

Overview of Federal and State Employment Laws —What Town Employers and Their Attorneys Need to Know to Minimize the Risk of Discrimination Claims

September 30, 2022

Agatha K. Raynor araynor@crivellocarlson.com

Crivello Carlson, S.C.

414.271.7722

Why are these issues important?

- Doing the “right” thing
 - Treating people fairly
- Establishing a Positive Working Environment
 - Productivity: Avoid absenteeism, turnover
- Avoid Litigation: Time-Consuming, Divisive, Expensive
(and brings potential bad publicity)

Scope of Presentation:

- At-Will Employment
 - Overview of Major Federal Employment Laws
 - Overview of Major Wisconsin Employment Laws
- PURPOSE: Spot issues and know when to reach out to HR

*****The information in this presentation is provided for general information only and does not constitute legal advice. For legal advice about a specific concern or situation, always consult with an attorney.*****

BASIC PRINCIPLE OF EMPLOYMENT LAW: EMPLOYMENT-AT-WILL



EMPLOYMENT CONTRACTS MAY ALTER THE AT-WILL RELATIONSHIP: Be careful of inadvertent contracts



FEDERAL ANTI-DISCRIMINATION LAWS



Temporary Employees



“Staffing firm workers are generally covered under the anti- discrimination statutes. This is because they typically qualify as ‘employees’ of the staffing firm, the client to whom they are assigned, or both. Thus, staffing firms and the clients to whom they assign workers may not discriminate against the workers...

The [EEOC] guidance makes clear that a staffing firm must hire and make job assignments in a non-discriminatory manner. It also makes clear that the client must treat the staffing firm worker assigned to it in a non-discriminatory manner...”

Source: EEOC Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Protects individuals from discrimination based upon:

- Race
- Color
- Sex**
- Religion
- National origin



Sex Discrimination Also Applies to:

- Gender Identity/Transgender Status
- Sexual Orientation

Bostock v. Clayton County, 590 U.S. _____



Title VII Also Prohibits Workplace Harassment

- Harassment, a form of discrimination, is *unwelcome* conduct that is *based on* race, gender, color, religion, sex, etc.
- To be actionable harassment, conduct must be so “severe or pervasive that it alters the conditions of employment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)



Quid pro Quo Sexual Harassment

Unwelcome sexual advances or conduct, the submission to which is explicitly or implicitly a term or condition of the individual's employment



Hostile Work Environment Harassment

Intimidating, hostile or offensive environment *which interferes with an employee's work* (Must be severe or pervasive enough to alter conditions of employment and be based on a protected class)



Title VII Also Prohibits **RETALIATION**



Pregnancy Discrimination Act: applies to pregnancy, childbirth, or a medical condition related to pregnancy or childbirth



Pregnancy Discrimination Act



Requires Equal Treatment as Other Persons “Not so Affected but Similar in Their Ability or Inability to Work”

Pregnancy Discrimination:

Young v. UPS, 135 S. Ct. 1338 (2015)



AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Protects Individuals age 40 or older *in all aspects of employment*



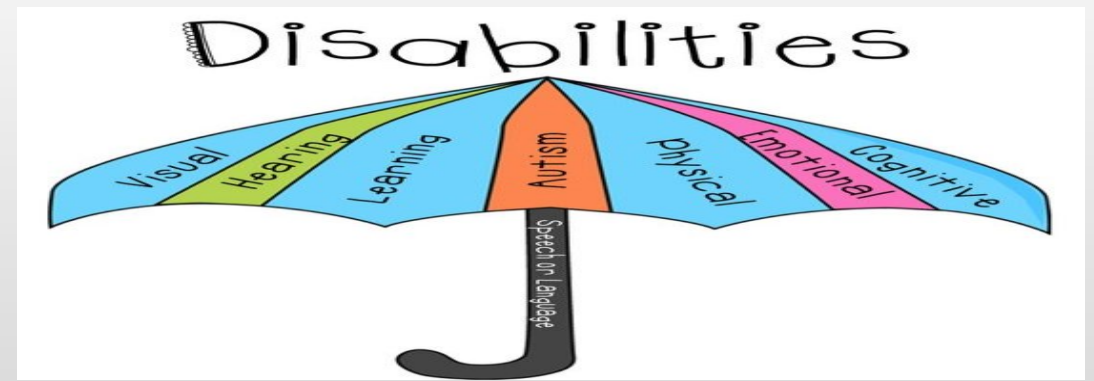
AMERICANS WITH DISABILITIES ACT (ADA)

- Prohibits discrimination *in all aspects of employment*
- Requires “reasonable accommodations”



2008 Amendments to the ADA: ADAAA

- Broadened definition/application of “major life activities” (now includes eating, standing, lifting, bending, reading)
- Broadened definition of “substantially limits”
- Result: More individuals fall under the “ADA umbrella”



Reasonable Accommodations

- The ADA requires employers to provide reasonable accommodations



Reasonable
Accommodation
in the workplace

- What is “reasonable” depends on the specific circumstances (**fact-specific inquiry**)

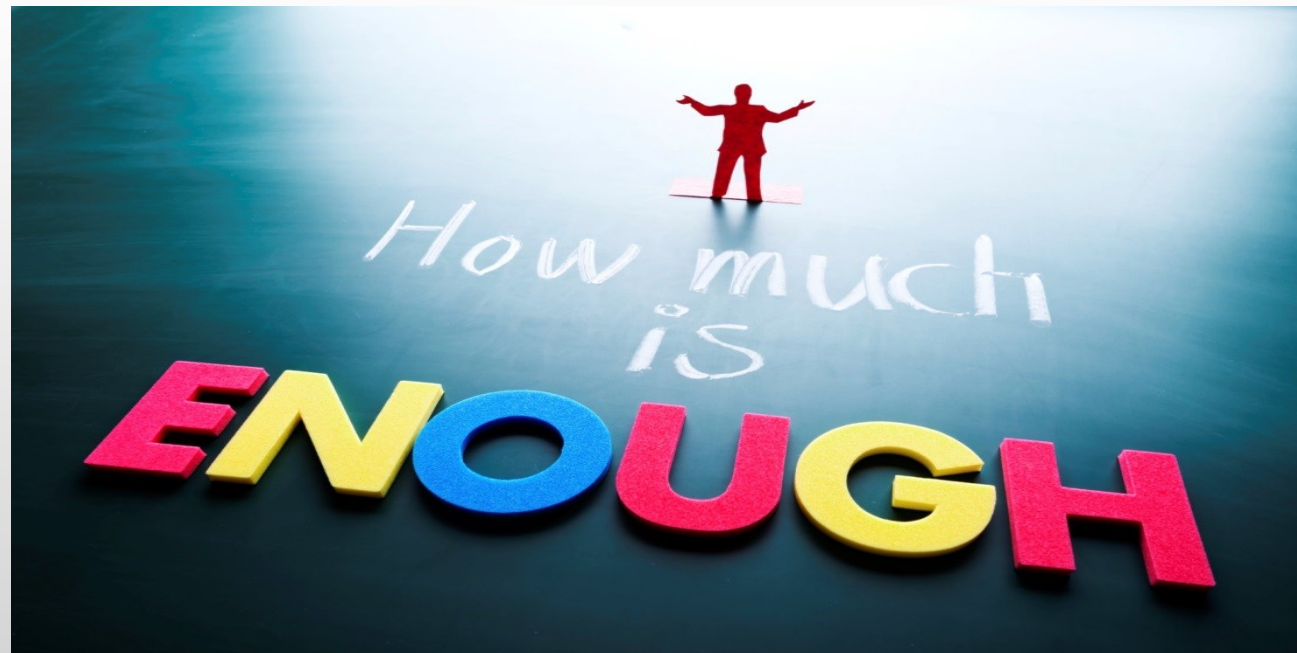
“The Interactive Process”



The ADA requires the employer to engage in an interactive process to explore/determine “reasonable accommodations”

Undue Hardship

- The accommodation cannot create an undue hardship on the Employer
(**Note: Different from FMLA, where undue hardship is not a consideration**)



Generally, these anti-discrimination laws apply to all terms and conditions of employment:

- Recruiting
- Hiring
- Training
- Promoting
- Disciplining
- Discharging



**These laws generally also include
Anti-Harassment and Anti- Retaliation provisions
(Just like Title VII)**



Hostile Work Environment Harassment

Intimidating, hostile or offensive environment *which interferes with an employee's work* (Must be severe or pervasive enough to alter conditions of employment and be based on a protected class)



Common Myths About Workplace Harassment



Myth #1:

The conduct must be based on a sexual act to constitute harassment



Truth: Workplace Harassment is much more than *sexual harassment*, and more than just *physical acts* (i.e can be visual, verbal)

Myth #2:

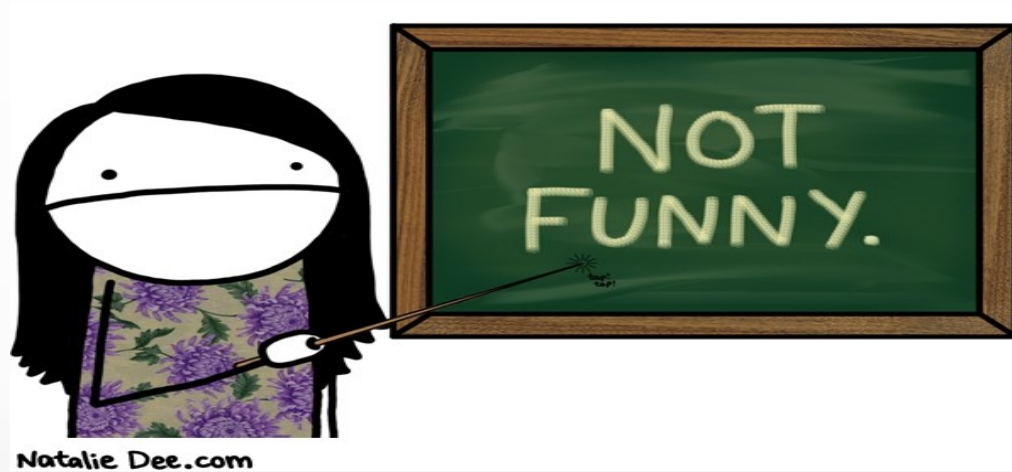
Only conduct at the workplace can constitute harassment



Truth: Inappropriate conduct outside the workplace can constitute harassment if it creates a hostile environment or involves *quid-pro-quo* harassment.

Myth #3:

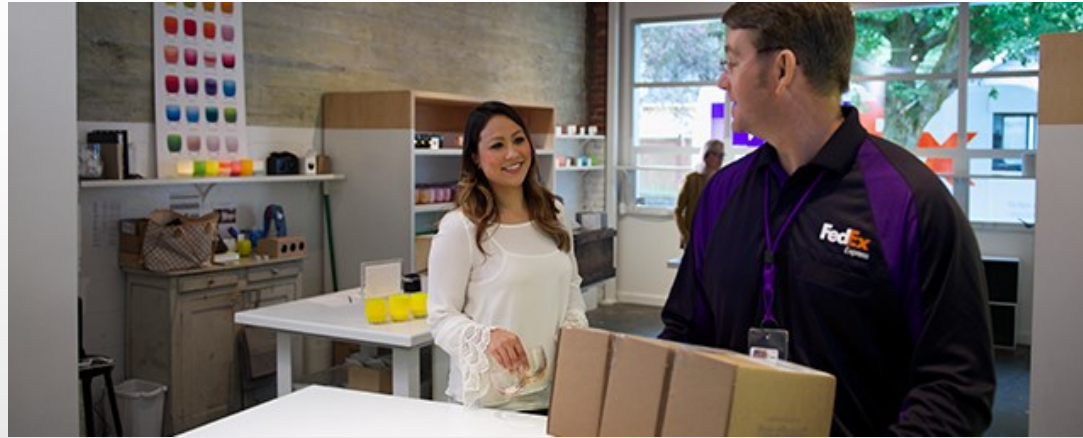
Sexual harassment requires an *intent* to harass



Truth: Even if intended to be funny or complimentary, it may still be offensive and can constitute harassment if it creates a hostile work environment

Myth #4:

Employees are only protected from workplace harassment by other employees



**Truth: Employees are protected from harassment by third-parties
(i.e. vendors, contractors)**

Myth #5:

An employer has no obligation to take action or prevent harassment unless a formal complaint is filed by the victim of the harassment



/ Do not confuse harassment with:

- > Stress
- > Work constraints
- > Conflicts
- > Directives/deadlines
from Supervisors
- “Tough” Boss who is equally
tough on everyone



Family and Medical Leave Act

Allows unpaid leave to eligible employees



FMLA: Types of Leave

- Employee's serious health condition
- Serious health condition of employee's spouse, child or parent
- Birth/adoption/foster care placement
- Military Service



The
Family
and
Medical
Leave
Act

FMLA: Practical Issues

- When an employee seeks leave for a FMLA-qualifying reason for the first time, the employee need not expressly assert FMLA rights or even mention the FMLA.
- When an employee requests FMLA leave or the employer acquires knowledge that leave may be for a FMLA-qualifying reason, provide the employee with notice concerning his or her eligibility for FMLA leave and his or her rights and responsibilities under the FMLA.

Two Types of FMLA Claims:

(1) Interference with
FMLA Rights



(2) FMLA Retaliation

UNIFORMED SERVICES EMPLOYMENT AND RE-EMPLOYMENT RIGHTS ACT

38 U.S.C. §§ 4301–4335

- Protects service members' and veterans' civilian employment rights
- Under certain conditions, requires employers to put individuals back to work in their civilian jobs after military service.
- Protects service members from discrimination in the workplace based on their military service or affiliation.



EMPLOYERS SHOULD BE AWARE OF
SPECIFIC STATE AND/OR LOCAL
EMPLOYMENT LAWS



WISCONSIN FAIR EMPLOYMENT ACT (Wis. Stats. 111.31 *et seq.*)

Protects individuals from discrimination based upon:

- Age
- Race
- Creed
- Color
- Disability
- ***Marital Status***
- Sex
- **Sexual orientation**
- Pregnancy/maternity
- National origin/Ancestry
- ***Arrest record***
- ***Conviction record***
- Military service
- ***Use or nonuse of lawful products off the employer's premises during nonworking hours***

*Employee Access
to Personnel Records
Wis. Stat. 103.13*



Wisconsin's Social Media Protection Act: Wis. Stat. § 995.55 (2)

Employers may **not**:

- Request/require access (login) information or otherwise require a current/prospective employee to grant access or allow observation of a personal internet account.

Employers **may**:

- Require access information (such as a password) for a device supplied by the employer
- Restrict access to web sites while using its equipment or network
- View or access the personal internet account of an employee if that account is open to the public



Wisconsin Bone Marrow and Organ Donation Leave Act: Wis. Stats. 103.11

Allows employees up to six (6) weeks leave in a 12-month period for the purpose of serving as a bone marrow or organ donor



Deductions from Wages

Employers cannot make any deduction from the wages earned by any employee for faulty workmanship, lost or stolen property, or damage to property, unless:

- The employee authorizes the employer in writing to make that deduction;
- The employer and a representative designated by the employee determine that the loss was due to the employee's negligence, carelessness, or willful and intentional conduct; or
- The employee is found guilty or held liable in a court of law.

If an unauthorized deduction is made, the employer may be liable for twice the amount of the deduction.

Wis. Stats. 103.455



REVIEW: Why are these issues important?

- *EEOC Wins Jury Verdict of over \$17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms*
- *EEOC Obtains \$600,000 Verdict Against AutoZone For Failure To Accommodate Disabled Employee*
- *Employee Wins \$51 Million Age Discrimination Lawsuit Against Lockheed Martin*

Walmart Hit With \$125 Million Jury Award in ADA Suit by EEOC

****Green Bay, WI – July 2021****



REVIEW: Why are these issues important?

- Doing the “right” thing
- Treating people fairly
- Establishing a Positive Working Environment
 - Culture/Policies (Dignity, respect)
 - Productivity: Avoid absenteeism, turnover
- Avoid Litigation: Time-Consuming, Divisive, Expensive
(and brings potential bad publicity)

QUESTIONS

