

Employment Law for EAP Professionals

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Overview

- ▶ Connection between EAP and Employees with Legal Issues
- ▶ Three Most Common Workplace Legal Issues and the Applicable Laws:
 1. Discrimination (EEO laws)
 2. Leave (Family and Medical Leave Act)
 3. Reasonable Accommodations (Americans with Disabilities Act)
- ▶ Helping Employees Who Have Legal Issues
- ▶ Q&A and Discussion Throughout

EAP & Employees with Legal Issues

- ▶ “[A]n EAP is a workplace program designed to assist: (1) work organizations in addressing productivity issues, and (2) “employee clients” in identifying and resolving personal concerns, including health, marital, family, financial, alcohol, drug, legal, emotional, stress, or other personal issues that may affect job performance.”
 - ▶ Source: International Employee Assistance Professionals Association, <https://www.eapassn.org/About/About-Employee-Assistance/EAP-Definitions-and-Core-Technology> (emphasis added; last visited Sept. 14, 2022).
- ▶ NOTE: EAP professionals have two “clients,” namely the employer and the employee. EAP should avoid a conflict of interest. If there is conflict between the employer and the employee, then the employee should be referred for independent advice to avoid putting the EAP professional in the proverbial “middle” of “legal issues.”

EAP & Employees with Legal Issues (cont'd)

- ▶ “EAP services include assessments, counseling, and referrals for additional services to employees with personal and/or work-related concerns, such as stress, financial issues, legal issues, family problems, office conflicts, and alcohol and substance use disorders.”
- ▶ Source: U.S. Office of Personnel Management, Employee Assistance Programs, <https://www.opm.gov/policy-data-oversight/worklife/employee-assistance-programs/> (emphasis added; last visited Sept. 14, 2022).

Three Most Common Workplace Legal Issues

1. Discrimination
2. Leave
3. Reasonable Accommodation

Federal Discrimination Laws

- ▶ Prohibit discrimination against applicants and employees on the basis of **protected characteristics**. (“EEO Laws”)
 - ▶ Protected Characteristics: age, disability, engaging in protected activity, genetic information, national origin, pregnancy, race/color, religion, sex/gender, military service. (“EEO Basis”)
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws-guidance-0> (last visited on Sept. 14, 2022).

Three Main Types of Discrimination

1. Disparate Treatment (commonly referred to as “discrimination”)
2. Retaliation
3. Harassment

Type #1: Disparate Treatment

- ▶ **Adverse employment action** against an applicant or employee on the basis of a protected characteristic. (In other words, a situation in which there is an EEO basis for the adverse employment action.)
 - ▶ Adverse Employment Actions: not hiring (non-selection), firing, withholding a promotion, imposing a demotion, reducing or eliminating pay, hours or job duties, reducing or eliminating benefits, etc.

Type #1: Disparate Treatment (cont'd)

- ▶ Examples and Questions

- ▶ Example: An employee gets pregnant, and her supervisor wants to make things at work “more comfortable” for her. Immediately, the supervisor reassigns all her work to other employees, sends her home without pay to “rest,” and tells her “not return to work until you’re ready.”

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING DISPARATE TREATMENT

Type #2: Retaliation

- ▶ **Materially adverse** action at work, or outside the workplace, against a current or former employee who engaged in **protected activity**, on the basis of that protected activity.
 - ▶ Materially adverse action: an action that would dissuade a reasonable person from engaging in protected activity.
 - ▶ Protected activity: opposing workplace discrimination or participating in the EEO process, such as filing a charge of discrimination or being a witness.
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues> (last visited Sept. 14, 2022).

Type #2: Retaliation (cont'd)

- ▶ Examples and Questions

- ▶ Example #1: An employer sends a negative letter of reference to a former employee's potential new employer, because the employee filed an EEOC charge against the former employer after he was fired.
- ▶ Example #2: A federal government supervisor gives an employee a negative mid-term review, because the employee made contact with an EEO counselor and complained of discrimination and harassment by the supervisor.

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING RETALIATION

Type #3: Harassment

- ▶ Unwelcome conduct by a **supervisor** or a **co-worker**, based on a protected characteristic, that is **severe or pervasive** enough to create a hostile work environment, or if the harassment results in a tangible employment action.
 - ▶ Severe or Pervasive: If the conduct is severe enough, then once may be enough, such as certain kinds of touching. Repeated conduct over time, such as mocking someone based on their race, may be pervasive.
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-harris-v-forklift-sys-inc> (last visited Sept. 14, 2022).

Type #3: Harassment (cont'd)

- ▶ Co-Worker: Requires showing that the employer knew or should have known and failed to take prompt remedial action.
- ▶ Supervisor: “Strict liability” if the other requirements (e.g., severe or pervasive, etc.) are met, subject to affirmative defense for harassment not involving “tangible employment action.”
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors> (last visited Sept. 14, 2022).

Type #3: Harassment (cont'd)

- ▶ Examples and Questions

- ▶ Example: Every day at lunch for the past month, a male employee viewed pornographic websites on his computer. The screen was situated in a way that a group of four co-workers, two men and two women, could see the screen. All five employees had the same supervisor. The four co-workers complained to the supervisor after the first day happened. The supervisor responded, “we don’t have a company policy against this, and he’s on break. I can’t do anything about it, and you don’t have to look.”

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING HARASSMENT

Family and Medical Leave Act

- ▶ An **eligible employee** of a covered employer may take up to 12 workweeks of leave during any 12-month period for a **qualifying reason**. (Up to 26 workweeks to care for service member who is the employee's spouse, son, daughter, parent, or next of kin.)
 - ▶ Eligible Employee: Employed at least 12 months and, in that time, worked 1,250 hours or more.
 - ▶ Qualifying Reasons: (1) a serious health condition of the employee; (2) birth or placement of adopted or foster child; (3) to care for a spouse, son, daughter, or parent with a serious health condition; and (4) any qualifying exigency arising out of the fact that a spouse, son, daughter, or parent is a military member on covered active duty or call to covered active-duty status.
 - ▶ Source: U.S. Department of Labor, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf> (last visited Sept. 14, 2022).

Family and Medical Leave Act (cont'd)

- ▶ FMLA leave may be used in blocks of time, on a reduced schedule, or intermittently.
- ▶ FMLA leave is unpaid, however employees may choose to draw upon accrued, unused paid leave if they have any. Employers are permitted to have a policy that requires employees to use available paid leave concurrently with FMLA leave.
- ▶ During FMLA leave, an employer must continue an employee's coverage under a group health plan. After FMLA leave, an employer must restore an employee to their original job or an equivalent one.
- ▶ Source: U.S. Department of Labor, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs28.pdf> (last visited Sept. 14, 2022).

Family and Medical Leave Act (cont'd)

- ▶ FMLA prohibits discrimination, harassment, retaliation, and interference.
 - ▶ Source: U.S. Department of Labor, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs77b.pdf> (last visited Sept. 14, 2022).

Family and Medical Leave Act (cont'd)

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING FMLA LEAVE

Americans with Disabilities Act

- ▶ Title I of the ADA
 - ▶ Prohibits employment discrimination on the basis of disability (covered earlier in this presentation).
 - ▶ Requires a covered employer to provide **reasonable accommodations** to **qualified individuals with disabilities**, who are employees or applicants for employment, absent an undue hardship to the employer.
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (last visited Sept. 14, 2022).

Americans with Disabilities Act (cont'd)

▶ Reasonable Accommodation

- ▶ Covered employers must reasonably accommodate qualified individuals with a disability to the extent needed to afford them an equal opportunity to do their **job duties** and otherwise benefit from the full range of **employment-related opportunities available to others**.
- ▶ Job Duties: Raised platform at a cash register to permit employee who uses wheelchair to reach register and ring-up customers.
- ▶ Employment-Related Opportunities Available to Others: Sign language interpreter at employer's annual awards ceremony to permit deaf employee to attend and participate.
- ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (except examples are those of the presenter; last visited Sept. 14, 2022).

Americans with Disabilities Act (cont'd)

- ▶ Reasonable accommodation requirement applies to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship.
- ▶ To be a qualified individual, the person must be able to perform the essential functions of their position, with or without accommodation.
 - ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (last visited Sept. 14, 2022).

Americans with Disabilities Act (cont'd)

- ▶ Examples of reasonable accommodations include:
 - ▶ Reallocating non-essential job functions (receptionist who used to deliver the mail),
 - ▶ Leave or modified schedule (for medical appointments or during flareups),
 - ▶ Workplace policies (eating at work for diabetic employee),
 - ▶ Reassignment to a position for which the person is qualified, unless there would be a hardship or there is no such job (the accommodation of last resort). Reassignment must be to position that is equivalent in pay, status, and other relevant factors, unless not available, in which case closest available position if there is one.
- ▶ Source: U.S. Equal Employment Opportunity Commission, <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada> (except some illustrations are those of the presenter; last visited Sept. 14, 2022).

Americans with Disabilities Act (cont'd)

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING REASONABLE ACCOMMODATIONS

Helping Employees Who Have Legal Issues

- ▶ Regarding potential discrimination, ask questions that go beyond buzzwords like “discrimination,” “harassment,” and “retaliation.”
 - ▶ What is happening?
 - ▶ Who is doing it?
 - ▶ When did it happen?
 - ▶ Why do you think this is happening?
- ▶ There could be “legal issues” and the person should be referred to an attorney to guide them if there is an EEO Basis involved, if there is a workplace investigation of any kind, if there are conduct or performance issues of any kind, or if the person is suffering emotionally because of workplace problems.

Helping Employees Who Have Legal Issues (cont'd)

- ▶ Regarding potential FMLA leave, ask if the person's (or family member's) doctor has filled out a medical provider certification and if they have told their employer that they need leave?
- ▶ If their employer is not helping or they are having trouble with the doctor's office, these could be "legal issues," and they should be referred to an attorney to guide them.

Helping Employees Who Have Legal Issues (cont'd)

- ▶ Regarding ADA reasonable accommodations, ask if the person's doctor has provided a note explaining what their medical condition is and what workplace limitations they have.
- ▶ If their employer is not helping or they are having trouble with the doctor's office, these could be "legal issues," and they should be referred to an attorney to guide them.

Helping Employees Who Have Legal Issues (cont'd)

- ▶ AUDIENCE EXAMPLES AND QUESTIONS REGARDING HELPING EMPLOYEES WITH LEGAL ISSUES

Conclusion & Thank You

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