(Federal) Alphabet Soup

ABCs of Employment Law

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A rundown of the important points in Title VII, the ADEA, the ADA, FMLA and more.

A plethora of different laws governs employment issues that employers need to become familiar with. We could dedicate, and others have dedicated, entire treatises to each of these topics. This article will provide very brief and general information about the major federal employment-related statutes.

Title VII

Title VII of the Civil Rights Act of 1964 is a federal statute that prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin in hiring, firing, compensation, and any terms, conditions, or privileges of employment, against employees and job applicants. 42 U.S.C. §2000e-2. Title VII also prohibits retaliation against a covered person, meaning someone who opposes employment discrimination or participates in a Title VII process. *See* 42 U.S.C. §2000e-3; *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000); *Fenton v. HiSAN Inc.*, 174 F.3d 827, 831 (6th Cir. 1999). Title VII requires employers to post notices of employee rights under Title VII and establishes recordkeeping requirements for employers. 42 U.S.C. §2000e-8, 10; 29 C.F.R. §1602. Title VII applies to both private and public employers with 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. 42 U.S.C. §2000e, 2000e-2. The Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing Title VII. 42 U.S.C. §2000e-5.

As noted above, Title VII prohibits discrimination in employment against someone based on skin color. Additionally, an employer can be liable under Title VII for discriminating against an employee because he or she has certain characteristics associated with race. Employers can also be liable for racial harassment if harassment is so severe and pervasive that it alters an employee's condition of employment and creates an abusive working environment. 29 U.S.C. §626 (c), (d); 42 U.S.C. §2000e-5 Courts have also recognized reverse race discrimination, which involves discrimination toward employees belonging to groups that historically have been favored over other groups, such as whites and males. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985).

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Discrimination based on national origin and citizenship is also prohibited under Title VII. National origin is defined as "the country where a person was born, or from which his or her ancestors came." 29 C.F.R. §1606.1. Additionally, Title VII prohibits discrimination on the basis of religion and requires an employer to make "reasonable accommodations" that allows an employee to practice his or her religion unless the employer can establish that the accommodation would result in an undue hardship on the conduct of the employer's business. 42 U.S.C. §2000e(j). The most common requests for religious accommodation involve conflicts between work schedules and religious practices. Courts recognize claims for religious and national origin harassment. *Hafford v. Seidner*, 183 F.3d 506 (6th Cir. 1999); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012 (4th Cir. 1996); 29 C.F.R. §1606.8.

Sexual harassment is a form of discrimination prohibited by Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment taking form as either "quid pro quo" harassment or harassment creating a hostile work environment. "Quid pro quo" harassment is when someone makes a request for a sexual favor or makes tolerating sexual advances a term or condition of employment of another or when submitting to or rejecting requests or advances is used as the basis of the employment decisions. *See generally* 29 C.F.R. §1604. A hostile work environment exists if a sexually objectionable environment is so severe and pervasive that it alters the terms or conditions of employment. To meet the standard supporting a sexual harassment action, a court must determine that a reasonable person would find the conduct hostile or abusive, and the alleged victim must perceive the conduct hostile or abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

Under Title VII, individuals usually bring either disparate treatment or disparate impact claims. Under a disparate treatment approach, an individual asserts that he or she was discriminated against on the basis of a protected trait by comparing him- or herself to an individual outside of the protected class. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Plaintiffs can prove disparate treatment through direct or circumstantial evidence. *See Id.* at n.11. Disparate impact cases involve facially neutral job qualifications. In a disparate impact case, a plaintiff alleges that a job qualification has a disproportionately large negative impact on a particular protected group of individuals. 42 U.S.C. §2000e-2(k). An employee may also claim that an employer's alleged discriminatory actions were based on mixed motives. 42 U.S.C. §2000e-2(m), 5(g).

In 1978, the Pregnancy Discrimination Act amended Title VII to specify that sex discrimination includes discrimination based on pregnancy and related conditions. 42 U.S.C. §2000(k). The Pregnancy Discrimination Act requires that covered employers treat women affected by pregnancy, childbirth, and related conditions, including abortion, the same as other applicants and employees who are similar in their ability or inability to work. 29 C.F.R. §1604; app. A-34. The act requires an employer to treat pregnancy, childbirth, or related medical conditions the same as it treats other conditions that involve temporary disability in benefit plans, employment leave policies, vacation leave policies, promotion decisions, and reinstatement decisions. *Id.*; 29 C.F.R. §1604.10(b). An employer is not required to treat more favorably workers affected by pregnancy or pregnancy-related conditions. *See generally*, 29 C.F.R. §1604 app. A-5. Again, employers have recordkeeping requirements under the Pregnancy Discrimination Act and they must post notices of employee rights under it. 42 U.S.C. §2000e-10; 29 C.F.R. §1602.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) is a federal statute passed in 1967 to prohibit employment decisions based upon age related to hiring, job retention, compensation, conditions, and privileges of employment. 29 U.S.C. §621. With some exceptions, the ADEA covers individuals who are 40 years of age or older, including job applicants, former employees, members of labor organizations, and individuals placed by employment agencies. 29 U.S.C. §§623, 630, & 631. Courts have also recognized age-based harassment as a violation under the ADEA. *Crawford v. Medina General Hospital*, 96 F.3d 8300 (6th Cir. 1996); *Young v. Will Cty. Dep. of Public Aid*, 882 F.2d 290 (7th Cir. 1989). Generally, an individual plaintiff establishes a claim for age discrimination under the ADEA with direct or indirect evidence showing that the plaintiff (1) is age 40 or older, (2) was performing his or her job satisfactorily, (3) suffered a materially adverse employment action, and (4) was replaced by a younger employee. *See Sirvidas v. Commonwealth Edison Co.*, 60 F.3d 375, 378 (7th Cir. 1995). The ADEA also establishes recordkeeping requirements for employers and requires them to post notices in the workplace informing employees of their ADEA rights. 29 U.S.C. §627; 29 C.F.R. §1627.

In 1990, Congress amended the ADEA and enacted the Older Workers Benefit Protection Act (OWBPA) making clear that discrimination on the basis of age in nearly all forms of employee benefits is unlawful and creating safeguards to ensure that older workers are not coerced into waiving their rights to seek legal relief under the ADEA. 29 U.S.C. §626(f)(1). Essentially, the OWBPA requires that an employer provide equal benefits to, or to incur equal cost for benefits on behalf of, all employees, with several exceptions. 29 U.S.C. §623.

Under the OWBPA an employee can only knowingly and voluntarily waive rights or claims under the ADEA. *Id.* An employer may consider only knowingly and voluntarily made waivers valid and enforceable. *Id.* A waiver is not considered knowing and voluntary unless an individual receives a period of at least 21 days to consider the agreement. If an employer requests an employee to waive rights or a claim in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual must receive a period of 45 days to consider the agreement. And, to be considered knowing and voluntary, a waiver agreement must specify that for a period of at least seven days following the execution of the agreement the employee may revoke the waiver agreement. *Id.*

Americans with Disabilities Act

Title I of the Americans with Disabilities Act (ADA) covers all private and state

government employers with 15 or more employees and makes it unlawful for employers to discriminate against an otherwise qualified individual with a disability. 42 U.S.C. §12101, 12111; 29 C.F.R. §1630.2. On January 1, 2009, the ADA Amendments Act of 2008 (ADAAA) went into effect and amended the ADA, broadening the scope of protection for individuals with disabilities.

A reasonable accommodation includes making existing facilities used by employees readily accessible to and usable by individuals with disabilities.

Public Law No. 110-325; 42 U.S.C. §§12101–12112. An individual with a disability is defined as an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of impairment, or is regarded as having an impairment. 42 U.S.C. §12102. The definition of a disability is construed broadly to provide more protection to individuals with potential disabilities. *Id.*

The ADA only protects qualified individuals with disabilities, which means individuals who can perform the essential functions of a job "with or without a reasonable accommodation." 42 U.S.C. §12111. The ADA requires an employer to provide a reasonable accommodation to qualified individuals with disabilities who are employees or applicants for employment, unless doing so would cause an undue hardship. 42 U.S.C. §§12111–12112; 29 C.F.R. §1630. A reasonable accommodation includes making existing facilities used by employees readily accessible to and usable by individuals with disabilities. A reasonable accommodation may also include any one of the following: job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, or other similar accommodations for individuals with disabilities. 42 U.S.C. §§12111–12112.

Undue hardship for an employer is caused when the requested accommodation results in significant difficulty or expense, when considered in light of the following factors: (1) the nature and net cost of the accommodation; (2) the financial resources of the facility or facilities, the number of employees at the facility or facilities; (3) the effect on expenses and resources, or other impact on the operation of the facility or facilities; (4) the overall financial resources of the entity; (5) the size of the business with respect to the number of employees: (6) the number, type, and location of its facilities; (7) the type of operations of the entity, including the composition, structure, and functions of the workforce; and (8) the geographic separateness and administrative or fiscal relationship of the facility/facilities in question to the covered entity. 42 U.S.C. §§12111–12112. Similar to other antidiscrimination statutes, the ADA prohibits an employer from retaliating against an individual because that individual has opposed any act or participated in a proceeding to enforce the ADA. 42 U.S.C. §12203; 29 C.F.R. §1630. The ADA requires employers to keep certain records and post information about employee ADA rights. 42 U.S.C. §§12115, 12117; 29 C.F.R. §1602.

Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) regulates the hours and wages of employees and requires covered employers to pay a minimum hourly wage and to pay overtime compensation to particular employees. It also regulates child labor. 29 U.S.C. §§201, 206–207 & 212. The FLSA requires that an employer pay employees for all hours worked, which includes all of the hours an employee is "suffered or permitted to work" for the employer. 29 C.F.R. §785.11; 29 U.S.C. §203. The FLSA requires every employer subject to its minimum wage and overtime provisions to make, keep, and preserve certain records on employees, specifically regarding their pay and hours worked, including for exempt employees. 29 C.F.R. §516.

If an employee is exempt under the FLSA, the employer is not required to pay overtime wages to that employee, but for an exemption to apply, an employee's specific job duties and salary must meet all of the requirements under the regulations. 29 U.S.C. §213; 29 C.F.R. §§541, 792. The most common exemption is for an employee employed in a "bona fide executive, administrative, or professional capacity." But there are several other exemptions, including but not limited to, exemptions that apply to computer systems employees, retail and service employees, outside salespeople, and hospital employees. *Id.*; 29 U.S.C. §207. To fall under any of these exemptions, an employee must be paid a specified minimum amount on a salary basis, and his or her work must consist of specified categories of duties.

Many states also have their own wage and hour laws, and attorneys should familiarize themselves with the local requirements in addition to the FLSA.

The Equal Pay Act (EPA) is an amendment to the FLSA passed in 1963 that forbids unequal wages for women and men who work in the same establishment, on jobs that require the same skill, effort, and responsibility, and performed under similar working conditions. 29 U.S.C. §206(d); 29 C.F.R. §1620. The term "wages" includes all payments made to an employee as remuneration for employment, including vacation, holiday pay, and other fringe benefits. 29 C.F.R. §1620.10–1620.11. The EPA protects all employees covered by the FLSA and further applies to employees normally exempt under the FLSA. 29 C.F.R. §1620.

A plaintiff establishes a prima facie case under the EPA by showing that his or her employer is subject to the EPA, he or she performed work in a position requiring equal skill, effort, and responsibility under similar working conditions in the same establishment as another person of a different gender, and he or she was paid less than the member of the opposite gender providing the basis of comparison. *Jones v. Flagship Intel*, 793 F.2d 714 (5th Cir. 1986). Once a plaintiff sets forth a prima facie case, the burden shifts to the employer to prove that the unequal pay was due to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any

factor other than gender or some combination of other factors. *See, e.g., EEOC v. Whitin Mach. Works, Inc.*, 635 F.2d 1095 (4th Cir. 1980); *Ryduchowski v. The Port Authority of New York and New Jersey*, 203 F.3d 135 (2d Cir. 2000); *EEOC v. Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980). The EPA also mandates additional recordkeeping requirements for employers. 29 C.F.R. §1620.

Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN Act), enacted in 1988, requires employers of 100 or more employees to provide written notice to affected employees, union bargaining representatives, and local government officials 60 days in advance of a "plant closing" or "mass layoff." 29 U.S.C. §§2101–2109; 20 C.F.R. §639.1. "Mass layoffs" involve employment loss, regardless of whether one or more units are shut down at a site, and "plant closings" involve employment loss resulting from shutting down one or more distinct units within a single site of employment, both within a 30-day period. The purpose of the WARN Act is to protect workers and their families by requiring employers to give advance notice of "plant closings" and "mass layoffs" so that the workers have some transition time to adjust to the loss of employment, and have an opportunity to obtain alternate employment. An "employer" under the WARN Act is defined as a business enterprise that employs either 100 or more employees, excluding part-time employees, or a business enterprise that employs 100 or more employees who, in the aggregate, work at least 4,000 hours per week. 29 U.S.C. §2101. Workers on temporary layoff or on temporary leave who have reasonable expectation of recall are counted as employees. 20 C.F.R. §639.3.

A "plant closing" is defined as "the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees." 29 U.S.C. §2101(2). A part-time employee is defined as an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required. 29 C.F.R. §639.3(h). It is important to note that while part-time employees are not included when considering whether the WARN Act will apply to an employer, they are entitled to notice if the act does apply. The required content of a notice depends on the recipient, and the applicable regulations describe what notices to government officials, employees, and representatives must contain. 20 C.F.R. §639.7.

Under the WARN Act, the term "mass layoff" means a reduction in force that is not the result of a plant closing and results in an employment loss at a single site of employment during any 30-day period for at least 33 percent of the employees, excluding part-time employees, and at least 50 employees, excluding part-time employees, or at least 500 employees, excluding part-time employees. 29 U.S.C. §2101(a)(3). Employment loss means an employment termination, other than a discharge for cause, voluntary departure, or retirement, a layoff exceeding six months, or a reduction in hours of work of more than 50 percent during each month of a six-month period. 29 U.S.C. §2101(a)(6). The WARN Act also covers employment losses that occur over a 90-day period. An employer is required to give advance notice if it has a series of small layoffs over a 90-day period that add up to the numbers that would require WARN Act requirements for the 60-day notice. But an employer is not required to give notice if it can show that the individual events occurring over those 90 days occurred due to separate and distinct actions that are not an attempt to evade the WARN Act. 29 U.S.C. §2102(d).

Occupational Safety and Health Administration

The Occupational Safety and Health Administration (OSHA) is an agency of the United States Department of Labor with the sole responsibility for worker safety and health protection. Congress created the Occupational Safety and Health Act of 1970 (OSH Act) to assure the safety and health protection of workers. 29 U.S.C. §§651–678. The OSH Act covers all employers and their employees in the 50 United States and all territories and jurisdictions of federal authority. 29 U.S.C. §653. There are several recordkeeping requirements for employers under the OSH Act. 29 C.F.R. §1904. The OSH Act specifies that an employer's principal obligations are to furnish to each employee with a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm. 29 U.S.C. §666.

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Employers must comply with the safety and health standards established by OSHA, which are voluminous. OSHA regulates various machines and equipment, practices, operations, and environmental conditions in the workplace. OSHA standards are generally classified under four broad industry groups with some overlap: general industry (manufacturing, service sector, health care, government agencies, and academia), construction, maritime and longshoring, and agriculture. 29 C.F.R. §1910, 1915–1922, & 1926.

The OSH Act authorizes OSHA to conduct workplace inspections to enforce its standards, and every establishment covered by the OSH Act is subject to inspection. OSHA Pub. 2056, All About OSHA. Several things can trigger and OSHA inspection, including a complaint to OSHA by an employee or an employee representative. 29 U.S.C. §657(f). An OSHA inspection also will occur for all job-related fatalities and catastrophes. OSHA defines a fatality as an employee death resulting from employment accident or illness, and it defines a catastrophe as the hospitalization of three or more employees resulting from an employment accident or illness. OSHA, Field Operations Manual ch. 11 §II (A)(1) & (2) (Nov. 9, 2009), http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-148.pdf. Following an inspection, an OSHA

Area Director can issue citations without penalties, issue citations with proposed penalties, or determine that neither is warranted. 29 C.F.R. §1903; OSHA Pub. 2056, All About OSHA. An employer may not retaliate against an employee for exercising any of his or her rights under the OSH Act. 29 U.S.C. §660; 29 C.F.R. §1977.

The FMLA applies to all public employers and private employers who employ 50 or more employees within a 75-mile radius from the place of employment.

Family Medical Leave Act

The Family Medical Leave Act of 1993 (FMLA) provides up to 12 weeks of unpaid, job-protected leave in a 12-month period to eligible employees for covered family or medical needs. Employers must follow specific notice requirements. 29 C.F.R. §825.301. The purposes of the FMLA are to help balance the demands of the workplace with the needs of families, to promote stability and economic security of families, and to promote national interests in preserving family integrity. 29 U.S.C. §2601; 29 C.F.R. §825.101. In January of 2009, the Department of Labor crafted several regulations interpreting and redefining the FMLA. Public Law 110-181. The FMLA applies to all public employers and private employers who employ 50 or more employees within a 75-mile radius from the place of employment. 29 C.F.R. §825.104.

As mentioned, the FMLA generally requires that employers provide employees with up to 12 weeks of unpaid leave per year due to either the employee's serious health condition or the employee's need to care for a family member with a serious health condition, or for the employee to care for a newly born, adopted, or fostered child. 29 U.S.C. §2601 *et seq.* For an employee to qualify for leave under the FMLA, the employee must have been employed by the employer for at least 12 months, although those 12 months need not have been consecutive, and the employee must have worked at least 1,250 hours for the employer in the 12 months immediately preceding the leave request. *Id.*

An employee requesting leave must give his or her employer adequate notice of the necessary leave, or intermittent leave, and an employer can require the employee to submit medical certification of the serious health condition for which leave is requested. *Id.* An employer is required to notify an employee both about his or her eligibility for FMLA leave and whether the employer will designate the leave as FMLA leave. An employer must reinstate an employee who takes FMLA leave to his or her original position or a position that is substantially equivalent in all material respects when the employee is physically capable of returning to work. *Id.* An employee has no greater right to reinstatement than if the employee had been actively employed during his or her FMLA leave. 29 U.S.C. §2601 *et seq.*

During leave under the FMLA, an employer must maintain the employee's coverage under any group health plan as if the employee had been continuously employed during the entire leave period. 29 C.F.R. §825.209. The FMLA also provides two different types of leave for service member. As amended, "an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 workweeks of leave during a 12-month period to care for the service member. The leave described in this paragraph shall only be available during a single 12-month period." 29 U.S.C. §2612(a)(3); 29 U.S.C. §2612(a)(1)(E). The second form of service member leave under the FMLA is established through the provision that an employee may use his or her traditional 12-week allotment of leave "[b]ecause of any qualifying exigency… arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation." Employers are prohibited from retaliating against employees for using FMLA leave and from interfering with an employee's right to take FMLA leave. 29 U.S.C. §2615(a)(1) & (2); 29 U.S.C. §2615(a)(2); *Hoge v. Honda of Am. Mfg., Inc.*, 384 F.3d 238, 244 (6th Cir. 2004). Entitlement or interference claims are based on prescriptive rights, which establish entitlements to employees and set floors for employer conduct, while retaliation claims are based on proscriptive rights, which prohibit disparate employer conduct with regard to employees taking leave. *Taylor v. The Union Inst.*, 30 F. App'x 443, 452, 2002 WL 252443 (6th Cir. 2002). Employees may not waive their rights under the FMLA.

National Labor Relations Act

The National Labor Relations Act (NLRA) is a federal law governing relations between labor unions and businesses engaged in interstate commerce. 29 U.S.C. §141 *et seq.* The NLRA guarantees employees the right to organize and join unions, to bargain collectively through representatives chosen by a majority of employees in an appropriate bargaining unit, and to engage in other concerted activities. 29 U.S.C. §157. The National Labor Relations Board (NLRB) is an independent federal agency created to administer and enforce the NLRA. Fact Sheet on the National Labor Relations Board.

An employee is defined as any individual who is employed by an employer who affects interstate commerce. However, the NLRA's definition of employee specifically excludes agricultural laborers, domestic servants, any individual employed by a parent or spouse, independent contractors, supervisors, government employees, and individuals employed by an employer subject to the Railway Labor Act. 29 U.S.C. §§152(2) & (3). Among other requirements and mandates, the NLRA prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights under the NLRA. 29 U.S.C. §158.

Conclusion

This article provided a general overview of some of the federal statutes that govern the employment law arena. We recommend that you advise clients to consult with an attorney who specializes in employment law before they move forward with employment-related issues. FD