

## Employment Law Update

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## Topics of Discussion

- I. Federal Anti-Discrimination Statutes
- II. Hiring
- III. Conducting Investigations
- IV. Discipline and Termination: Preventing Employment Litigation

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## Topics Not Discussed

- Workers' Compensation
- Occupational Safety and Health Act ("OSHA")
- Laws Applicable to Unions and Collective Bargaining of Employees
- State Anti-Discrimination Statutes


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## I. Federal Anti-Discrimination Statutes: Creating Employee Rights

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## Fair Labor Standards Act of 1938 ("FLSA")

- Basic minimum wage and overtime standards
  - Current minimum wage = \$5.15 / hr
  - 1938 minimum wage = \$0.25 / hr (\$3.01 / hr present value)
  - Highest minimum wage in 1968 = \$1.60 / hr (\$7.84 / hr present value)
  - Lowest minimum wage in 1948 = \$0.48 / hr (\$2.84 / hr present value)



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## Fair Labor Standards Act of 1938 Cont.

- Overtime pay at rate of not less than 1.5 times regular rate of pay for hours worked in excess of 40 hours in a workweek
  - Certain exemptions to overtime pay requirements
    - "Executives, Administrators, and Professionals"
    - Salespeople
    - Nurses (Baylor shifts)
    - Farm employees
    - Seasonal workers (amusement parks)

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## Fair Labor Standards Act of 1938 Cont.

- Restrictions on hours of work for minors under age 16
- Restrictions on types of work for minors (hazardous occupations)
- Does not require:
  - Severance pay
  - Sick leave / "Comp Time"
  - Vacations
  - Holidays
  - Extra pay for working weekends, nights, or holidays

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## Fair Labor Standards Act of 1938 Cont.

- Employers must keep payroll, overtime, INS I-9, W-2s, and other documents for a period of 2 years
- Must post FLSA overtime statement and State minimum wage posters in employee break area

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## Equal Pay Act of 1963

- Prohibits gender-based wage discrimination between men and women in the same establishment who are performing jobs requiring equal skill, effort, and responsibility under similar working conditions



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## Title VII of the Civil Rights Act of 1964 ("Title VII")

- Prohibits Discrimination Based on:
  - Gender (including sexual harassment)
  - Race / Color
  - Religion
  - National Origin



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## Title VII of the Civil Rights Act of 1964 Cont.

- Prohibits:
  - "Same sex" sexual harassment
  - "Same race" racial harassment
  - "Reverse gender discrimination" (female discriminating against male)
- Sexual harassment = "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"

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## Title VII of the Civil Rights Act of 1964 Cont.

- Pertains to all aspects of employment:
  - Hiring, firing, discipline, promotion, compensation, training, etc.
- Applies to employers with 15 or more employees
  - Beware state anti-discrimination statutes

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## Age Discrimination Act of 1969 (“ADEA”)

- Prohibits discrimination based on age
- Of employees age 40 or older
- Exception: highly compensated executives may be involuntarily retired at age 65
- Applies to employers employing more than 20 employees
  - Beware state anti-discrimination statutes
- (Still LBJ)

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## Rehabilitation Act of 1973 (“Rehab Act”)

- Prohibits discrimination based on disability
- Covers only federal agencies, federal contractors, and programs receiving federal aide
  - Federal aide = Medicare / Medicaid, CHAMPUS, etc.



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## Pregnancy Discrimination Act of 1978 (“PDA”)

- Amendment to Title VII
- Discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful gender discrimination under Title VII



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## Pregnancy Discrimination Act of 1978 Cont.

- Employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the essential functions of the job
- If employee is temporarily unable to perform her job due to pregnancy, employer must treat her the same as any other temporarily disabled employee
  - modified tasks, alternative assignments, disability leave, or leave without pay

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## Americans with Disabilities Act of 1990 (“ADA”)

- Prohibits public and private employers from discriminating against “qualified persons with physical and mental disability”
- Qualified disability includes:
  - Alcoholism / Past Drug Addiction
    - May discipline / terminate for use of illegal drugs
    - May discipline / terminate for use of alcohol during working hours
  - HIV-positive (even if asymptomatic)



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## Americans with Disabilities Act of 1990 Cont.

- Requires employers to make “reasonable accommodations” to needs of disabled applicant or employee
- Unless reasonable accommodation would cause “undue hardship” on employer
  - Cost
  - Employer’s financial resources
  - Nature of employer’s business operations
- Applies to employers who employ 15 or more employees
  - Beware state anti-discrimination statutes

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## Americans with Disabilities Act of 1990 Cont.

- Mandates that employer keep employee medical file separate from general personnel file
  - In locked cabinet / area
  - Along with workers' compensation documents

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## Family Medical Leave Act of 1993 ("FMLA")

- Eligible employees may take up to 12 workweeks of unpaid leave in a 12 month period for:
  - Birth of child
  - Care for spouse, child, or parent with serious medical condition
  - Because employee's serious medical condition makes employee unable to perform essential functions of job



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## Family Medical Leave Act of 1993 Cont.

- Eligible employee entitled to return to same or equivalent position
- Eligible employee entitled to return to same benefits including group health coverage

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## Family Medical Leave Act of 1993 Cont.

- FMLA "serious health condition" not the same as ADA "disability" BUT . . .
- Employer may ask for medical certification from physician stating that employee / family member has serious health condition
- Applies to private employers with 50 or more employees
  - Beware state anti-discrimination statutes
- May keep FMLA documentation in employee's ADA medical file

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## ADA / PDA / FMLA Quiz

- Fact pattern: 1. Female employee of CHC with 10 employees (including physicians) requests unpaid pregnancy leave of 12 weeks for birth of child; 2. Normal pregnancy
- Question: Must the employer honor request and allow employee to return to same or equivalent position after 12 weeks?

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## Other Employee Rights Created by Judges

- Negligence
  - Employers must take reasonable steps to ensure the health, safety, and welfare of employees
- Breach of Contract
  - Actual breach of actual contract
  - Breach of employee handbook
    - Attachment 1 – Handbook At-Will Disclaimer
    - No such thing as "probationary employee"



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## II. Hiring

- Pre-Offer Inquiries
- Post-Offer Inquiries

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## Pre-Offer Inquiries - Age

<ul style="list-style-type: none"><li>• <u>Fair</u></li><li>• Date of Birth</li><li>• Experience</li><li>• Degrees / Certifications</li></ul>	<ul style="list-style-type: none"><li>• <u>Unfair</u></li><li>• Avoid inquiry that implies employer's preference for persons under 40</li><li>• Avoid statements about "overqualification"</li><li>• Request for photographs</li></ul>
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## Pre-Offer Inquiries - Criminal History

<ul style="list-style-type: none"><li>• <u>Fair</u></li><li>• Convictions</li><li>• Guilty and No Contest Pleas</li></ul>	<ul style="list-style-type: none"><li>• <u>Unfair</u></li><li>• Arrests</li><li>• Imprisonment</li></ul>
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## Pre-Offer Inquiries - Citizenship

<ul style="list-style-type: none"><li>• <u>Fair</u></li><li>• Ability to provide proof of legal eligibility to work in United States</li><li>• Ability to speak / write / read foreign language when a job requirement</li></ul>	<ul style="list-style-type: none"><li>• <u>Unfair</u></li><li>• Citizenship</li><li>• Birth Certificate</li><li>• Naturalization</li><li>• Baptismal record</li><li>• Ancestry / National Origin</li></ul>
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## Pre-Offer Inquiries - Disability

- Fair
- Whether applicant "can perform essential functions of position with or without reasonable accommodation"
- Request to describe or demonstrate performance of essential functions with or without accommodation

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## Pre-Offer Inquiries - Disability

- Unfair
- Nature, severity, or extent of disability
- Whether applicant requires reasonable accommodation
- Whether applicant has applied for or received workers' compensation

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### Pre-Offer Inquiries - Family

- Fair
- Whether applicant can meet specified work schedules
- Names of relatives currently employed by employer
- "Person to be notified in case of emergency"
- Unfair
- Marital status
- Spouse's occupation
- Whether has children
- Nature of childcare arrangements

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### Pre-Offer Inquiries - Military

- Fair
- Education, training, or work experience in the US military or national guard
- Unfair
- Type or condition of military discharge
- Request for discharge papers
- Applicant's experience in military other than US military

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### Pre-Offer Inquiries - Pregnancy

- Fair
- May inquire as to expected duration of stay on the job or anticipated absences ONLY IF made to males and females alike
- Unfair
- Any inquiry concerning pregnancy, medical history, and related matters

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### Pre-Offer Inquiries - COMPLETELY AVOID

- Religion / Creed
- Gender
- Sexual Orientation
- Race / Color
- Membership in Social Clubs

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### Post-Offer Inquires - Disability

- Job offer may be conditional upon applicant's ability to perform essential functions with or without reasonable accommodation

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### Post-Offer Inquiries - Disability

- After real job offer, may inquire about
  - workers' compensation history
  - prior sick leave usage
  - illnesses / diseases / impairments
  - may require medical examination
  - BUT ONLY IF ASK OF ALL EMPLOYEES

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## INTERMISSION

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## III. Conducting Investigations

- Immediate
- Reasonably Thorough
- Prompt and Reasonable Corrective Action

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## Conducting Investigations – Steps Involved

- 1. Assess complaint
- 2. Choose investigator
- 3. Interview parties and witnesses
- 4. Communicate discipline decision

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## Assess Complaint

- Take all oral comments seriously
- Immediately separate accuser and accused
- Call police if potential for violence or accusation involves crime
- Suspend accused without pay pending results of the investigation, promising pay will be received if accused vindicated OR suspend with pay

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## Choose an Investigator

- Impartial
- Objective
- Trusted by Employees and Management
- Certain circumstances may warrant investigation by attorney / private investigator

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## Interview Parties and Witnesses

- First interview accuser
- Second interview bystander witnesses
- Third interview accused
  - Ensure that accused knows exact nature of allegations
  - Need not reveal accuser's identity
- Fourth re-interview accuser and bystander witnesses

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## Interviews Cont.

- Investigator documents interviews through note-taking
- May require witnesses to write and sign statements
  - If patient involved, may not want to do so

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## Interviews Cont.

- Avoid subsequent defamation claims
  - use quotes when documenting witness statements
  - “Ms. Smith states that Ms. Brown yelled at the patient” is preferable to “Ms. Brown yelled at the patient”
  - Investigator should have third-party witness present for all interviews

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## Interviews Cont.

- Employee has right to have a co-worker present during “any interview in which the employer is investigating potential misconduct by that employee possibly resulting in disciplinary action” (NLRA)
- Employee has no right to have attorney, relative, or friend present during interview

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## Communicate Discipline Decision

- Inform accuser, accused, and managers “who need to know” on a confidential basis
- Information consists of only outcome of the investigation and corrective action

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## Communicate Discipline Decision Cont.

- Avoid subsequent defamation claims
  - Document communication of discipline decision to accuser
  - “The allegations were substantiated . . .” preferable to “Ms. Smith acted inappropriately . . .”
  - If termination, respond to reference checks with only information known to be true (dates of employment, eligibility for rehire, etc.)

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## Communicate Discipline Decision Cont.

- If mandatory reporting . . .
  - State health department
  - State nursing board
- . . . then avoid subsequent defamation claims
  - “Ms. Smith states that Ms. Brown yelled at the patient” is preferable to “Ms. Brown yelled at the patient”

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## IV. Discipline and Termination: Preventing Litigation

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## Emotional Aspects of Employment

- All identify ourselves by what we do
- Spend more time with coworkers than with family (relationships)
- People more likely to attack termination decision (blame someone else) than reassess their own perception of their competence

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## Fairness

- Touchstone of discipline / termination
- Akin to bedside manner
- Even if employee doesn't deserve fairness, act fairly

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## Fairness Cont.

- 5 Elements
  - 1. Notice of expectations
    - minimum = written anti-sexual harassment and anti-discrimination policies
    - preferably employee handbook (w/ disclaimer)
    - avoid inaccurate performance reviews

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## Fairness Cont.

- 5 Elements Cont.
  - 2. Consistent application / enforcement of expectations
    - consistent with wording of policy
    - consistent towards similarly situated employees
  - 3. Unbiased / neutral investigator / decisionmaker

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## Fairness Cont.

- 5 Elements Cont.
  - 4. Chance to be heard
  - 5. Reasonable (though not necessarily correct) outcome

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## Privacy Considerations

- Some state statutes restrict employer's ability to terminate employee for lawful, off-duty, off-premises activities
  - unless employer's restriction of off-duty activities "relates to a bona fide occupational qualification," or "is necessary to avoid a conflict of interest or the appearance of a conflict of interest with the responsibilities of the employer . . . ."

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## Avoid False Reasons for Discipline or Termination

- Termination because a supervisor "does not like" employee is legally permissible under most circumstances
- "House cleaning" (i.e., group termination) for poor performance of entire department is legally permissible under most circumstances

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## When Possible, Obtain a Release of Liability

- Upon termination, offer severance in consideration for release
- Severance and Release Agreement - Attachment 2
  - Example for discussion only, must be reviewed by attorney before using

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Questions ???

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## **Jim Miles, JD**

Jim Miles is an attorney with a regional practice who specializes in the representation of health care organizations and health care professionals. His practice emphasizes litigation, government relations, regulatory compliance, and business planning. Mr. Miles has significant experience with defending health care organizations involved in employment litigation. He serves as associate general counsel to the Colorado Health Care Association, and as general counsel to the Community Health Association of Mountain/Plains States, Colorado Community Health Network, Pueblo Healthcare, and other health care provider trade associations. Mr. Miles also maintains an active trial schedule before federal and state tribunals. He earned a Doctorate degree from the University of Denver College of Law in 1996.