Labor Law Landmines:
How to avoid stepping on [in] them!

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HARASSMENT, WHAT’S NEW?

EEOC CHARGES, LAWSUITS WAY UP!
State and federal laws generally forbid two kinds of “harassment”:

- “Tangible Job Action” Harassment
- “Hostile Environment” Harassment
“Tangible Job Action” Harassment*

Generally, a “tangible job action” occurs when a harassing manager or supervisor discharges, demotes, denies a promotion, or makes other significant or adverse changes in an employee’s terms and conditions of employment as part of the harassment.

*It’s also often called “quid pro quo” ("this for that") harassment.
“Tangible Job Action”
SEXUAL HARASSMENT

Occurs when a person’s submission to sexual advances or other sexual conduct is a condition for favorable employment decisions, or the person’s rejection is the reason for unfavorable employment decisions.
“Hostile Work Environment”
Harassment

* “Unwelcome” conduct

* Targets or affects a “legally protected characteristic”

* Unreasonably interferes with an individual’s job performance or

* Creates a hostile, intimidating or offensive work environment
What is “unwelcome” conduct?

Harassing conduct is “unwelcome” if the person feels the conduct is offensive, undesirable, and uninvited.

It doesn’t necessarily mean that the person complains or objects to the harasser.
ADDITIONAL LEAVE AS REASONABLE ACCOMMODATION

Monitoring the RTW status of employees out on leave:

* Need to be on top of paperwork and make a paper trail

* Use the DOL forms correctly

* Strike the right tone

* Think creatively, explore options, challenge assumptions

* Be patient
MUST consider possibility of additional leave for ADA qualified.

Do NOT include in policy:

* Maximum time

* Full release requirement

* No fault attendance provisions
ATTENDANCE REQUIREMENTS:

There is a push to have courts declare that attendance is not an essential function if you have the skills to do the job.

* Courts split.
* *EEOC v. Ford, 6th Cir.:* here, EEOC lost. Regular attendance was an essential function of job.
* Very case specific.
* Impact of telecommuting.
Reassignment/reinstatement issues:

* Is there a job for which this person is qualified?

* NOT enough to give preference to a RTW employee over others who are qualified.

* EEOC: if they meet the minimum qualifications, they are entitled, even if there are people who are MORE qualified.
Coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions—the courts (EXCEPT the Fifth Circuit) are coming around to the EEOC’s view.

U.S. Supreme Court to take up the issue soon.
Equal pay getting more attention--

Focused on compensation systems and practices that discriminate based on gender—whether intentional or not.

* EEOC directed investigations
* EEOC commissioner charges
* State and local laws
Background Checks

Ensure compliance with Fair Credit Reporting Act (FCRA).

EEOC—more in a minute.

Ensure compliance with state laws.
Background Checks

Credit History
A credit check should be performed only if it is relevant to the position, such as one in which the employee handles large sums of money.

• The EEOC views disqualification of an applicant based upon poor credit as an action that may result in disparate impact discrimination.

• Some states prohibit the use of credit information in employment decisions.
ARRESTS AND CONVICTIONS—

An automatic exclusion because of a criminal conviction may have a disparate impact on certain protected classes.

Use caution when screening based upon a record of criminal conduct.

Is the exclusion “job related and consistent with business necessity?”

Make an individual assessment of each applicant rather than automatically rejecting
This WAS the EEOC rule…

* Denying employment due to an arrest record is presumptively discriminatory because there is no proof that the conduct occurred.
  * The employer may consider whether the underlying conduct renders an applicant unfit for the position.

* Application questions regarding arrest/conviction record--
  * Unlawful to be contained in application under some state & local laws ("Ban the Box” legislation)
    * Better not to have it on application as an automatic “screen”

* Review your applications and other forms to ensure compliance.
FLSA Compliance

(not new, but...)

Exempt Employees

Most common exemptions:

1. Executive
2. Administrative
3. Commissioned sales
4. Professional
Salary Basis Test:

- On a salary or fee basis at a rate of $455 per week or more ($23,660 a year).

- Payment on a regular basis of a predetermined amount of compensation each pay period on a weekly, or less frequent, basis.

- The predetermined amount cannot be reduced because of variations in the quality or quantity of the employees work.
DOL proposed rule change likely effective late 2019:

- $679 per week or more or $35,308 annually

* No changes to the job duties test and no automatic $ adjustments.
To qualify for the Executive Exemption:

a) Compensation on a salary basis at a rate of at least $455 per week

b) Primary duty is management

c) Customarily & regularly directs the work of 2 or more other employees

d) Has the duty to (i) hire or fire other employees or (ii) whose suggestions as to hiring and firing are given particular weight
Exempt Employees – Administrative:

To qualify for the Administrative exemption:

Compensation on a salary basis at a rate of $455 per week; and

Primary Duties Test –

1) duty to perform office or non-manual work related to management; and
2) “exercises discretion and independent judgment” in significant matters.
The employee has authority to make an independent choice, free from immediate direction or supervision. This involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered.
A Grey Area – Working Supervisors:

• Common question under both the Administrative and Executive exemptions.

• A manager/supervisor/administrator who performs both exempt and non-exempt work at the same time is not automatically disqualified.

• Generally, the exempt employees themselves make the decision regarding when to perform the non-exempt duties. In contrast, the non-exempt employee generally is directed by a supervisor to perform the exempt work.
Exempt Employees – Commissioned Sales

May be exempt from overtime if--

* the employee is employed by a retail or service establishment, and
* the employee's regular rate of pay exceeds one and one-half times the minimum wage for every hour worked in a workweek in which overtime hours are worked, and
* more than half the employee's total earnings in a representative period must consist of commissions.
* Unless all three conditions are met, overtime must be paid for all hours worked over 40 in a workweek at time and one-half the regular rate of pay.
If paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met.

If not, the employer must separately total the employee's commissions and other compensation paid during the representative period.

The total commissions paid must exceed the total of other compensation paid.
Exempt Employees--Professionals

* Work requiring advanced knowledge in a field of science or learning, and which includes consistent exercise of discretion and judgment.

* The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction—NOT by experience.

* RNs, doctors, lawyers, CPAs
“Highly compensated” employees performing office or non-manual work and paid total annual compensation of $100,000 if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

NOTE: Under the proposed rule, HCEs would increase to $147,414 a year.
Non-exempt employees are paid hourly and are subject to minimum wage provisions and/or overtime pay provisions.

- FLSA minimum wage: $7.25

- Caveat: state and local laws.
Pay Arrangements –
Task Work

- The employee is paid an agreed sum for a single job, regardless of the time required for employee’s completion.

- Regular rate of pay is determined by dividing total compensation by the number of hours actually worked.
Deductions

• An employer cannot make any deductions from the employee’s wages for the cost of an item if it brings the employee below minimum wage.

• Cost of personal protective equipment (PPE) generally cannot be deducted.
• Time spent traveling during normal work hours is considered compensable work time.

• Time spent in home-to-work travel by an employee in an employer-provided vehicle, or in activities performed by an employee that are incidental to the use of the vehicle for commuting (like re-fueling), are generally not hours worked and do not have to be paid.
Am I working when I’m traveling from my home straight to the job site?

If I have to let my company know where I might be reached if I’m needed, am I on call?
Am I working when I get to a job but for some reason beyond my control, I can’t start?

Am I working when I’m sent to pick up another employee to go to work?
Conduct audit of exempt positions

Most employers have categories of employees that are misclassified

Do NOT wait for legal challenges—unless you like paying lawyers
Marijuana in the Workplace
Pre-Employment Testing: state medical marijuana statute did not require employer to accommodate off-site use nor did it protect applicant from adverse consequences under employer’s drug free workplace policy.

- Ross v. RagingWire Telecommunications (Cal. 2008)
- Roe v. Teletech Customer Care Management (Wash. 2011)

Off-Site Use/Random Drug Screen: because medical marijuana is illegal under federal law, termination was not unlawful under state statutes.

- Disability: Emerald Steel Fabricators v. Bureau of Labor (Ore. 2010)
- Lawful Activities: Coats v. Dish Network, LLC (Colo. 2015)

Post-Accident Testing: state medical marijuana statute only protects licensed users from criminal prosecution.

- Casias v. Wal-Mart Stores, Inc. (6th Cir. 2012)
Failure to Hire Medical Marijuana User Unlawful


* Applicant disclosed medical marijuana license and would not pass pre-employment drug test; only used at home.
  * NOTE: Written policy did not condition job offer on passing drug test.
* Company refused to hire her even before conducting a drug test.

Major Points of Darlington Ruling:

* Under state medical marijuana law, which includes an anti-discrimination provision, employer can only regulate what an employee does at work, not at home.
* No conflict between federal law which says marijuana is illegal, and state law permitting medical use.
Must Engage in Interactive Process

* Employee disclosed medical marijuana use before taking required pre-employment drug test for administrative position.
* Employer terminated employee on first day of work, because “we follow federal NOT state law.”

Major Points of Barbuto Ruling:
* Because employee disclosed disability, employer was required to engage in interactive process – even if request was to use drug illegal under federal law.
* Employers subject to federal drug-free regulations may defend against state disability discrimination claims by showing that off-site use would cause an “undue hardship.”
Employing Marijuana User Not Illegal under Federal Law

*Noffsinger v. SSC Niantic Operating Co. (D. Conn. Aug 8, 2017)*

- Applicant verbally offered administrative job at nursing facility and was *asked* to take pre-employment drug test.
- Job offer rescinded the day before Applicant’s first day of work.

**Major Points of Noffsinger Ruling:**

- Federal law does not prohibit employers from hiring individuals who use federally-illegal drugs at home.
  - *Rationale*: The Controlled Substances Act does not regulate employment and the ADA was not meant to regulate off-duty activity.
- Employers required to comply with the Federal Drug Free Workplace Act are *not exempt* from *state* medical marijuana statute’s *anti-discrimination provisions.*
Latest and Greatest
from the
National Labor Relations Board
What’s Going on at the NLRB

* Republican majority.

* New General Counsel has been appointed.

* Bear in mind the adjudication model versus formal rule-making.
Changing Enforcement Priorities—GC’s Memo

* Obscene, vulgar, disrespectful, racist speech including via social media may no longer be protected.

* Confidentiality rules about workplace investigations may be upheld.

* Use of employer email might be curtailed.
* Joint employer standard: Returned to standard of **actual** exercise of direct and immediate control over essential terms and conditions of employment.

* BUT WAIT—The Board rescinded the decision because of a recusal issue with one of its members. Now: **potential** and **indirect** control are the keys.

* New rule in the works?
Workplace rules—

* Past NLRB approach: Unlawful even if facially neutral but would reasonably be construed as restricting protected rights.

* Now: The employer's legitimate business interests and justifications as well as potential impact on employee rights must be considered.
Inquiring into employer justifications:

* No interference with protected rights: lawful.

* Some impact on protected rights but outweighed by employer justifications: maybe lawful, maybe not.

* Employer justifications are insufficient: unlawful. Example: rule against discussing wages or benefits.
Recent NLRB Action

* Union organizing—

* Past NLRB approach: “Overwhelming” community of interests as to employees comprising a bargaining or voting unit. Unions tend to win elections in smaller units.

* Now: No longer required to demonstrate "overwhelming"—showing “community of interests” is sufficient.
**Quickie election rule roll-back?**

* Employers hate being rushed into elections with little time to litigate important voter eligibility issues or provide employees with reasons not to unionize.

* NLRB considering a rule change—much Democratic opposition. Board has not actually decided if it will change the current rule—but it probably will.
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