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LEGAL MINEFIELDS IN THE LEGISLATIVE WORKPLACE FOR



LEGISLATIVE SUMMIT*

presented by

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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

Hiring and Promoting

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

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Thank You

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