

The Ever Expanding Scope of Employers' Equal Opportunity Obligations

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Agenda

- Statutory Overview of Discrimination
 - Federal law
 - Title VII
 - Americans with Disabilities Act
 - Age Discrimination in Employment Act
 - Equal Pay Act
 - Genetic Information Nondiscrimination Act (GINA)
 - State and local laws
 - New York Human Rights Law
 - New York City Human Rights Law

Statutory Overview

Discrimination Claims

Title VII of the Civil Rights Act of 1964 (Title VII)

Discrimination Claims

Title VII of the Civil Rights Act of 1964

- One of the principal federal statutes prohibiting employment discrimination. Title VII makes it unlawful for an employer to discriminate based on certain protected classifications and prohibits harassment and retaliation as a form of discrimination.

Protected Classifications under Title VII - Race

- Title VII prohibits employment discrimination based on race.
- In the Title VII context, race also refers to an individual's immutable personal characteristics associated with a certain race, such as:
 - Skin color
 - Hair texture
 - Certain facial features
 - A characteristic that predominately impacts one race

Protected Classifications under Title VII - Color

- Although color may overlap with race, it specifically refers to an individual's:
 - Skin color
 - Pigmentation
 - Skin shade
 - Skin tone
 - Complexion
- Example: Discrimination against a Cuban-American with a dark skin tone by a Cuban-American with a light skin tone because of the difference in their skin tone

Protected Classifications under Title VII – National Origin

- When an employer discriminates against an individual because of the country where the individual was born or the country from which his or her ancestors came
 - Sometimes overlaps with race and color discrimination

Protected Classifications under Title VII - Sex

- In the Title VII context, sex not only refers to a person's sex assigned at birth, but also to:
 - A person's gender presentation
 - A person's change in the sex they present or their status as a transgender person
 - Pregnancy, childbirth, lactation, and other physiological conditions applicable to one sex or the other
 - Disparate treatment of a person because of their sexual orientation
 - The unfavorable treatment of a sub-category of one sex
 - For example, women with children as opposed to men with children
- Sex discrimination in compensation is prohibited both by Title VII and the EPA and includes sexual harassment (i.e., quid pro quo and hostile work environment).

Religion under Title VII

- Generally, Title VII prohibits religious discrimination in the same way as it prohibits discrimination based on other protected class characteristics. An employer's failure to reasonably accommodate an applicant's or employee's sincerely held religious belief that conflicts with a job requirement, unless it would cause an undue hardship on the business.
- An employer may not deny an employee with a sincerely held religious belief an accommodation because the employer finds the religious belief to be unreasonable, incorrect, or implausible. Although the applicant or employee will usually initiate the request for an accommodation, an employer risks liability for religious discrimination when it acts with the motive of avoiding an accommodation, even when it has no more than an unsubstantiated suspicion that an accommodation may be needed
- Example: Employer with a dress code policy generally prohibiting employees from wearing headwear may need to make an exception for an employee who wears a turban for religious reasons. The employer can provide a reasonable accommodation by revising its dress code policy or making an exception to the policy to allow the employee to wear the turban at work.

Who is Covered Under Title VII?

- Title VII protects employees and applicants for employment.
- Title VII does not protect foreign nationals working abroad for US-controlled companies, US citizens working abroad for non-US-controlled companies, or independent contractors.

Who is an Employer under Title VII?

- Most private employers that **employ 15 or more** employees are covered under Title VII. State and local governments and governmental agencies are also covered under Title VII.
- The 15-employee threshold and definition of industry affecting commerce do not apply to the federal government as an employer.

Prohibited Conduct Under Title VII

- Taking adverse employment actions against employees and applicants based on their membership in a protected classification
- Refusing to promote a qualified employee
- Demoting an employee
- Discriminating in an employee's compensation or terms and conditions of employment
- Refusing or failing to prevent or eliminate harassment or retaliation
- As amended by the Pregnancy Discrimination act, Title VII prohibits discrimination based on breastfeeding or lactation
- Reverse Discrimination, although less common, is also prohibited under Title VII
- Refusing to hire an applicant

Prohibited Conduct Under Title VII (cont.)

- Terminating an employee, including constructive discharge
- Classifying or segregating employees in a way that:
 - deprives the employees of employment opportunities; or
 - adversely affects their status as employees
- Making statements in job advertisements that indicate a preference or limitation

Conduct that Is Not Prohibited Under Title VII

- It is not unlawful for an employer to take an adverse action against an employee that is not because of their membership in a protected classification.
 - For example: If an employer does not promote an employee that identifies as non-binary because they had consistent attendance and performance issues, this is unlikely discriminatory conduct.
 - The same is true if an employer does not accommodate an employee's religious belief because it's an undue burden on the employer's business

The Americans with Disabilities Act (ADA)

Discrimination Claims

The Americans with Disabilities Act (ADA)

- The ADA makes it unlawful for an employer to discriminate against qualified individuals with a disability.

Who is covered under the ADA?

- The ADA covers employees and job applicants who are qualified for the position held or desired and prevents discrimination against these individuals based on disability
 - Qualified means the employee or applicant possess the skill, experience, education, and other job related requirements.
- Does not generally cover independent contractors and volunteers

Who is an Employer under the ADA?

- Most private employers that **employ 15 or more** employees are covered under ADA. State and local governments and governmental agencies are also covered under ADA.
- The 15-employee threshold and definition of industry affecting commerce do not apply to the federal government as an employer.

Disabilities under the ADA

- Under the ADA, a disability is:
 - A physical or mental impairment that substantially limits one or more major life activities
 - A record or past history of impairment
 - Being regarded as having an impairment
 - Have an association with an individual with a known disability

The Americans with Disabilities Act (ADA)

- An employer's duties under the ADA generally arise only after the employer has knowledge of an employee's substantially limiting impairment

The Americans with Disabilities Act (ADA)

- Other prohibited actions include: failing to provide a reasonable accommodation for the known physical or mental limitations of a qualified individual with a disability, unless the employer can show the accommodation imposes an undue hardship on the operation of its business; denying employment opportunities to a qualified individual with a disability because of the need for reasonable accommodation; adversely affecting the employment opportunities or status of an individual with a disability by limiting, classifying, or segregating the individual; and using standards, criteria, and administration methods that are not job-related and consistent with business necessity and have a discriminatory effect or perpetuate discrimination.

Prohibited Conduct under the ADA

- Employers are prohibited from engaging in the following conduct:
 - Recruitment activities
 - Advertising practices
 - Application procedures
 - Hiring
 - Upgrading
 - Promotion
 - Award of tenure
 - Demotion
 - Transfer
 - Layoff
 - Termination
 - Right of return from layoff

Prohibited Conduct under the ADA (cont.)

- Rehiring
- Rates of pay and other types of compensation
- Changes in compensation
- Job assignments or classifications
- Organizational structures
- Job position descriptions
- Lines of progression
- Seniority lists
- Denial of any employment terms, conditions, or privileges
- Leaves of absence, including sick and other time
- Benefits
- Selection and financial support for training, including participation in:
 - Apprenticeships;
 - Professional meetings;
 - Conferences and related activities; and
 - Selection for leaves of absence to pursue training
- Employer-sponsored activities, including social and recreational programs

Age Discrimination in Employment Act (ADEA)

Discrimination Claims

Age Discrimination in Employment Act (ADEA)

- ADEA prohibits employment discrimination against applicants and employees on the basis of age.
 - 40 and older
- While individuals under 40 are not covered by the ADEA, they may be protected under state law.
 - Example: New York's state law prohibits age discrimination against individuals who are 18 years of age or older.
- The Older Workers Benefit Protection Act (OWBPA) amended the ADEA to prohibit age discrimination concerning older workers' employee benefits like severance and requires that any waiver of ADEA rights be knowing and voluntary.

Who is covered under the ADEA?

- Employees and job applicants who are 40 years or older
- Does not generally cover independent contractors

Who is an Employer under the ADEA?

- Most private employers that **employ 20 or more** employees are covered under ADEA. State and local governments and governmental agencies are also covered under ADEA.
- The 20-employee threshold and definition of industry affecting commerce do not apply to the federal government as an employer.

Prohibited Conduct under the ADEA

- The ADEA prohibits employers from taking the following employment related actions because of an individual's age:
 - Refusing to hire an applicant
 - Discharging an employee
 - Discriminating with respect to an employee's compensation, terms, conditions or privileges of employment
 - Segregate or classify employees in a way that:
 - deprives the employees of employment opportunities, or
 - adversely affects their status as employees.
 - Make any statements in job advertisements that indicate a preference or limitation based on age.
 - For example, advertisements that specify "recent college graduate" violate the ADEA because the statement may deter older applicants, but requesting an applicant's birth date or age does not itself violate the ADEA.

Conduct that is Not Prohibited under the ADEA

- The ADEA does not generally prohibit reverse Age Discrimination
 - Employers should consider that this form of discrimination may be prohibited under state law.

Equal Pay Act (EPA)

Discrimination Claims

Equal Pay Act (EPA)

- The EPA prohibits sex-based discrimination in payment of wages for equal work

Who is Covered under the EPA?

- Most employees are covered under the EPA including federal employees and most state employees unless they are exempted under the FLSA
- Men and women are covered

Prohibited Conduct Under the EPA?

- The EPA requires that employers pay male and female employees equal wages for equal work in the same establishment.
- Wages is defined broadly and includes all forms of compensation or payments made to or on behalf of an employee:
 - Wages or salaries
 - Deferred compensation, including profit sharing plans
 - Expense accounts, gasoline allowances, uniform cleaning allowances, and the like
 - Use of a company car
 - Bonuses
 - Vacation and holiday pay
 - Premium pay for working on weekends or holidays
 - Any fringe benefits, such as medical, hospital, accident, life insurance, and retirement benefits

Genetic Information Nondiscrimination Act (GINA)

Discrimination Claims

Genetic Information Nondiscrimination Act (GINA)

- GINA is a federal statute that prohibits discrimination on the basis of genetic information
- GINA has two major components:
 - Title I – covers group health plans and insurers
 - Title II – prohibits employers from discriminating against employees or applicants based on genetic information and from collecting genetic information, except in limited circumstances

Who is covered under GINA?

- Individuals protected by GINA include:
 - an employee (employed by a covered employer)
 - a job applicant
 - a former employee

Who is an Employer under GINA?

- With limited exceptions, an employer is any person that employs **15 or more** employees as defined under the EEOC regulations. The employers do not include Indian tribes or bona fide private membership in clubs that are exempt from federal taxation.

Conduct Prohibited by GINA

- GINA prohibits employers from discriminating against an individual based on the individual's genetic information in connection with:
 - Hiring and discharge
 - Compensation
 - Terms, conditions, or other privileges of employment
 - Limiting, segregating, or classifying an employee in a way that deprives the employee of employment opportunities or affects that person's status as an employee because of genetic information about the employee
 - Harassing an applicant or employee based on that person's genetic information.
 - Retaliating against an employee because the employee:
 - opposed a practice that is unlawful under GINA; or
 - made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under GINA
 - Requesting, requiring, or buying an employee's genetic information or that of an employee's family member.

Conduct that is Not Prohibited by GINA

- An employer does not violate GINA based on the use, acquisition, or disclosure of medical information that is not genetic information about an individual's manifested disease, disorder, or pathological condition. This is true even if the disease, disorder, or pathological condition has or may have a genetic basis or component

Genetic Information Defined

- GINA defines genetic information as information about:
 - The genetic tests of an employee or the employee's family members
 - The manifestation of a disease or disorder in an employee's family members (that is, family medical history)
 - An employee's request for, or receipt of, genetic services or participation in clinical research that includes genetic services by the employee or the employee's family member
 - The genetic information of a fetus carried by an employee or by the employee's pregnant family member
 - The genetic information of an embryo that is legally held by the employee or family member using assisted reproductive technology
- Family member is defined by GINA as any individual who is a dependent of the individual as a result of marriage, birth, adoption, or placement for adoption.

State and Local Overview

Discrimination Claims

Overview of New York State Human Rights Law

- **New York State Human Rights Law**
 - New York Executive Law Sections 290-301
 - Generally greater protections than federal law
 - Employers of ANY size
 - Generally protects: employees, applicants, interns, and independent contractors
 - Sexual harassment and all other harassment-related claims: domestic workers, including housekeepers and babysitters
 - Generally does not protect: employees where employer is parent, spouse, or child

Protected Categories Under NY Human Rights Law (NYHRL)

- New York Human Rights Law prohibits employment discrimination based on “civil rights”:
 - Race
 - Color
 - Religion
 - Creed
 - National origin, including ancestry
 - Age
 - Sex, including pregnancy
 - Sexual orientation, including actual or perceived
 - Gender identity or expression, including status as transgendered individual

Protected Categories Under NY Human Rights Law (cont.)

- Familial status
- Military service
- Marital status
- Disability
- Predisposing genetic characteristic
- Domestic violence victim status
- Sometimes: arrest records, past convictions

Prohibited Conduct Under NY Human Rights Law

- The New York Human Rights Law makes it unlawful for an employer, to discriminate because of an individual's membership in a protected classification, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.
- For an employer to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment, which expresses directly or indirectly, any limitation, specification or discrimination as to an individual's membership in a protected classification, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.
- For any employer to discharge, expel or otherwise discriminate against any person because he or she has opposed any practices forbidden under NYHRL or because he or she has filed a complaint, testified or assisted in any proceeding under NYHRL

Prohibited Conduct under NYHRL (cont.)

- For an employer to subject any individual to harassment because of an individual's membership in a protected classification, or because the individual has opposed any practices forbidden under this law or because the individual has filed a complaint, testified or assisted in any proceeding under this article, regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims. Such harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected classifications.

Conduct that is Not Prohibited Under NYHRL

- It is not unlawful to treat employees differently based upon legitimate, non-discriminatory reasons (e.g., work performance).
- There is no law against bullying in the workplace.
 - Such laws have been proposed in the past, but have not been enacted.
- It is not discrimination or harassment for supervisors to manage – or even “micro-manage” – their subordinates on an even-handed basis.
- It is not discrimination or harassment for managers to request/direct employees to perform work tasks within their job description.

Local Codes – NYC Human Rights Law

Administrative Code

- New York City's administrative code protects residents of the city and those who work in the city.
- The NYC Human Rights Law applies to employers who have employed four or more individuals within the past year.
- NYC Human Rights Law prohibits employment discrimination based on: race, religion, color, creed, national origin, age, immigration or citizenship status, gender, sexual orientation, disability, marital status, partnership status, caregiver status, sexual and reproductive health decisions, any lawful source of income, and status as a victim of domestic violence/status as a victim of sex offenses or stalking.

Conducting Internal Investigations

November 19, 2021

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Agenda

- Reasons Employers Must Investigate
- Selecting the Investigator
- Investigation Objectives
- Investigation Planning
- Investigation Preparation
- Investigatory Interviews
- *Weingarten* Rights
- Investigation Report
- Investigation File
- Post-Investigation Remediation
- Close-Out and Communicate Outcome
- Dos and Don'ts
- “Bad” Investigations
- Consequences of “Bad” Investigations
- Recurring Investigation Issues
- Questions?

Reasons Employers Must Investigate

- Employers must investigate **any** report or complaint of harassment, discrimination and/or retaliation it receives.
 - Under the longstanding *Faragher-Ellerth* defense (federal law), an employer could defeat a harassment claim if (i) it attempted to prevent and correct the harassing conduct and had an internal complaint procedure; and (ii) the employee unreasonably failed to take advantage of preventative and corrective opportunities provided by the employer.
 - NY law provides that an employee's failure to make a complaint about the harassment to the employer "shall not be determinative" of whether the employer is liable. The law instead adds a narrow affirmative defense if the employer can establish that "the harassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."

Reasons Employers Must Investigate (cont.)

- Still a valid defense to a claim brought pursuant under federal law.
- Also, even under NY Law, it will likely be factually persuasive for an employer to have commenced a timely investigation and have taken remedial action, when warranted.
- Regardless, an employer may actually be able to effectively address and remedy harassment.
 - End inappropriate conduct.
 - Appease the complaining employee.
 - Improve employee morale.
 - Increase productivity.

Selecting the Investigator

- At the outset, evaluate who should conduct the investigation.
 - An insider (e.g. Human Resources employee);
 - An outside investigator; or
 - An attorney (offers additional advantage of privilege and work product protections).
 - The work of an investigator is generally subject to discovery in litigation, unless protected under the attorney-client privilege and/or the work product doctrine.

Selecting the Investigator (cont.)

- Attorney-Client Privilege.
 - One of the oldest privileges for confidential communications.
 - Promotes full and frank communications between attorneys and clients.
 - Elements of the Attorney-Client Privilege.
 - A communication.
 - May be oral or written.
 - Between client and counsel.
 - Definition of counsel may extend to non-lawyer agent of attorney.
 - Made in confidence.
 - If the client states so or the attorney reasonable concludes.
 - For the purpose of attorney legal advice.
 - Client must be seeking predominantly legal advice or services.

Selecting the Investigator (cont.)

- The Work Product Doctrine.
 - Materials prepared in anticipation of litigation.
 - Applies even if not prepared primarily or exclusively for litigation purposes.
- Protecting the Attorney-Client Privilege.
 - Give notice of the legal nature of the investigation.
 - Maintain a record of the legal nature of the investigation.
 - Obtaining legal advice must be the predominant purpose of a communication.
 - Non-lawyer in investigation must be working under the direction of an attorney.

Selecting the Investigator (cont.)

- Losing the Benefit of the Attorney-Client Privilege.
 - Internal disclosures beyond those who did not have a “need to know.”
 - Disclosures to third parties.
 - Disclosures to a government agency.
 - Placing privileged information in issue.
 - Using investigations in defense of action.
- Losing the Benefit of the Work Product Doctrine.
 - Determination of “substantial need” by adversary.
 - The case for which the materials were prepared has terminated.
 - Disclosure to third parties.
- *Upjohn* Warning
 - Make sure that the employer, and not the employees, holds the privilege.
 - Clarify to employees that the employer has exclusive control over the privilege.

Selecting the Investigator (cont.)

- “To be clear, we serve as counsel for the employer. We are not your personal counsel and cannot give you legal advice.”
- “Your communications with us, as part of the investigation, are confidential and protected by, among other things, the attorney-client privilege. As the employer is our client, the attorney-client privilege belongs solely to the employer. Accordingly, the employer, in its sole discretion, may elect to waive the privilege and disclose your communications with us to third parties.”

Selecting the Investigator (cont.)

- What to look for in an investigator:
 - Should be experienced, unbiased, and objective, and be perceived as such;
 - Avoid an employee with a vested interest in the matter and avoid an employee with a close relationship with the accused;
 - The subject of the investigation should have no supervisory authority over the investigator, and no direct or indirect control over the investigation;
 - A good investigator should not be accusatory or aggressive; be empathetic and able to draw out the shy or reluctant witness; and
 - Investigator should be knowledgeable of company policies/procedures and respect confidentiality.

Investigation Objectives

- To determine whether allegations of misconduct have merit.
- To determine who was involved in the misconduct.
- To decide what disciplinary or other measures should be taken and against whom.
 - To prevent recurrence.
 - To limit employer liability.
- To determine preventative steps so that the misconduct does not occur in the future.
- To mitigate, not increase, risk.

Investigation Planning

- **Timing: When should the investigation begin?**
 - Immediate investigation or time for thought and planning?
 - Do preliminary actions need to be taken?
 - Suspension or transfer of accused.
 - Paid leave for complainant.
 - Be careful here.
 - Reporting structure change may be necessary if complaint involves supervisor/supervisee relationship.
- **Scope: What questions do we want answered/who do we want to answer them?**
- **Evidence: How will we preserve and safeguard evidence?**
 - Emails, videotapes, journals, time cards, other relevant documents.
- **Protect the Process and the People.**
 - Prohibit retaliation against employees for making a complaint or for participating in the investigation.
 - Protect evidence – implement a litigation hold.
 - Consider confidentiality.

Investigation Preparation

- Review the report or complaint.
- Gather and review all documentary evidence.
 - Including relevant policies.
 - Including personnel file.
- Determine initial witnesses.
- Determine order of interviews.
 - Typically reporter or complainant is early on.
 - May need to add to the witnesses list as witnesses are interviewed.
- Prepare witness outlines.
 - Always require truthfulness.
 - Always state non-retaliation policy.
 - Always ask for other potential witnesses.
- Schedule interviews.
 - Consider location of interviews.

Investigatory Interviews

- Who else should be present?
 - Consider having a second investigator/witness present.
- Tape recorder vs. note taking.
- Assess the credibility of the witness and document assessments.
- Don't promise or require absolute confidentiality.

Investigatory Interviews (cont.)

- Be direct in questioning! Ask:
 - Who? What? Where? When? Why? How?
 - Non-leading questions.
 - Non-judgmental questions.
 - Open-ended questions.
- Focus on getting facts and specific allegations, rather than conclusions like “I was bullied” or “I was harassed.”
- Listen – don’t interrupt or finish the interviewee’s sentences. Use silences to your advantage and let the interviewee fill in gaps.
- Ensure witness knows how to follow-up with you as needed.

Weingarten Rights

- An employee represented by a union can request that a union representative be present during certain investigatory interviews.
 - If the interview could lead to discipline of employee subject to interview.
 - Failure to acknowledge *Weingarten* rights can result in any ultimate discipline being overturned by NLRB.
- No duty to inform union employees of their *Weingarten* rights.
 - But many employers proactively inform employees subject to investigatory interviews of the *Weingarten* rights to avoid claims that the employee asked for union representation.
- No such rights in nonunion settings.
 - Was the case briefly in the early 2000s.
- Does not apply when issuing discipline.

Weingarten Rights (cont.)

- Right does not extend to a “preferred” union representative.
- Only applies where employer believes that the employee may be subject to discipline at the time of interview.
- Does not extend so as to enlist the presence of those other than union representatives.
- Union representatives may not interfere with the interview.
- Set ground rules.
 - Do not allow the union representative to answer for the employee.
 - Only one person should speak at a time.

Investigation Report

- State the facts: avoid legal conclusions.
- Include:
 - Issue and scope of investigation.
 - Factual determinations.
 - Credibility determinations.
 - Conclusions as to if the alleged allegations are true.
 - Identify violations.
 - Company policy.
 - Common sense.

Investigation File

- What should be included?
 - Written complaint;
 - Policies;
 - Personnel file documents;
 - Prior complaints, if any;
 - Chronology of events;
 - Electronic evidence, if any;
 - Other documentary evidence;
 - Witness statements, if any;
 - Witness interview notes (preserved in typed and original form if handwritten); and
 - Investigation Report.

Post-Investigation – Remediation

- Impose appropriate discipline and/or termination.
- Reexamine internal policies and procedures.
- Strengthen communication with employees.
- Review existing policies/develop new policies.
- Provide new training.

Close Out and Communicate Outcome

- Communicate results to the complainant and the accused.
 - Prompt communication following the completion of the investigation and the outcome determination.
 - Avoid excessive detail.
- Communicate results to others involved in the investigation such as witnesses.
 - Minimal disclosure only.
 - More detailed information should be shared only on a “need to know” basis.
- Investigator should not share copies of the report to the extent possible.

Dos & Don'ts

- Planning.
 - DO explain the process to the complainant and witnesses.
 - DON'T delay in beginning the investigation.
- Interviews.
 - DO ask open-ended questions.
 - DON'T be accusatory in interviews.
 - DO be un-biased.
 - DON'T think you know the outcome before you have fully investigated.
- Report.
 - DO write facts (The allegations are...).
 - DON'T write legal conclusions (This constitutes misconduct).
- Monitor.
 - DO watch to ensure the problem has been resolved.
 - DON'T assume that there can be no other ongoing problems.

“Bad” Investigations

- The Non-Existent Investigation.
- The Cursory Investigation.
- The “Biased” Investigation.
- The “Sits on the Shelf” Investigation.

The Non-Existent Investigation

- A report / complaint is made – and nothing is done.
- Most often occurs when a verbal report is made to a first line or middle manager and one of the following occurs:
 - The complainant asks that the recipient of the report not to escalate;
 - The recipient feels the reporter isn't the “right person” to make the report;
 - The recipient feels the report has not been made in the “right way”;
 - The recipient feels that he/she is not the “right person” to receive the report; or
 - The recipient determines the complaint is trivial / meritless.

The Cursory Investigation

- The investigation is too quick and appears “rushed.”
- Investigator fails to talk to the relevant people or ask the right questions to get to the heart of the issues.
- Investigator fails to seek out the right evidence.
- Investigator conducts an appropriately thorough investigation, but fails to document it.

The “Biased” Investigation

- Selection of the investigator(s).
 - Need to avoid not only actual bias, but also the appearance of bias.
 - Consider whether to use internal investigation or outside counsel.
- Compliance with policy.
 - Investigations can also appear “biased” when they do not follow the procedures outlined in the employer’s written policies.
 - Policy drafting concerns.
- To avoid a “biased” investigation, conduct the investigation in a manner that assures the parties you are taking the matter seriously and not pre-judging the outcome.

The “Sits on the Shelf” Investigation

- Failure to initiate and conclude the investigation in a reasonable amount of time.
- Failure to adequately close out the investigation.
- Failure to take remedial action following a substantiated investigation.

Consequences of “Bad” Investigations

- Loss of the *Faragher-Ellerth* defense.
- Can be deemed acquiescing in, or condoning, the unlawful conduct.

Consequences of “Bad” Investigations (cont.)

- Punitive damages
 - Title VII – available, with caps ranging from \$50,000 to \$300,000 depending on employer size, to “punish an employer who has committed an especially malicious or reckless act of discrimination.”
 - NYSHRL – recently amended to allow punitive damages, without any cap, against private employers.
 - Failure to respond to complaints could be used as a basis to argue for punitive damages.
- Other, non-legal consequences
 - Loss of morale and positive employee relations;
 - Lost productivity; and
 - Higher turnover rates.

Recurring Investigation Issues

- Employee attempts to assert his/her Fifth Amendment right or other Constitutional protection. What is the right response?
 - No such right in the private sector.
 - An employer may compel an individual to participate in an investigation and may discipline or discharge an employee that refuses to participate.



Recurring Investigation Issues (cont.)

- Employee says he doesn't want his statement "on the record."
What should the investigator do?
 - Cannot be granted.
 - Determine basis of statement in the first instance.
 - Is there a fear of retaliation?

OFF THE RECORD

Recurring Investigation Issues (cont.)

- What do I do if employee/witness gets hostile or very upset during an interview?
 - A volatile situation must be defused.
 - A break can be beneficial.
 - Temporarily end and resume at a later date.



Recurring Investigation Issues (cont.)

- Employee says she's retained a lawyer and won't participate in the investigation if her lawyer isn't present. Is this allowed?
 - No right to bring a lawyer.
 - If absolutely necessary, establish ground rules.



Recurring Investigation Issues (cont.)

- Employee comes to HR to report a concern but doesn't want it to be "official" or later asks that it be withdrawn. What should HR do with the information?
 - Must still investigate.

UNOFFICIAL

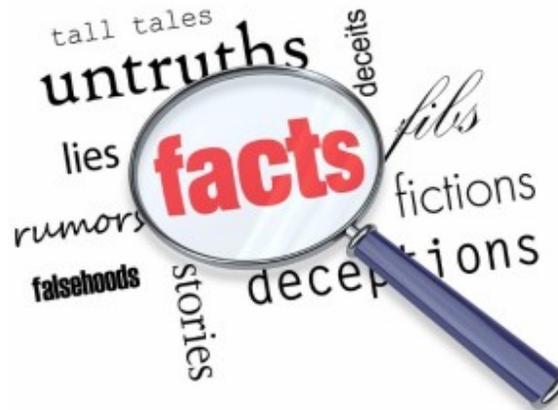
Recurring Investigation Issues (cont.)

- Employee's mother calls to complain about how her son is being treated at work. Should the complaint be investigated?
 - May need to treat as complaint.
 - Contact employee and explore.



Recurring Investigation Issues (cont.)

- What do I do if a witness makes new allegations that are not part of the scope of the current investigation?
 - If allegations relate (e.g., harassment by same subject), they should be included in the investigation.
 - If not, advise the witness to pursue a separate complaint.
 - Document communication.



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QUESTIONS?

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An Employer's Affirmative Obligation to Accommodate Employees

What Does That Mean?

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Agenda

Employee Accommodations

- Accommodating Disability, Illness and Injury
 - The ADA/HR
 - Leave as an accommodation
 - Disability accommodations at work
 - Leave Laws
 - For employee's own needs;
 - For employee's dependents' needs.
- Accommodating Religious Beliefs
 - Religious accommodations at work
 - Who is Covered?
 - Sincerely Held Religious Belief
 - Interactive process
 - Defenses
 - Exceptions to vaccine mandates
 - Voluntary Programs
 - OSHA ETA
 - Center for Medicare and Medicaid Services (CMS) Interim Final Rule
 - Executive Order 14042 Federal Contractors
 - State Law

Disability Accommodations

Who Is Covered?

- The Americans with Disabilities Act (ADA) provides that:
 - “No covered entity shall discriminate against a **qualified individual** on the basis of **disability** in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”
- Under the ADA, covered employers must also provide **reasonable accommodations** to qualified individuals with a disability, absent an undue hardship.
 - An employer that fails to reasonably accommodate the known limitations of a qualified individual with a disability violates the ADA, unless providing the accommodation would be an undue hardship.
 - Very fact- and circumstance-specific.
- The New York State Human Rights Law (NYSHRL) and New York City Human Rights Law (NYCHRL) create similar obligations.

What is an Accommodation?

A modification or adjustment that enables the person to perform the ***essential functions*** of the job or job application.

- Modified equipment
- Modified work schedule
- Reallocating marginal job functions
- Service animals
- Remote work
- Excused intermittent absences
- Leave* *see next slide*
- Reassignment to vacant positions

Disability Accommodations

Recognizing an Accommodation Request

Employee must request, **BUT**

- No formal writing required
- Just enough information to indicate:
 - The employee needs an adjustment, change, or other assistance at work; *and*
 - The need is related to a medical condition.
- No magic words

Disability Accommodations

Recognizing an Accommodation Request

- An exception to the employee's burden to raise the need for an accommodation exists when the employer:
 - Knows that the employee has a disability,
 - Knows, or has reason to know, that the employee is experiencing workplace problems because of the disability, *and*
 - Knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.
- An employer is not expected to know or assume the:
 - Degree of impairment.
 - Impact on job performance.
 - Need for reasonable accommodation.

Evaluating an Accommodation Request

- Engage in the “interactive process” ASAP
- **The Goal:**
 - Identify the precise limitations caused by the disability.
 - Explore potential reasonable accommodations that could overcome those limitations.
- Both the employer and the individual seeking an accommodation must engage in the interactive process in *good faith*.
 - Failure to engage in the interactive process, standing alone, may not be an ADA or NYSHRL violation, but could be used as “prima facie evidence of bad faith.”
 - Failure to engage is a NYCHRL violation, even if no accommodation could have been provided without undue hardship.

Employer's Information Rights

- An employer is entitled to know that an employee requesting accommodation has a covered disability that requires reasonable accommodation.
- “Reasonable documentation” includes information that describes:
 - The impairment.
 - The nature, severity, and duration of the impairment.
 - The activity or activities that the impairment limits.
 - The extent to which the impairment limits the employee's ability to perform the activity or activities.
- An employer cannot:
 - Ask for documentation unrelated to determining the existence of a disability and the necessity for an accommodation.
 - Request an employee's complete medical records in most instances because it would contain unrelated information.
 - Request information about other disabilities an individual may have.

The Interactive Process

1) Determine the job's essential functions

- Analyze the particular job and determine its purpose and essential functions.

2) Establish the individual's limitations

- Consult with the individual with the disability to determine: (a) the individual's exact job-related limitations; (b) how those limitations could be overcome with a reasonable accommodation.

3) Explore potential accommodations

- Discuss with the individual to: (a) identify potential accommodations; and (b) assess their effectiveness in enabling the individual to perform the essential functions of the job.

4) Select the most appropriate accommodation

- Consider the individual's preference but ultimately select and implement an accommodation that works best for both the employer and employee.

The Interactive Process

- Once the individual's precise limitations have been identified, the employer, in consultation with the employee, should identify potential accommodations that will alleviate or remove workplace barriers.
- The interactive process is a shared responsibility to act in good faith. An employer's good faith during the interactive process may be shown by actions such as:
 - Meeting with the employee requesting an accommodation.
 - Requesting information about the individual's condition and limitations.
 - Asking the employee what the employee specifically wants.
 - Showing some sign of having considered the employee's request.
 - Offering and discussing available alternatives when the request is too burdensome.

The Interactive Process

- Document the interactive process and related efforts:
 - Create log of every attempt at accommodation and the employee's corresponding response;
 - Send follow-up correspondence to the employee; or
 - Summarize conversations in a memo to the file.
- **NYC:** The NYCHRL requires the employer, upon the conclusion of the cooperative dialogue, to provide written notice to the employee of the conclusion of the cooperative dialogue process and any accommodation granted or denied.

Leave As An Accommodation

- Confirm expiration/exhaustion of other available leave;
 - Obtain objective medical information on which to evaluate request;
 - Avoid inflexible leave policies;
 - Always engage in an individualized assessment.
-
- Indefinite leave is not a reasonable accommodation (but is the leave at issue indefinite?)

Disability Accommodations Potential Defenses

No Reasonable Accommodation Found

- Engaging in the interactive process does not mean that an accommodation exists.
- Sometimes, a disability cannot be accommodated without undue hardship.
- However, undue hardship of the employee's requested accommodation is not enough. To completely deny an accommodation request, there must be no effective accommodation that can be provided without undue hardship.

Disability Accommodations Potential Defenses

Undue Hardship

- Under the ADA, an employer is **not required** to make a reasonable accommodation that would place an undue hardship on that employer.
- Undue hardship is any action that fundamentally alters the nature or operation of the business or is:
 - Unduly costly.
 - Extensive.
 - Substantial.
 - Disruptive.

Leave - The Patchwork of Considerations

Employee's Own Need

Employer Policy/CBA			
NY Paid Sick/Safe Leave	COVID Q. Leave	COVID V. Leave	ADA HRL
Short-Term Disability	Workers' Compensation		
FMLA			

Employee's Dependent's Need

Employer Policy/CBA
NY Paid Sick/Safe Leave
NY Paid Family Leave
FMLA

Family and Medical Leave Act (FMLA)

FMLA - Overview

COVERED EMPLOYERS

- All public employers; and
- Private employers with 50 or more employees

ELIGIBLE EMPLOYEES

- Employed at least 12 months;
- Have worked at least 1,250 hours;
- Work in a location where the employer has 50 or more employees in a 75 mile radius.

AVAILABLE LEAVE

- Up to 12 weeks per 12 month period most qualifying reasons;
- Up to 26 weeks per 12 month period for military caregivers;
- **Unpaid, job protected, retaliation prohibited. Consecutive or intermittent.**

FMLA – Qualifying Reasons for Leave

- Birth, adoption, bonding
- Employee's own serious health condition
- Immediate family member's serious health condition
- To care for an immediate family member (i.e., child, spouse, or parent) of the employee who has a serious health condition.
- Qualified exigencies that are the result of a covered service member being called to duty in the Armed Forces.
- To care for a covered servicemember who is injured or becomes ill while on covered active duty.

New York Paid Family Leave (PFL)

PFL – Overview

COVERED EMPLOYERS

- All public employers that elect coverage;
- All private employers

ELIGIBLE EMPLOYEES

- Regular schedule is 20 or more hours per week; and
- Employed for at least 26 consecutive work weeks;

LEAVE AVAILABILITY

- Up to 12 weeks
- Job protected, retaliation prohibited
- Paid (67% of employee's AWW, capped at 67% NYS AWW)

PFL – Qualifying Reason for Leave

Qualifying reasons for leave:

- To care for a family member with a serious health condition;
- Childbirth, adoption, bonding
- To meet “qualifying exigencies” (as defined in the FMLA) arising from the fact that a spouse, domestic partner, child, or parent of the employee is on active duty or “has been notified of an impending call to active duty” in the U.S. Armed Forces.

New York Paid Safe & Sick Leave (NYPSL)

PSL - Overview

COVERED EMPLOYERS

- All private-sector employers
- Not-for-profits, charter schools, private schools

ELIGIBLE EMPLOYEES

- All employees of covered employers physically in NY
- Full-time, part-time, temporary

LEAVE ELIGIBILITY

- 1 hour for every 30 hours worked
- Paid time/unpaid if employer has fewer than 5 employees and net income of \$1 million or less
- Accrual caps permitted
 - 40 hours annually: less than 100 employees
 - 56 hours annually: 100 or more employees

PSL- Qualifying Reasons

- A **mental or physical illness**, injury or health condition **of an employee or an employee's family member**, regardless of whether that condition has been diagnosed or requires medical care at the time the employee requests leave;
- The **diagnosis, care, or treatment of a mental or physical illness**, injury or health condition of, or need for medical diagnosis of, **or preventative care for, an employee or an employee's family member**; and
- Certain absences from work due to **domestic violence, a family offense, sexual offense, stalking, or human trafficking**, of an employee or an employee's family member.

Workers' Comp./STD/LTD

WORKERS' COMPENSATION

- Required employer-obtained insurance
- Partial income replacement
- Medical benefits
- Work-related injuries and illness
- **Not a job-protected leave program**

SHORT-TERM DISABILITY

- Required employer-obtained insurance
- Partial income replacement (up to 26 weeks/50% of average weekly wage capped at \$170 per week)
- Non-work related injuries or illnesses
- **Not a job-protected leave program**

LONG-TERM DISABILITY

- Optional insurance, employer may or may not pay for
- Partial income replacement after short-term disability exhausts

Religious Accommodations

Religious Accommodations

Who is Covered?

- **Title VII**

- Applies to public and private employers with 15 or more employees.
- Prohibits discrimination based on religion and requires employers to provide accommodations for sincerely held religious beliefs or practices unless doing so would impose an undue hardship.

- **NYSHRL**

- As of February 2020, applies to employers of all sizes. Previously applied to employers with 4 or more employees.
- Like Title VII, protects employees from religious discrimination and requires employers to provide accommodations for sincerely held religious beliefs or practices unless doing so would impose an undue hardship.

- **NYCHRL**

- Applies to employers with four or more employees within the past year.
- Also prohibits religious discrimination and requires religious accommodations.

- As under the ADA, any employee or applicant of an employer can seek a religious accommodation – there are no minimum duration of service, minimum hours worked, or similar requirements.

Religious Accommodations

Recognizing Accommodation Requests

- A religious accommodation is an adjustment to the work environment or an employer's policies and practices that will allow the employee to comply with his or her religious beliefs.
- As with the ADA, it is generally the employee or applicant's obligation to request a religious accommodation.
- To be an adequate request for accommodation, the employee must provide enough information to make it clear to the employer that:
 - There is a conflict between his/her observance or practice and a work requirement; and
 - The observance or practice is religious in nature.
- The employee does not need to use any special language or mention the ADA, NYSHRL, NYCHRL, or "religious accommodation."
- A request for accommodation does not need to be written—can be verbal.

Religious Accommodations

Sincerely Held Religious Beliefs

- An employer may question the sincerity of an employee's purported religious belief where it has an objective basis for doing so.
- According to the EEOC, factors that can create doubt in an employer's mind as to the sincerity of the employee's belief include the following:
 - Whether the employee has acted in a way that is inconsistent with the claimed belief;
 - Whether the employee is seeking a benefit or an exception that is likely to be sought for nonreligious reasons;
 - Whether the timing of the request is questionable (for example, because it follows closely on the heels of the same employee's request for the same benefit for different reasons); and
 - Whether the employer has other reasons to believe that the employee is seeking the benefit for secular reasons.

Religious Accommodations

Sincerely Held Religious Beliefs

- Where an employer has an objective basis for questioning the employee's stated religious belief, it may request additional information from the employee to decide whether to grant the religious accommodation request.
- That information need not, however, take any specific form.
 - Per the EEOC, “[t]he employee’s own first-hand explanation about the sincerity or religious nature of the employee’s professed belief such that third-party verification is unnecessary.”
 - “Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is requested, it does not have to come from a clergy member or fellow congregant, but rather could be provided by others who are aware of the employee’s religious practice or belief.”

Religious Accommodations

The Interactive Process

- If the employer determines that the employee has a sincerely held religious belief, it must engage in the interactive process and consider whether the requested accommodation, or any alternative accommodation, can be provided without undue hardship.
- Although an employer is not required by Title VII to conduct a discussion with an employee before making a determination on an accommodation request, doing so is important from a logistical and risk mitigation perspective.
- Where there is more than one reasonable accommodation that would not pose an undue hardship, the employer can choose among those accommodations and is not obliged to provide the one preferred by the employee.
 - But, an employer's proposed accommodation will not be "reasonable" if a more favorable accommodation is provided to other employees for non-religious purposes, or if it requires the employee to accept a reduction in pay rate or some other loss of a benefit or privilege of employment and there is an alternative accommodation that does not do so.
- Employers should document all stages of the interactive process (and in fact, must do so under the NYCHRL), including the request, the accommodations offered and ultimately approved or denied, and the employee's response.

Examples of Religious Accommodations

- Time off from work
- Adjusted schedule
- Exceptions to employment policies, including dress code

- *EEOC v. Abercrombie & Fitch Stores, Inc.*
 - Case settled in 2015 after the Supreme Court sent the matter back to the 10th Circuit.
 - Company paid plaintiff \$25,670,00 in damages and \$18,983.00 in court costs.
 - The plaintiff, Samantha Elauf, was a Muslim teen who applied for a job at the retail store location in Tulsa, Oklahoma. Ms. Elauf wore a headscarf or hijab as part of her religion.
 - Ms. Elauf was denied employment because her hijab failed to comply with the company's "look policy" which prevented head covering. Ms. Elauf filed a claim at the EEOC.
 - The Supreme Court held that an applicant for employment may not be refused hire if the employer was motivated by avoiding the need to accommodate a religious practice.

Religious Accommodations

Potential Defenses

Undue Hardship

- The undue hardship threshold under Title VII is lower than the standard under the ADA. Under the ADA, an undue hardship would cause significant difficulty or expense. However, under religious discrimination claims, an undue hardship is a lower standard and requires only “*more than de minimus cost.*”
- Factors to be considered under Title VII include:
 - “[T]he identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation.”
 - Burden on the conduct of the employer’s business, including whether the accommodation would diminish efficiency in other jobs, infringe on other employees’ job rights or benefits, or impair workplace safety.
- Courts and the EEOC agree that Title VII does not require that the religious beliefs of an employee be prioritized above safety in the workplace. See *e.g., Sides v. NYS Div. of State Police*, 2005 WL 1523557, at *6 (N.D.N.Y. Jun. 28, 2005) (“[s]afety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer’s business.”).

Voluntary Vaccination Programs

- Some businesses have implemented mandatory vaccination policies
- Must recognize exceptions for medical/disability and sincerely held religious beliefs per EEOC Guidance
- Can include various accommodations:
 - Work from home
 - Testing accompanied by other safety protocols

OSHA ETS

- The ETS requires covered employers to develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead establish, implement, and enforce a policy allowing employees who are not fully vaccinated to elect to undergo weekly COVID-19 testing and wear a face covering at the workplace.
- Employers who develop a policy with a test out option do not need to give consideration to medical or religious accommodations.
- Employer's with a mandatory vaccination policy will need to accommodate.
- Language from the USDOL Mandatory Vaccination Sample Policy: *Employees may request an exception from this mandatory vaccination policy if the vaccine is medically contraindicated for them or medical necessity requires a delay in vaccination. Employees also may be legally entitled to a reasonable accommodation if they cannot be vaccinated and/or wear a face covering (as otherwise required by this policy) because of a disability, or if the provisions in this policy for vaccination, and/or testing for COVID-19, and/or wearing a face covering conflict with a sincerely held religious belief, practice, or observance. Requests for exceptions and reasonable accommodations must be initiated by [insert relevant instructions]. All such requests will be handled in accordance with applicable laws and regulations and [insert reference(s) to the employer's applicable policies and procedures].*
- Enforceability?

Center for Medicare and Medicaid Services (CMS)

- CMS Issued Interim Final Rule on November 4, 2021
- Interim Rule covers health care services, support and suppliers
- Medicare and Medicaid providers and suppliers ONLY
- Interim Rule expressly addresses the ongoing obligation of employers to provide accommodation for medical/disability and sincerely held religious belief per EEOC guidance
- This past week, Missouri and nine other states brought a lawsuit in federal court to challenge the CMS Rule, arguing that the mandate violates the Administrative Procedures Act (APA). Stay tuned!!!
- Within 30 days of the Rule's implementation (i.e., by December 6, 2021), all covered workers must obtain a single dose COVID-19 vaccine or the first dose of a two-dose vaccine prior to providing services for a covered entity. Within 60 days (i.e. by January 4, 2022), all covered workers must obtain the second dose of a two-dose vaccine.

Federal Contractors and Subcontractors

- Executive Order 14042 (originally required vaccination by December 8, 2021)
- On November 4, 2021, White House issued a Fact Sheet announcing compliance date postponed to January 4, 2022.
- On November 10, 2021, Safer Federal Workforce Task Force provided updated guidance that indicated that “[c]overed contractor employees must be fully vaccinated no later than January 18, 2022.”

Safety protocols include:

1. Vaccination “except in circumstances where an employee is legally entitled to an accommodation.”
2. Compliance with guidance on masking and physical distancing.
3. Designation of person(s) to coordinate workplace safety efforts related to COVID-19.

Healthcare Workers in NYS

- 10 NYCRR §2.61 (August 26, 2021) requires that “[c]overed entities shall continuously require personnel to be fully vaccinated against COVID-19, with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other covered entities absent receipt of an exemption as allowed below.”
- §2.61 DOES NOT include a medical exemption
- Previously two preliminary injunctions had been issued (EDNY; NDNY)
- 2nd Circuit Court of Appeals issued an order on October 29, 2021 vacating the injunctive relief and ordering the cases remanded to the District Courts; Court of Appeals issues a 50 page decision explaining the order on November 4, 2021
- The Court noted that “it appears to us fully possible for employers to comply with both Section 2.61 and Title VII.”
- With regard to the Rule requiring vaccination, the Court noted that “[t]he Rule establishes a medical exemption to the vaccination requirement, but – consistent with New York’s prior vaccination requirements for healthcare workers – does not include an exemption based on religious belief. The Rule permits, but does not require, employer to make other accommodation for individuals who choose not to be vaccinated based on their sincerely held religious beliefs.”

Questions



Survey Reminder

Please remember to fill out the survey at the conclusion of this webinar, especially if you are requesting credit.

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