LEGAL MINEFIELDS IN THE LEGISLATIVE WORKPLACE FOR LEGISLATIVE SUMMIT*

presented by
Jonathan A. Segal, Esq.

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PART I – EEO BACKGROUND
Equal Employment Opportunity

1. Protected EEO groups:
   a. Federal
   b. State
   c. Local
Equal Employment Opportunity

2. Examples of protected groups:

- Age
- Citizenship
- Disability/handicap (physical or mental)*
- Family/parental status*
- Genetic information
- Gender identity**
- Marital status**
- National origin/ancestry
- Pregnancy
- Protected complaints or other activities
- Protected leave
- Race/color
- Religion/creed*
- Sex/gender
- Sexual orientation**
- Veteran’s status/military status

* Reasonable accommodation obligation subject to undue hardship defense.
** In some state & local jurisdictions only.
Equal Employment Opportunity

3. **EEO prohibitions/protections apply to** every employment decision, policy and practice, such as:

- Job requirements
- Where you advertise
- Whether to interview
- Questions asked in interview
- Whether to hire
- Career management
- Compensation and benefits upon hire
- Benefits
- Pay increases

- Hours of work
- Accommodations
- Assignments
- Appraisals
- Training provided
- Whether to promote
- Whether to discipline
- Whether to discharge
- Whether to lay off
- Working conditions
PART II – HIRING AND PROMOTING
Hiring and Promoting

1. Diversity:
   a. Benefits of diversity:
      i. Legal
      ii. Business benefits:
         ▪ Talent of applicant pool
         ▪ Community served
         ▪ Diversity of ideas
   b. Develop diverse pool of qualified applicants
Hiring and Promoting

2. Screening applicants/resumes:
   a. Review application and any resume carefully:
      i. Look for inconsistencies, for example
      ii. Ask for specifics where generalities
   b. Be careful of unconscious bias relative to names and addresses
Hiring and Promoting

3. Impermissible and/or inappropriate interview questions:
   a. EEO status
   b. Family status
   c. Personal
Hiring and Promoting

4. Permissible interview questions:
   a. Examples:
      i. Prior experience
      ii. Current skills
      iii. Job requirements
      iv. Situational/behavioral questions
4. Permissible interview questions: (continued)
   b. Benefits of starting with uniform list of questions:
      i. Legal
      ii. HR best practice
Hiring and Promoting

5. Disabilities/Accommodations:
   a. Can ask about applicant’s ability to perform the essential functions of the job (using job description)
   b. Cannot ask about physical or mental conditions
   c. If applicant raises physical or mental condition that may interfere with applicant’s ability to perform essential functions of job or makes any request for an accommodation, potential duty to engage in interactive dialogue
Hiring and Promoting

6. EEO/diversity danger zones (examples only):
   a. Personal comfort level — “like me” bias
   b. Bad cultural fit
   c. Accent
   d. Overqualified
   e. Customer preference (relative to EEO factor)
   f. Stereotyping (e.g., women with children)
   g. Catch 22 relative to assertiveness
   h. Unemployed
   i. Criminal convictions/credit reports
   j. Diversity as a “plus”
PART III – PERFORMANCE MANAGEMENT
Performance Management

1. **At-will employment** — either party can terminate the employment relationship:
   a. At any time
   b. For any or no [lawful] reason
   c. With or without prior notice
Performance Management

2. Unlawful reasons to terminate an employee include (but are not limited to):
   a. Membership in protected group
   b. Engaged in protected activity
   c. Took protected leave
Performance Management

3. Why performance management prior to termination ordinarily is important, even if employee is at-will:
   a. Fairness to the employee
   b. Cost to replace and train
   c. Decreases the likelihood of a claim
   d. Decreases exposure in litigation
Performance Management

4. Common excuses (but not defenses) for failure to provide pre-termination performance management (where it is appropriate):
   a. Inadequate time
   b. Conflict avoidance
   c. Fear of claim
Performance Management

5. Pre-termination notice is not always recommended and/or required, for example:
   a. Early employment
   b. Serious misconduct
Performance Management

6. Vehicles for providing notice:
   a. Informal coaching
   b. Appraisal process
   c. Formal discipline
Performance Management

7. Documentation:
   a. Critical in terms of notice:
      i. Opportunity to improve
      ii. Defense of potential claim
   b. Early intervention maximizes chance of performance management being successful
Performance Management

8. Physical or mental disabilities/serious health conditions:
   a. Focus on performance/behavioral deficiency:
      i. Do not speculate as to underlying cause
      ii. Do not inquire as to underlying cause
Performance Management

8. Physical or mental disabilities/serious health conditions: (continued)
   
   b. Interactive accommodation dialogue if:
      
      i. Employee discloses physical or mental condition or serious health condition in response to coaching, discipline or evaluation
      
      ii. Employee requests any accommodation
Performance Management

9. Attendance:
   a. Comply with policy (as applicable)
   b. Ensure consistency (where similarly situated)
   c. Exclude protected absences and no retaliation because of them
Performance Management

10. Importance of consistency:
   a. Risks of inconsistency:
      i. Discrimination claims
      ii. Perceptions on fairness — management credibility
   b. Making and documenting legitimate exceptions
Performance Management

11. Importance of timeliness:
   a. Business value
   b. Human element
   c. Legal considerations
Performance Management

12. Importance of:
   a. Positive reinforcement
   b. Recognition
   c. Appreciation
Performance Management

13. Treating employees with respect and dignity
PART IV – HARASSMENT
Harassment

1. Two types of unlawful harassment:
   a. Quid pro quo
   b. Hostile work environment on account of any protected group
Harassment

2. Inappropriate behaviors (examples only):
   a. Linking any employment decision, benefit, etc. to a subordinate’s submission or refusal to submit to sexual advances [Always illegal]
   b. Asking for sex (even if no demand or threat)
Harassment

2. Inappropriate behaviors (examples only):
   (continued)

c. Repeated request for dates (after individual has said “NO”):
   i. Initial request risky if supervisory authority (direct or indirect)
Harassment

2. Inappropriate behaviors (examples only):
   (continued)

d. Comments with regard to appearance of a sexual or suggestive nature or at inappropriate times or frequency

e. Unwelcome and/or inappropriate touch

f. Sexual, suggestive or hate-based graffiti
Harassment

2. Inappropriate behaviors (examples only):
(continued)

g. Slurs/epithets which relate to any protected group (such as the “N” word)
h. Hate symbols (such as noose or swastika)
i. Making fun of or mimicking accent, disability etc.
Harassment

2. Inappropriate behaviors (examples only):
   (continued)
   j. Sexual or suggestive “jokes” or “jokes” which stereotype, demean or make fun of any protected group
   k. Sexual or suggestive conversations, materials, objects, etc.
   l. Stereotypic comments
   m. Foul or obscene language
   n. Hostile behavior targeted at employee because of membership in protected group
Harassment

3. Non-defenses to inappropriate behavior (examples only):
   a. It was not unlawful
   b. No bad intent
   c. It was only a “joke”
   d. Employee never complained before
   e. Employee complaining participated
   f. Off site/off clock
   g. Equal opportunity abuser
Harassment

4. Prohibitions on inappropriate behavior apply to:
   a. The workplace as well as off site work, social and other events
   b. Written, oral, electronic and all other forms of communication (for example, e-mail or social media)
   c. Non-employees, such as constituents
Harassment

5. Supervisors must not only refrain from inappropriate conduct but also:
   a. Report all complaints to designated person
   b. Respond proactively, even in the absence of a complaint
   c. Take remedial action (in consultation with designated person, taking into account Constitutional considerations)
   d. Refrain from retaliation (broadly defined)
PART V – RETALIATION
Retaliation

1. Law protects:
   a. Complainants
   b. Witnesses
   c. Others who participate in the investigatory process
   d. Others who are associated with the person making the complaint
Retaliation

2. Prohibited retaliation covers:
   a. Tangible employment actions
   b. Other material terms and conditions of employment
   c. Retaliation independent of the workplace (e.g., badmouthing former employee who alleged bias)
Retaliation

3. The fact that the complaint lacks legal merit is not a defense to unlawful retaliation
Retaliation

4. Retaliation also is prohibited if employee:
   a. Engages in protected whistle-blowing
   b. Engages in activity protected by Constitution
   c. Requests and/or receives reasonable accommodation
   d. Requests or takes approved leave of absence
   e. Alleges work-related injury and/or receives workers compensation
Thank You