

Keep Yourself Litigation Healthy

By Cami L. Davis, Esquire

There are a seemingly countless number of laws on the books that impact employers, and while the number and types of laws that affect businesses may vary, one area of the law that affects virtually every employer is employment law. Most businesses never speak to a lawyer until they have to. But waiting until a disgruntled employee brings suit can be not only costly in terms of litigation, but in terms of reputation as well. Being aware of your legal obligations and making your business compliant with applicable laws can be, in the long run, one of the biggest cost-savers for your business. Following are some of the major employment laws that you need to be aware of, as well as some tips to keep your company litigation healthy.

Most states, including Pennsylvania, have a presumption of at-will employment. This means that an employer, except in limited circumstances, has the right to terminate an employee for good reason, bad reason, or no reason at all. This right is further limited by certain statutory exceptions which are found in federal, state and local laws.

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion, national origin and sex, including discrimination because of pregnancy, childbirth, abortion and related conditions. Harassment based on these protected characteristics is also prohibited by Title VII. While many employers are aware that it is a violation of the law to harass an employee based on a protected characteristic, many do not realize that employers also have an obligation to protect their employees from harassment by customers. For example, if a customer goes into a diner and makes several sexually inappropriate comments to a waitress, an employer may have an obligation to take immediate corrective action if it knew or should have known of the harassment, through its managers or other supervisory employees. In addition, it is important to remember that Title VII prohibits retaliation against employees who engage in “protected activity,” such as complaining about sexual harassment or filing a Charge of Discrimination with the Equal Employment Opportunity Commission for religious discrimination. Retaliation can include termination, demotion, but also includes other adverse treatment. Like many of the laws that are being discussed here, Title VII is a complex law, and requires close examination in the context of the facts of a particular situation. Title VII applies to employers that employ 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. ***Employer Tip:*** *You are responsible for maintaining a harassment-free environment for your employees, regardless of whether the harassment is coming from*

ROTHMAN
GORDON
Just Right

Rothman Gordon P.C.
Attorneys At Law
310 Grant Street
Third Floor, Grant Building
Pittsburgh, PA 15219
phone 412.338.1110
fax 412.281.7304
www.rothmangordon.com

internal or external sources. **Employee Tip:** *If you feel that you are being discriminated against or harassed on the basis of any of these characteristics, keep a log of discriminatory incidents, and seek an attorney's advice early in the process.*

Americans with Disabilities Act (ADA) prohibits discrimination against qualified individuals with a disability, against individuals who are regarded as having a disability, and against individuals who have a record of such a disability. The ADA also requires that an employer make reasonable accommodations for qualified individuals with a disability, unless to do so would be an undue hardship for the employer. While most employers probably are aware that it is unlawful to discriminate against someone based on their current disability, it is important to remember is that the ADA also protects employees who *used* to have a disability. For example, a person who used to have a drug addiction is protected from discrimination to the same extent as a person who currently has a disability. In addition, it's also important to remember that an employer's *perception* that an individual is disabled qualifies that employee for protection under the ADA. Let's say that, as a plant supervisor, you have an employee who has had back surgery. The doctor releases her to come back to work, but you tell her that you feel that she's unable to resume her job on the assembly line, and instead give her a position in the shipping department with less pay. Even though the employee is not disabled, you perceived her to be, and she therefore may have a claim under the ADA. And as with Title VII, it is a violation of the ADA to harass an employee on the basis of his or her disability, as well as to retaliate against an employee for exercising his or her rights under the ADA. The ADA applies to employers that employ 15 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year. **Employer Tip:** *While your intentions may be good, never assume an employee cannot perform his or her duties. Ask for confirmation from his or her doctor as to what is an appropriate accommodation for the employee.* **Employee Tip:** *If you are disabled and need an accommodation, ask for it. Be willing to discuss your disability and cooperate with your employer to determine what is the best way for you to perform your job duties.*

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against applicants and employees who are age 40 or over. It covers all practices related to employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA was amended to include the Older Workers Benefit Protection Act, which provides further protection to workers age 40 and over. The Older Workers Benefit Protection Act provides that an individual may not waive any right or claim under the ADEA unless the waiver is "knowing and voluntary." The law sets forth specific criteria to determine whether the waiver is knowing and voluntary. To understand what this means, here is an example: if an employer terminates a 50 year-old employee and has the employee sign a severance agreement wherein the employee releases his or her right to sue the employer for age discrimination, the release must comply with each and every aspect of the Older Workers Benefit Protection Act. The United States Supreme Court has held that if the employer does not comply with the provisions of this law, the employee is entitled to retain any severance received, and can also bring a lawsuit for age discrimination (if she alleges that she has been discriminated against because of her age), regardless of any purported release. The ADEA covers employers employing 20 or more employees in each of 20 or more calendar weeks in the current or preceding calendar year, and as with the other laws discussed here, includes a prohibition against retaliation. **Employer Tip:** *A*

*signature on a severance agreement for an individual 40 or over may not be enough to protect your business. Have any documents reviewed by an attorney to ensure it is in compliance with the law. **Employee Tip:** If an employer asks you to sign a release in connection with a severance agreement, have the release, as well as the circumstances surrounding your termination, examined by an attorney.*

State and Local Laws provide, in most cases, additional protection to employees, whether it be by providing protection to additional classes of employees, covering employers that employ a fewer number of employees than required by federal laws, or in some other way. It is important for employers to be aware of additional requirements that may be imposed upon them by state laws and/or municipal ordinances. While a retail store with five employees is certainly not subject to Title VII, for example, it may be covered by a state law that provides similar or greater relief to its employees.

In sum, there are a large number of laws that regulate employment relationships. I've touched on a few of the major ones here. It's important to be aware of the existence of these laws and others, and to make sure that you are acting in compliance with them when you make employment decisions. It's much more cost-effective to be aware of, and to prevent, unlawful conduct early than to find out when you're served with a complaint that you may have acted contrary to the law.

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