

CLE Presentation

INTRODUCTION TO EMPLOYMENT LAW:

How to Hire, Fire and Avoid Litigation

July 2010

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I. DISCRIMINATION LAWS

While selectivity in hiring is allowed and encouraged, it is important to be aware that the hiring process is highly regulated. In accordance with numerous federal and state laws, hiring practices must be non-discriminatory and may not infringe on the privacy rights of applicants. These laws regulate the information an employer can request on application forms, on tests and during interviews.

A. Title VII

Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. § 2000(e), et seq. Title VII covers employers with 15 or more employees. This statute prohibits discrimination in employment on the basis of race, color, religion, sex, pregnancy and national origin and applies to applicants as well as employees. Title VII also prohibits sexual harassment.

Title VII's nondiscrimination prohibition applies to all aspects of the employment relationship, including but not limited to recruitment, hiring, training, compensation, promotion, discipline and discharge. As a result of the Civil Rights Act of 1991, Title VII lawsuits may be tried before a jury with exposure to compensatory and punitive damages awards. Such damages are subject to certain caps and are awarded in addition to traditional "make whole" relief (reinstatement, back pay, attorneys' fees, etc.).

B. The ADA

Title I of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101, et seq. The ADA covers employers engaged in interstate commerce with 15 or more employees. Title I of the ADA prohibits employment discrimination against a qualified individual with a disability because of the disability. A person with a "disability" is an individual who (i) has a physical or mental impairment that substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. The ADA covers job application procedures, testing, hiring, advancement, discharge, compensation, job training and other terms, conditions and privileges of employment.

Employers must also make "reasonable accommodations" for "otherwise qualified" individuals with disabilities to enable them to perform the essential functions of the job unless doing so would impose an "undue hardship" on their business. Under the ADA, "undue hardship" requires a showing of significant difficulty or expense by the employer. The enforcement and remedies provisions of Title VII apply to Title I of the ADA. Also, public employers must comply with the public accommodation requirements of Title II of the ADA.

C. The Rehabilitation Act

Sections 503 and 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. and 29 U.S.C. § 794, et seq. These laws apply to government contractors (Section 503) and grant recipients (Section 504). They prohibit discrimination on the basis of non-job-related disabilities and require the employer to make reasonable accommodations. The requirements and cases under this law are very similar to the ADA. Section 503 also requires covered employers to take affirmative action to employ and advance in employment qualified persons with disabilities.

D. The ADEA

Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621, et seq. The ADEA protects individuals 40 years of age and over from discrimination in employment based upon their age. The ADEA's protection extends to hiring, discharge, promotions, compensation, benefits and all other conditions or privileges of employment.

E. Section 1981

Civil Rights Act of 1866, 42 U.S.C. § 1981. Section 1981 provides that "all persons... shall have the same right to make and enforce contracts ... as ... white citizens." The Civil Rights Act of 1991 defines "make and enforce contracts" in Section 1981 to include the "making, performance, modification and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

F. Section 1983

42 U.S.C. § 1983. Section 1983 prohibits state actors from depriving a person of his/her rights, privileges and immunities secured by the Constitution or laws of the United States. Claims under Section 1983 in the public employment context often involve alleged violations of the equal protection and due process clauses of the Constitution.

G. The Equal Pay Act

The Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d). This law requires employers to pay equal wages to women and men for jobs in the same establishment which involve substantially "equal skill, effort and responsibility," and which are performed under "similar working conditions."

H. The PHRA

Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951, et seq. The PHRA covers employers with 4 or more employees. The PHRA also applies to certain independent contractors. It prohibits discrimination on the basis of race, color, religious creed, ancestry, age (40 or older), sex, national origin, disability, the use of a guide or support animal because of blindness, deafness or physical handicap, and possession of a general education development ("GED") certificate rather than a high school diploma.

I. Executive Order 11246

Executive Order 11246. This Executive Order, which applies to federal contractors and subcontractors, requires, among other things, "affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." It is enforced by the Office of Federal Contract Compliance Programs ("OFCCP") in the United States Department of Labor. Contractors who meet certain thresholds (based on number of employees and dollar amount of contracts) are also required to develop and maintain a written affirmative action plan (AAP) directed at the employment of minorities and females.

J. The Federal Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681a, et seq., as amended by the Consumer Credit Reporting Act ("CRA") of 1996 (effective September 30, 1997).

The FCRA, as amended, requires employers using "investigative consumer reports" from "consumer reporting agencies" to disclose in writing to the applicant that they intend to obtain such a report. The employer must also obtain written consent from the applicant before ordering any such reports. If a decision not to hire is based on information in that report, before any adverse action is taken, the applicant must be notified of the information intended to be used. The applicant must also be provided with a copy of the applicable report and given a copy of the Federal Trade Commission's "summary of rights."

K. State Laws

Individual states have varied and specific state laws that regulate employment practices.

II. THE HIRING PROCESS

A. Job Posting

1. Post the available position(s) in places that would result in a diverse application pool. Relying on word of mouth alone can result in an extremely homogenous applicant pool/workplace.

2. Recruitment methods must also be reviewed. Word-of-mouth recruiting and its potential for perpetuating homogeneity in the workforce may open the door to allegations of both intentional or disparate impact discrimination. Consider other methods for recruiting applicants, such as general circulation advertising and posting.

3. The internet can be an excellent place to post positions. However, the employers who are Federal contractors or subcontractors should be aware of the 41 C.F.R. Part 60-1 Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes; Final Rule, which was issued by the Office of Federal Contract Compliance Programs (OFCCP), and became effective February 6, 2006. This regulation expressly defined Internet Applicants to whom the record keeping requirements now undoubtedly apply as:

An individual who satisfies the following four criteria:

- The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- The contractor considers the individual for employment in a particular position;
- The Individual's expression of interest indicates the individual possesses the basic qualifications for the position; and
- The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

4. When a job is posted do not use potentially discriminatory requirements (e.g., "college student," "recent grads," "young") because if an applicant does not have the requisite skills or experience, he/she can be screened out before the interview process.

B. Job Description¹

A well drafted job description can help screen applicants for the necessary skills before the interview process begins. A job description, at a minimum, should include:

1. A detailed description of the essential functions of the job; and
2. The level of experience/education required/preferred.
3. Include in the job description statements such as "equal opportunity employer" and "minorities are encouraged to apply."

C. Job Application

It is critical that application forms only request information that is job-related. Application forms should be periodically reviewed and updated. Employers must keep in mind that any inquiry which is not job-related becomes suspect if a challenge to the hiring decision is made.

How to minimize problems related to the application:

1. Implement a policy limiting the duration that an application remains active.
2. The application should state that the employer is an equal opportunity employer and does not discriminate on the basis of race, sex, color, religion, national origin, ancestry, age or disability status.'
3. Where appropriate, an at-will disclaimer should be included on the application form stating that employment is "at-will" and that the applicant understands that if hired, employment may be terminated at any time with or without cause and with or without notice. The application should also state that no oral or written representations to the contrary are binding unless signed in writing by a designated representative of the employer.

¹ **EXEMPT VS. NON EXEMPT DESIGNATION**

Whether a position is considered exempt or non-exempt for the purposes of overtime is a legal distinction under the Fair Labor Standards Act ("FLSA"). Determining which employee positions fit into the legal definition of executive, administrative or professional under the FLSA is a complex legal task.

Depending on your location, other categories (such as sexual orientation or marital status) may also need to be included.

- Inquiry as to an applicant's height and weight (unless you can establish job-relatedness or a bona fide occupational qualification) should be restricted.
- Applicants should certify (by signing the application) that all information provided on the application is accurate.
- You may also want to state on the application that a medical examination is required if an offer of employment is extended, and that by signing the application the candidate consents to the medical examination, including an urinalysis/drug screen.

2. Caution should be used in utilizing purchased forms. Application forms should be specifically tailored for each employer.

3. A policy regarding the handling of unsolicited resumes/applications should be implemented. Walk-in applications should not be accepted if vacancies do not exist.

III. INTERVIEWS

This is a critical aspect of the hiring process. An improperly conducted interview may form the basis of a discrimination claim. An interview may also wrongly utilize a selection technique which disproportionately screens out minorities or females.

General Suggestions

1. Interviewers should review job applicants' resumes thoroughly and in advance of an interview (flag any gaps in employment and note inconsistencies).
2. Interviewers should not write on or mark up the applicants' resumes or the application forms --keep notes on a separate sheet of paper.
3. Interviewers should avoid making promises or misrepresentations to applicants.
4. Current job descriptions should be used in connection with the interview process as a guide for the interviewers.
5. All applicants who are interviewed but not given job offers should be advised of their non-selection -- No detail required.
6. Open-ended questions often encourage applicants to provide information about their background.
7. Avoid indirect inquiries which might serve as evidence of illicit motives (e.g., asking an applicant to state what years he/she attended high school which may be construed as

an inquiry regarding age, or asking the applicant where he/she was born which may indicate national origin or race/color of the applicant).

8. Avoid questions which could be viewed as requesting personal information such as marital status, children, whether the applicant owns a home, leases, etc.

Examples of what an interviewer SHOULD NOT ask the applicant:

1. How old he/she is;
2. His/her date of birth;
3. What church/synagogue he/she attends;
4. A female applicant what her maiden or "family" name was;
5. Whether he/she is married, divorced, separated, widowed or single;
6. How many children he/she has;
7. The ages of any children of the applicant;
8. Who will care for the children while the applicant is working;
9. Whether he/she ever had his/her wages garnished or declared bankruptcy;
10. Whether he/she ever was arrested;
11. Whether he/she ever served in the armed forces of another country;
12. What foreign languages he/she can speak, read or write (unless the ability to speak, read or write specific foreign languages is a job requirement);
13. If he/she is for or against unions, whether the applicant was a member of a union or how the applicant feels about unions;
14. Whether he/she is a citizen of the United States;
15. To see the applicant's birth certificate, naturalization or religious records;
16. Whether he/she has a driver's license (unless possession of a driver's license is a job requirement);
17. About his/her I.Q.;
18. His/her views on birth control and family planning;
19. About his/her military discharge.

Potential ADA Violations

1. These questions should not be asked because they may reveal the existence or nature of an applicant's disability:

- Do you have a disability that would prevent you from performing the essential functions of this job;
- Whether he/she has AIDS, asthma, epilepsy, etc.;
- If he/she has a disability which would interfere with his/her ability to perform the job;
- How many days he/she was sick in the last year;
- Whether he/she has previously filed for disability and/or workers' compensation;
- Whether he/she has ever been treated for alcohol problems;
- Whether he/she has ever been addicted to drugs;
- Whether he/she has ever been treated for mental health problems; and/or
- What prescription drugs he/she is currently taking.

2. Physical Examinations

a. CANNOT require pre-offer physical examinations including:

- Medical examinations
- Psychological testing

NOTE: Medical examinations do not include drug testing.

3. Permitted Questions:

a. CAN require post-offer pre-employment physical examinations and can condition offer on passing the exam.

b. CAN ask if the applicant if they can perform a specific task. If the applicant says they can, you can ask the employee to demonstrate or describe how they would perform a specific task. CANNOT ask if an accommodation is needed or what the accommodation would be.

- Do ask "Can you perform [state a specific function of the job]?"

c. Interviewers can ask about any bona fide occupational qualification. However, every question asked or all information requested should relate to job qualifications and have some demonstrable relevance to the employment decision.

- **BFOQ Definition:** A bona fide occupational qualification ("BFOQ"), is a qualification reasonably necessary for an individual to possess in order for that individual to perform the functions of the job. So, if there is a reason why an individual needs to be of a certain religion, sex, age or national origin, or not pregnant in order to perform a particular job, an employer is allowed to consider such traits in the decision-making process. Also, if there is a criterion that appears neutral, but in fact disproportionately affects employees or applicants with a certain protected characteristic, it is allowed as long as the criterion is reasonably necessary for an individual to possess in order for that individual to perform the functions of the job.

d. **Establishing a BFOQ Defense:** In order to establish a BFOQ, an employer must show that all or substantially all of the members of the protected group would be incapable of performing the necessary functions of the position. The courts have consistently based a BFOQ on actual capacity or incapacity to perform the functions of the job.

4. Examples of what an interviewer MAY or SHOULD ASK:

- a. To elaborate on information provided on applicant's resume (provided the resume provides only lawful information);
- b. Why the applicant left his/her former employer;
- c. What kind of references the applicant would receive from former employer,
- d. What the applicant's prior job duties consisted of (the applicant's skills);
- e. What the applicant liked or disliked about his/her prior jobs;
- f. What kinds of job duties the applicant is interested in;
- g. What kind of communication style in others does the applicant find most challenging;
- h. What did the applicant think about his/her prior supervisors;
- i. Did the applicant get along with his/her prior supervisors;
- j. What kind of supervisor does the applicant like to work for;
- k. What were the applicant's wages at his/her prior jobs; I. How frequently were increases given at the applicant's prior jobs;
- m. Were pay increases based upon merit, productivity, or something else;
- n. How many increases did the applicant receive at his/her prior job, if based on merit;
- o. Whether the applicant ever was promoted in his/her prior jobs;

- p. What benefits did the applicant receive at his/her prior job;
- q. How much the applicant expects the Company to communicate with him/her and keep him/her involved as to what is going on;
- r. How has the applicant approached a challenging situation that occurred in their past work experience. What did the applicant learn from that experience. How does the applicant manage stress; and/or
- s. Of all the applicant's previous work experiences, which one most closely resembles the challenges the applicant feels the new assignment will present. What are the similarities.

IV. VERIFYING APPLICANT INFORMATION AND QUALIFICATIONS

A. Contacting Previous Employers

1. A prior employer's recommendation is often the best means of discovering more about an applicant's ability to satisfactorily perform the job. Possible problems may arise that relate to employee privacy. Contacting an applicant's current employer, may create hostility between employee and his employer which may result in a termination. Moreover, negative information regarding an applicant such as poor performance or misconduct may be communicated by a prior employer during a reference check. These communications could result in a defamation claim.

2. What is defamation? The elements of "defamation" are:

- a. Allegedly factual but untrue information;
- b. Identifies a particular person;
- c. Published to one or more additional individuals;
- d. Causes damage to one's reputation; and
- e. Where there is some degree of fault on the part of the party making the statement (e.g., that they knew or should have known that the statement was false or that they spoke in reckless disregard of its truth or falsity).

Generally, employers have a "qualified" or "conditional" privilege -- that provides immunity from defamation liability -- when giving a reference to a prospective employer. However, this privilege can be lost if the employer:

- Makes comments not germane to the employment relationship;

- Makes statements to people not covered by the privilege (e.g., to individuals other than prospective employers, who would not have a "common interest" in knowing about the applicant's work performance); and
- Acted with malice -- i.e., made a false statement knowing that it was false or with reckless disregard as to whether it was false.

3. Precautions to minimize risk when contacting previous employers:

a. Consent -- the application form should require the applicant to give a written consent to having his current and former employers contacted. Moreover, since former employers may hesitate to give information for fear of defamation liability, it is advisable to have the applicant also indicate that he or she consents to having his or her former employers provide information pertaining to performance and work history.

b. It is also important to act based upon the need to know:

- What do you need to know? - - Confine questions to areas related to the individual's employment relationship. Do not ask questions about the employee's private life which could result in the forfeiture of an employer's qualified privilege.
- Who needs to know? - - Once a reference is obtained, make it available only to individuals in your organization who are participating in the selection process. More widespread distribution of potentially defamatory information could constitute a "publication" of the defamatory information which similarly could result in loss of an employer's qualified privilege (it may also exceed the scope of any consent that you have obtained from the employee).

B. Prior Arrests/Convictions

1. In Pennsylvania, an applicant's criminal history record can be considered only to the extent that an individual's felony and misdemeanor convictions relate to the applicant's suitability for the specific position in question.

- If a decision not to hire is based in whole or in part on the applicant's criminal history, the applicant must be so notified. See 18 Pa. C.S.A. § 9125.
- Employers in Pennsylvania may not base employment decisions on criminal arrests or other criminal charges that do not result in convictions.

2. Several other states have similar restrictions on an employer's right to inquire about arrest records (e.g., California, Connecticut, Maryland, Massachusetts, Michigan, Ohio, Oregon, Rhode Island, Virginia).

C. Testing

1. Title VII expressly permits employers to use employment tests, which include paper and pencil and performance measures used as a basis for any employment decision, as well as all formal, scored, quantified or standardized techniques of assessing job suitability. The concern, however, is whether the testing or qualifying devices disproportionately screen out members of protected groups. Employers should consult the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. § 1607, 41 C.F.R. § 60.3) before utilizing any testing process or device. Employers should also consider the following questions:

- Does the test measure or predict job performance?
- Does the test measure significant duties and/or responsibilities of the job?
- Does the test have an adverse impact on protected classes? and
- If so, is there a business necessity?

2. Under the Americans with Disabilities Act, medical examinations may only be conducted after an offer of employment has been made. This rule, however, does not prohibit preemployment drug screens because drug screens are not considered to be medical examinations under the ADA.

V. HIRING THE APPLICANT

A. Offer Letters

1. Once a decision to hire has been made, a properly drafted offer letter should contain an appropriate at-will employment disclaimer. It is critical that no language which refers to a promise of continued employment be included in the offer letter. For example, avoid language such as "I am sure you will have a long and happy career with XYZ Company."

B. The Employment-At-Will Doctrine

1. "Employment-at-will" generally means that the employment relationship is presumed to be terminable by either party at any time with or without notice and with or without cause.

Exceptions: Implied contracts (handbooks, oral representations), covenant of good faith and fair dealing, promissory estoppel, violation of public policy.

C. Suggestions For Maintaining At-Will Status

1. Suggestions include:

- a. Have an at-will disclaimer in your employee handbook.
- b. Avoid making statements or representations to employees that are durational in nature or that imply any heightened sense of job security. Avoid terms like "permanent," "just cause," or "probation."
- c. Avoid "lifetime" or other "puffing" promises like, "you will never have to worry about a layoff here."
- d. Be careful when making offers of employment. Advise an employee of his or her at-will status and detail the terms and conditions of employment to avoid misunderstandings.
- e. Avoid unwarranted praise to employees or inflated performance evaluations.
- f. Avoid the use of "probationary periods" which may imply job security once the probation is completed.
- g. Make sure your employees understand what is expected of them, especially regarding rules of conduct and performance standards.
- h. Practice progressive discipline.
- i. If the offer is contingent upon any criteria such as passing a physical examination or signing a restrictive covenant agreement, make sure the letter states the specific requirement and attaches a copy of the agreement.
- j. Never make an offer prior to checking references.

2. Because legally effective personnel practices begin with the hiring process, employers must be aware of the following points in connection with the hiring process:

- a. When recruiting and advertising for positions, avoid references to age, race, sex, etc. Describe only the relevant requirements (education, skills and/or experience).
- b. If the information is not likely to help in assessing the applicant's qualifications, **DO NOT ASK FOR IT.**
- c. All information obtained from an applicant should only be disseminated on a need-to-know basis.

D. New Hire Reporting (The Personal Responsibility and Work Opportunity Reconciliation Act of 1996)

1. All employees hired after January 1, 1998 must be reported to the Pennsylvania New Hire Reporting Program within twenty days of hire.

VI. DURING THE COURSE OF EMPLOYMENT

A. Employee Evaluations

One of the best tools an organization has for assessing the progress and performance of an individual is the employee's evaluation. Thorough and accurate employee evaluations must be performed to support salary increases and promotions. Poor evaluations can be used to justify discipline or termination.

1. Evaluations should be performed consistently for every employee, at least once a year. Do not skip or delay.
2. Evaluations should be thorough and accurate.

B. Improving Employee Performance and Documenting Employee Misconduct

As performance issues or incidences of workplace misconduct arise, supervisors should, when appropriate, work with the employee to fix the problem. Documentation is an essential tool in correcting employee behavior and in protecting employers from liability should it become necessary to terminate an employee. Document and copy the employee on problems or instances of misconduct as they occur.

1. Documentation of performance misconduct should be specific and done on a timely basis. It should include references to prior oral discussions about the issue.
2. The memo should also state the employer's current expectations. It must clearly state the action being taken and specify what future action may be taken if no improvement is made or if the misconduct recurs. A timeline for improvement and follow-up should be stated.

C. Imposing Discipline

1. Progressive Discipline

- Depending upon the circumstances, progressive discipline generally means that the employer addresses problems as they arise with increasing degrees of discipline. In other words, "three strikes, and you're out."

- Notify Human Resources of problems pertaining to employees and job performance at an early stage. Human Resources can help to impose progressive discipline.
- If an employee is accused of wrongdoing, fully investigate and document the facts. Get signed statements, if possible. On the spot discipline or discharge without thorough review and consideration is imprudent
- Advise the employee of the allegations and afford the employee the opportunity to present his or her version of the events.
- Always check the entire personnel file, including prior evaluations, and speak with Human Resources before making a termination decision.
- Review your company's past practices and ensure that they are consistent with your choice of discipline/termination. How have similarly situated employees been treated in the past? Always be consistent and fair when dealing with personnel issues.
- Define and document a triggering event. If there isn't one, give the employee thirty days, for instance, to improve his performance.
- Clear all terminations with Human Resources. Management peers should easily understand the basis for a termination.

VII. HOW TO TERMINATE AN EMPLOYEE

Once the decision to discharge has been made, schedule a confidential termination meeting with the employee:

- Two employees should be present. One should take the lead as the spokesperson and the other as a note taker. The meeting should be in person.
- Keep the meeting brief
- Communicate the purpose of the meeting.
- Speak the truth -- do not sugarcoat the reasons for the decision.
- **DON'T ARGUE; DON'T THREATEN.**
- Explain all rights and benefits, including final payroll checks, vacation pay, etc.
- Prepare a memorandum to the file documenting the specific list of incidences leading to the termination and document the comments made during the termination meeting.
- Limit the dissemination of information regarding the discipline and discharge of an employee to those who need to know.

VIII. DEVELOPING EMPLOYMENT TRENDS

A. U.S. Supreme Court Greatly Expands Scope of Retaliation Claims

On June 22, 2006, in *Burlington Northern & Santa Fe Railway Co. v. White*, the United States Supreme Court established that the critical test in determining whether conduct may constitute retaliation is whether "a reasonable person in the plaintiff's position" might have been intimidated by the employer's actions such that they would refrain from complaining about discrimination.

This decision makes it clear that employers must be very careful in how they treat employees who complain or assist other in raising discrimination claims. Moreover, this will likely lead to more retaliation claims being filed, and employers will face greater difficulty in having such claims dismissed.

B. Sue-the Boss Bills

Sue the Boss Bills have become a topic of discussion in legislatures across the nation which would give workers grounds to sue their superiors "for being, basically, jerks." A proposed bill in New Jersey would allow employees to claim \$25,000 in damages if an employer created an "abusive work environment." Moreover, New York, Vermont and Washington, as well as a California workers advocacy group, are trying to pass similar bills.

C. Domestic and Sexual Violence Leave Laws

In recent years, several states have enacted laws that provide domestic violence victims (and in some states, victims of sexual assault and stalking) time off from work to address the violence.

D. EEOC Notice-Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities

Federal Equal Employment Opportunity laws do not prohibit discrimination against caregivers, per se, however, there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment, namely under Title VII or the ADA. Employers may also have specific obligations toward caregivers under other Federal statutes, such as the FMLA or other state or local law. The EEOC provided a number of examples in which discrimination against caregivers may arise:

1. Unlawful discrimination against women with young children;
2. Unlawful stereotyping during hiring process;
3. Decision motivated by both unlawful stereotyping and legitimate business reasons;
4. Unlawful sex-based assumptions about work performance;

5. Unlawful stereotyping based on participation in flexible work arrangements;
6. Employment decision lawfully based on actual work performance;
7. Stereotyping unlawful even if for benevolent reasons;
8. Denial of promotion based on stereotype of how mothers should act;
9. Effects of stereotyping on employer's perception of employee;
10. Subjective decision making based on nondiscriminatory factors;
11. Unlawful stereotyping based on pregnancy;
12. Unlawful refusal to modify duties;
13. Employer unlawfully denied benefit to male worker because of gender-based stereotype;
14. Employer unlawfully denied part-time position to male worker because of sex;
15. Unlawful denial of compensatory time based on race;
16. Unlawful harassment and reassignment based on sex and national origin;
17. Unlawful stereotyping based on association with individual with a disability;
18. Hostile work environment based on stereotyped mothers;
19. Hostile work environment based on pregnancy;
20. Hostile work environment based on association with individual with a disability.

IX SUMMARY

1. Review and revise all personnel practices, policies and procedures on a regular basis.
2. Be sure that management is aware and understands the equal employment opportunity laws -- be prepared to conduct training and education sessions.
3. Properly train all hiring managers and employees who conduct interviews.
4. Create a system of checks and balances with Human Resources as the final review authority.
5. Be consistent and fair in the implementation of all policies and procedures.
6. Create a positive working environment.
7. Communicate your policies to all employees.
8. Resolve disputes internally.
9. Keep abreast of legal and legislative developments in the area of labor and employment law.

Labor and Employment

Eckert Seamans' Labor and Employment Law Department provides full-service representation of private and public sector employers in all facets of employment and labor relations.

The department's experienced attorneys provide services in employment litigation, union/management relations and litigation-preventive counseling. Our attorneys are accessible and available at all times for immediate advice on the multitude of time-sensitive issues which confront management on a daily basis.

Our labor and employment attorneys will aggressively defend management's decisions and prerogatives in the courtroom. Eckert Seamans has assembled a team of employment litigators which has substantial jury trial experience and a track record of successful outcomes in courtrooms throughout the United States. We have, for example, defended individual and class action lawsuits involving claims under federal and state race, sex, age and disability discrimination laws; the Family and Medical Leave Act; ERISA; and the Fair Labor Standards Act. We have litigated employment contract, trade secrets and covenant not to compete cases.

Our seasoned traditional labor lawyers' expertise covers NLRB proceedings and related appellate work, collective bargaining, labor arbitrations, union avoidance training, union vulnerability audits and guidance through organization campaigns.

Our lawyers provide counseling and dispute-prevention assistance by reviewing and drafting personnel policies, handbooks, and other employment documentation. We regularly plan and guide employers through reductions in force, exit incentive or early retirement programs, individual termination or disciplinary actions and the administration and implementation of policies to comply with such federal and state laws as the Family and Medical Leave Act, the Fair Labor Standards Act, WARN, ERISA, USERRA, Executive Order 11246, and its affirmative action, record keeping, posting and reporting obligations. Department lawyers often conduct or assist clients with sexual harassment investigations. We have developed and presented supervisor training seminars. Because of our ongoing representation of clients with job sites throughout the United States, the department has developed the resources to review and evaluate proposed employment actions against the specific and individualized legal requirements of the various states.

Eckert Seamans' labor and employment attorneys work closely with our corporate attorneys in connection with planning and implementing the sale or acquisition of facilities and businesses to address potential employment or union problems.

Other areas of service include defending workers' and unemployment compensation claims and advice and representation in matters involving the Occupational Safety and Health Act (OSHA).

Recent Labor and Employment Results

Third Circuit Court of Appeals affirms verdict for our client. The plaintiff, a physician, sued our client alleging that her contract was not renewed because of her sex, in violation of state and federal discrimination laws. After a two-week trial, a jury returned a verdict in favor of our client. The plaintiff appealed and the U.S. Court of Appeals recently affirmed the judgment.

ERISA Disability Benefits Claims dismissed. In two separate lawsuits, employees of our client, a disability plan for a large manufacturing company, alleged that their long-term disability benefits had been erroneously terminated, since they were still unable to work and were receiving social security disability benefits. The U.S. District Court for the Middle District of Pennsylvania recently issued opinions in both cases upholding the action of the Plan Administrator in terminating the benefits.

Jury rejects race discrimination claims. An employee alleged that she was discriminated against by our client because of the racial preferences of a customer of our client. Our attorneys successfully tried the case resulting in a jury verdict in our client's favor. Post-trial motions were denied and no appeal was taken

Jury rejects race discrimination and retaliation claims. A human resources manager who was discharged for poor performance sued and alleged that she was paid less than Caucasian employees because of her race, and that she was discharged shortly after making a complaint about her pay, in retaliation for that complaint. A federal court jury rejected the plaintiff's claims, finding in favor of our client on all counts.

Defense verdict on disability and retaliation claims. The plaintiff alleged that he was discharged from his professional position because he was disabled and in retaliation for his having filed a workers' compensation claim. After a trial in Marshall County, West Virginia, the jury returned a verdict in favor of our client, rejecting all of the plaintiff's claims.

Sexual harassment and retaliation claims rejected. A Western District of Pennsylvania jury rejected a claim by a former employee who alleged that she was sexually harassed by a fellow-employee, and then was discharged shortly after she reported the sexual harassment. Our client's defenses that the employee had not reported the sexual harassment, and that she was discharged for poor performance were upheld by the jury.

Major arbitration case won. A client recently sold a manufacturing facility to a buyer who refused to assume the collective bargaining agreement. The Union demanded almost two million dollars in severance payments. The Arbitrator fully sustained our client's position and awarded no severance payments.

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John Quinn represents both organized and unorganized employers in all aspects of employee relations.

Representative Matters

- Defended employers in federal and state courts as well as before city, state and federal agencies in matters involving discrimination allegations;
- Defended employers in wrongful discharge cases and other employment-related matters to include covenants not to compete;
- Represented employers before the National Labor Relations Board and the Pennsylvania Labor Relations Board in unfair labor practice proceedings as well as in union organizational campaigns;
- Participated in numerous contract negotiations with various unions and he has represented employers in arbitration cases;
- Represents the management trustees of several Taft-Hartley Act funds.

Practice Groups

Labor and Employment

Education

J.D., University of Virginia School of Law, 1974
A.B., College of the Holy Cross, 1968

Admissions

Pennsylvania
U.S. District Court for the Eastern District of Pennsylvania
U.S. Court of Appeals for the Third Circuit

Professional Affiliations

Temple American Inns of Court
Former Chair of the Hearing Committee of the Disciplinary Board of the Pennsylvania Supreme Court

Community Involvement

Board of Directors of Carson Valley Children's Aid School and Plymouth County Club

Special Recognition

Selected for inclusion in *Pennsylvania Super Lawyers*

Articles/Speeches/Presentations

- “Labor & Employment: A Roundtable Discussion,” moderator of panel for *GC Mid-Atlantic*, September 2009.

Quoted

- “Restaurant Chain to Pay \$1 Million for Alleged Bias Against Men” quoted, SHRM Online, November 12, 2009.
- “Layoff Missteps Could Lead To Age Discrimination Suits” quoted, *Best Practices in HR*, July 18, 2009