

Workplace Laws & Strategies

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Overview

- 1. Sources of Employment Law**
- 2. Five Key Laws**
- 3. Employment Relationship Timeline from a Legal Perspective**
- 4. Five Strategies to Minimize Litigation Risk**



Sources of Employment Law



1. Common Law

- At-Will
- Contract
- Tort

2. Statutes

3. Constitutions (Government Actors)

Sources of Employment Law

Common Law, At-Will Doctrine



Rule:

- **In the absence of a contract expressing an intended duration, either party to an employment relationship is ordinarily at liberty to terminate the contract at will, upon giving the other party reasonable notice.**

Sources of Employment Law

Common Law, At-Will Exceptions



– Public Policy (Wrongful/Retaliatory Discharge)

- Public policy exception applies in limited circumstances where an employee is terminated for exercising a statutory right that protects a public interest, including exercising rights under workers' compensation.

– Implied Waivers

- The at-will employment relationship may be modified when there is a clear intent to do so, e.g., by termination-for-cause statements and/or handbook statements.

Practical Tip: Avoid Ambiguous Statements; Use Disclaimers

Sources of Employment Law

Common Law, Contract



- **Employment Agreement: Cons**
 - Eliminates at-will relationship
 - Basis for legal liability
 - Often not needed
- **Employment Agreement: Pros**
 - Plain expression of rights and responsibilities
 - Safeguards business continuity
 - Provides security to employee

Sources of Employment Law

Common Law, Torts



Examples:

- Defamation
- Intentional Infliction of Emotional Distress
- Wrongful/Retaliatory Discharge
- Invasion of Privacy

Sources of Employment Law Statutes



- Authority
 - **Federal Laws**
 - **State Laws**
 - **Local Ordinances**
- Categories
 - **Equal Employment Opportunity (“EEO”)**
 - **Labor**
 - **Privacy & Reputation**

Sources of Employment Law

Federal EEO Laws



- Age Discrimination in Employment Act (ADEA, age)
- Americans with Disabilities Act (ADA, disability)
- Equal Pay Act (EPA, gender pay equity)
- Immigration Reform Control Act (IRCA, citizenship and national origin)
- National Labor Relations Act (NLRA, unions)
- Pregnancy Discrimination Act (PDA, pregnancy)
- Reconstruction Era Civil Rights Acts of 1866 (race)
- Rehabilitation Act & Other Public Sector Laws
- Title VII of the Civil Rights Act of 1964 (race, color, religion, sex, nat'l origin)
- Uniformed Services Employment & Reemployment Rights Act (USERRA, military)
- Whistleblower Laws (anti-retaliation for reported safety and false claims issues: Sarbannes-Oxley, Whistleblower Protection Act of 1989, False Claims Act)

Practical Tip: www.eeoc.gov is an excellent resource.

Sources of Employment Law

Federal Labor Laws



- **Benefits, Safety & Health**

- Consolidated Omnibus Budget Reconciliation Act (COBRA, health-care coverage continuation)
- Employee Retirement Income Security Act (ERISA, pension & welfare plans)
- Older Workers Benefit Protection Act (OWBPA, age parity in benefit plans)
- Worker Adjustment and Retraining Notification Act (WARN, mass layoff)
- Occupational Safety & Health Act of 1970 (OSH Act, safety and health)

- **Wage, Hour & Leave**

- Consumer Credit Protection Act, Title III (CCPA, wage garnishment)
- Fair Labor Standards Act (FLSA, minimum wage & overtime pay)
- Family Medical Leave Act (FMLA, medical leave)
- Public Contracts Act, Service Contract Act, and other public sector laws
- USERRA (military leave)

- **Unions**

- Various, including the National Labor Relations Act

Practical Tip: www.dol.gov is an excellent resource.

Sources of Employment Law

Federal Privacy Laws



- ADA (medical testing and information)
- Drug-Free Workplace Act (drug testing)
- Electronic Communications Privacy Act (ECPA)
- Employee Polygraph Protection Act (EPPA, polygraphs)
- Fair Credit Reporting Act (FCRA, consumer reports)
- Privacy Act of 1974
- Safe Streets Act, Title III (communications)

Sources of Employment Law

Select Virginia Laws



Equal Employment Opportunity

- Virginia Human Rights Act
- Virginians with Disabilities Act
- VA Equal Pay Act
- VA Whistleblower Acts

Privacy Laws

- Statutory Invasion of Privacy
- Blacklisting/Job References
- Criminal Records Access
- Genetic Testing
- Medical Examinations

Labor Laws

- Workers' Compensation
- Minimum Wage Act
- Wage Payment Act
- Clean Indoor Act
- Child Labor Act
- Military Leave
- Jury & Witness Duty
- Health-care coverage
- Health & Safety
- Alien Employment

FIVE KEY STATUTES



1. Age Discrimination in Employment Act
2. Americans with Disabilities Act
3. Fair Labor Standards Act
4. Family Medical Leave Act
5. Title VII of the Civil Rights Act of 1964

Five Key Statutes

1. ADEA

- **Employers Covered.** The ADEA applies to employers with 20 or more employees, employment agencies, and labor organizations.
- **Employees Covered.** The law covers employees and job applicants who are 40 years of age or older.
- The ADEA prohibits discrimination because of a person's age for any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The law includes an anti-retaliation provision.

Factoid: In FY 2006, the EEOC resolved 14,146 age discrimination charges and recovered \$51.5 million from employers (excluding monies paid during litigation).

Five Key Statutes

2. ADA

- The ADA prohibits employers with 15 or more employees, employment agencies, and labor unions from discriminating against “qualified individuals with disabilities” in job application, terms, conditions and privileges of employment. Employers must provide reasonable accommodations that do not impose “undue hardships.”
- A **qualified** individual is one who, with or without reasonable accommodation, can perform the essential functions of the job.
- An **individual with a disability** is a person who:
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment.
- **Medical Examinations and Inquiries.**



Five Key Statutes

3. FLSA



- **Coverage.** FLSA covers most employers. State laws generally cover companies who do not meet the federal threshold requirement of \$500K in revenue.
- **Minimum Wage.** Covered employers must pay at least the minimum wage, currently \$5.15 per hour, to non-exempt employees (typically non-salaried workers)
- **Overtime Pay.** For covered, nonexempt employees, employers must pay overtime of at least one and one-half times an employee's regular rate of pay after 40 hours of work in a workweek. Some exceptions apply.
- **Child Labor.** FLSA sets age limits for certain type of work.
- **Remedies.** An employee may recover back pay and an equal amount in liquidated damages for “willful” violations, which are subject to a good faith defense. Class action lawsuits are on the rise.

Practical Tip: Proper classification and record-keeping are key.

Five Key Statutes

4. FMLA

- Covered employers, those who have 50 employees within a 75-mile radius of the job site, must grant an eligible employee (one who satisfies the work hours requirements) up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:
 1. birth and care of the newborn child of the employee;
 2. placement with the employee of a son or daughter for adoption or foster care;
 3. to care for an immediate family member (spouse, child, or parent) with a serious health condition; or
 4. to take medical leave when the employee is unable to work because of a serious health condition.



Five Key Statutes

5. Title VII



- **Employer Coverage.** Title VII applies to employers of 15 or more employees, employment agencies, and labor organizations.
- Title VII prohibits discrimination on the basis of **race, color, national origin, sex, or religion**. It covers intentional discrimination and neutral job policies that have an adverse disproportionate impact and are not justified by business necessity.
 - Terms, Conditions, and Privileges of Employment
 - Harassment/Hostile Work Environment
 - Segregation and Classification of Employees
 - Anti-Retaliation

Employment Relationship Timeline

1. Ongoing Legal Compliance

- Record-Keeping and Retention
- Posting of Agency Notices
- Tax Matters
- Workers' Compensation Insurance
- Immigration Compliance
- PRWORA Reporting Requirements
- EEO Internal Complaint System
- Company Handbook (recommended)

Employment Relationship Timeline

2. Defining the Relationship Up Front



- Type of New Hire
 - Contingent Worker (Indep. K; leased employees; etc.)
 - Employee
- Legal Relationship
 - At-Will
 - Contract
- Employer Protections
 - Restrictive Covenants (non-competes, non-solicitation, etc.)
 - Employee Common Law Duties
 - Other Protections for Employers (common law & statutory)

Employment Relationship Timeline

3. Recruitment & Due Diligence



- **Recruitment & Advertising**
 - Non-Discriminatory
 - Affirmative Action v. Reverse Discrimination
- **Interviews**
 - Use Interview Checklists
 - Revise & Avoid Inappropriate/Unlawful Questions

Employment Relationship Timeline

3 (cont'd). Recruitment & Due Diligence



- Background Checks
 - Job References/Blacklisting
 - Criminal Records Check
 - Consumer Reports (FRCA)
- Pre-Employment Testing
 - Drug & Alcohol Testing
 - Polygraphs
 - Medical Testing
 - Genetic Testing

Employment Relationship Timeline

4. Terms, Conditions & Privileges

- Recruitment & Hiring
- Wages, Hours, and Leave
- Benefits
- Safety & Security
- Workplace Privacy
- Performance
- Promotions
- Discipline
- Discharge (Severance Agreements)



EMPLOYMENT LAW HOT TOPICS



1

Retaliation

2

Defamation from Performance Appraisals

3

Releases (Waivers & Potential Retaliation)

4

Wage & Hour Litigation

Five Strategies to Minimize Litigation Risks



- 1. Company Handbook (Review & Revise)**
- 2. Checklists & Forms (Create & Use)**
- 3. Training & Communication**
- 4. Anti-Retaliation Policy (Zero Tolerance)**
- 5. Think Business Necessity**

Thank You!

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