employment action**
 - **A causal connection between the two**
- **Plaintiff also may have to show that relevant decision-maker knew of protected activity prior to deciding upon allegedly adverse employment action**

I. Understanding The Law – Types of Claims – Retaliation

What is Retaliation?

- An “adverse employment action” (e.g., denial of promotion, transfer to a less desirable position, denial of support, exclusion from meetings, etc.)
- A “hostile work environment” (conduct that is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.)

I. Understanding The Law – Types of Claims – Retaliation

Statutory Bases for Retaliation Claims

- **National Labor Relations Act**
- **Family and Medical Leave Act (FMLA)**
- **Employee Retirement Income Security Act**
- **Occupational Health and Safety Act**
- **Fair Labor Standards Act**
- **Title VII of the Civil Rights Act of 1964**
- **Americans with Disabilities Act (ADA)**
- **Age Discrimination in Employment Act (ADEA)**
- **Public employees can also bring retaliation claims under 42 U.S.C. § 1983**
- **Sarbanes-Oxley Act / Dodd-Frank Act**
- **Washington Law Against Discrimination (WLAD)**

III. Liability And Remedies – Employer Liability

Type of Damages and Remedies Available to Victims of Harassment

- **Lost Wages**
- **Emotional Distress**
- **Punitive Damages**
- **Attorneys' Fees**

III. Liability And Remedies – Employer Liability

Sexual Harassment Is The Most Common Source Of Harassment Lawsuits

- **What are the verdicts?**
 - **\$15M punitive damages against a provider of hospitality (2004)**
 - **\$2.3M settlement at an airline consulting firm (2003)**
 - **\$30M award against a supermarket chain (2002)**

Q & A



Thank you!



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