

# Central PA iDay

Radisson Penn Harris  
Hotel & Convention Center

April 9, 2009

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# INSURANCE TRIGGERS

## ▶ Administrative Level

- PHRC – Pennsylvania Human Relations Commission
- EEOC – Equal Employment Opportunity Commission

## ▶ Lawsuit

- State Court
- Federal Court

# AT-WILL EMPLOYMENT

- ▶ At-will Employment
- ▶ Exceptions to At-will Employment
  - Federal
    - ▶ 42 U.S.C. § 1983 – government violates a federal right
    - ▶ Title VII – race, color, religion, sex, or national origin
    - ▶ ADA – handicap status
    - ▶ ADAAA – ADA Amendment act
    - ▶ ADEA – age with respect to persons of at least 40 years of age
    - ▶ Equal Pay Act – sex in payment of wages
  - State
    - ▶ Civil Service
    - ▶ Police Tenure Act
    - ▶ Collective Bargaining Agreements
    - ▶ PHRA
    - ▶ Pennsylvania's Whistleblower's Act
    - ▶ Public Policy Exception

# 42 U.S.C. § 1983

- ▶ Provides remedy for rights created by federal law
- ▶ Plaintiff must prove: (1) violation of federal or constitutional law, by (2) person acting under color of state law
- ▶ § 1988 – fee switching provision

# FIRST AMENDMENT

## ▶ Free Speech – Public Employees' Statements Protected:

- Citizen
- Speaking on matter of public concern
- No adequate reason to treat employee differently as a result of speech

## ▶ Political Affiliation:

- Policy making: Participates in confidential meetings, prepares budgets, has authority to hire and fire – can be replaced for political reasons.
- Non-policy making – cannot be replaced for political reasons.

# FIRST AMENDMENT RETALIATION

- ▶ Employee engaged in protected activity
- ▶ Protected activity substantial factor in the alleged retaliatory action
- ▶ To Consider:
  - *De Minimis* or Trivial Actions – generally not protected
  - Red Flag Employment Actions: hiring, promotion, demotion, recall, transfer, or firing
  - Alleged acts of harassment must be sufficient to deter a person of ordinary firmness from exercising First Amendment Rights

# FOURTEENTH AMENDMENT

- ▶ Equal Protection – Triggered When:
  - Intentional discrimination
  - Treated differently from others similarly situated
  - No rational basis for differential treatment
  
- ▶ Due Process – Triggered by Failure to Provide Process that is Due:
  - Tenure Act
  - Civil Service
  - Grievance Hearing

# AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

## ▶ Claim Generally

- Over 40;
- Qualified for the position;
- Suffered from an adverse employment decision; and
- Replacement was sufficiently younger to permit a reasonable inference of age discrimination

# TITLE VII

- ▶ Private and Public Employers – applies to employers who employ 15 or more employees for more than 19 weeks in the current or preceding calendar year
- ▶ Prohibits discrimination on the basis of race, sex, national origin, or religion
- ▶ Prohibits discrimination because of association with another of a particular race, color, religion, sex, or national origin, i.e., interracial marriage
- ▶ Forbids retaliation based on an employee's opposition to practices made unlawful by statute

# TITLE VII RETALIATION

- ▶ Burlington Northern v. White (2006):
  - Anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace.
  - Anti-retaliation provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant.
- ▶ Crawford v. Metro. Gov't of Nashville (2009) – anti-retaliation provision protects employee answering questions during employer's internal investigation.

# PENNSYLVANIA HUMAN RELATIONS ACT (PHRA)

The Act essentially covers most of the same types of claims that can be brought separately under Title VII, ADA, or the ADEA.



# AMERICANS WITH DISABILITY ACT (ADA)

## ▶ Claim

- Has a disability,
- Is otherwise qualified to perform the essential functions of the job, and
- Has suffered an adverse employment action because of his or her disability.

## ▶ Disability Defined:

- A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- A record of such an impairment; or
- Being regarded as having such an impairment.

# ADA ACCOMODATION

- ▶ Generally - If a qualified individual with a disability desires and can perform a job with reasonable accommodations, the employer is obligated to provide same.
- ▶ Reasonable Accommodations Include – Job restructuring, part-time, modified work schedule, reassignment to a vacant position, etc.
- ▶ Employer Still Prevails: Demonstrates a legitimate, non-discriminatory reason for the adverse action.

# ADAAA

- ▶ Mitigating measures - not considered in assessing disability
  - Defined broadly
  - Exception for eye glasses or contacts
- ▶ Disability broadly interpreted – proof no longer requires extensive evidence
- ▶ Substantial limitation – broadly interpreted
  - Restricted as to conditions, manner, or duration under which they can be performed in comparison to most people
  - Episodic or in remission – disability if substantially limit when active
- ▶ Major life activities – expanded – only one major life activity
  - Caring for self, eating, walking, seeing, standing, lifting, bending, etc.
  - Operation of major bodily function

- ▶ Regarded as – changed substantially
  - Proof of actual or perceived disability
  - Does not need to be limiting in any way
  - Cannot be transitory or minor – less than 6 months and trivial
  
- ▶ Examples of disabilities
  - Epilepsy
  - Diabetes
  - Muscular dystrophy
  - Amputation
  - Intellectual disabilities
  - Multiple sclerosis
  - Cancer
  - Head trauma
  - Dyslexia
  - Learning disability
  - Cerebral palsy
  - Heart conditions
  - Mental illness
  - HIV

# FMLA – NEW AND IMPROVED

- ▶ 12 months of employment need not be consecutive, but employers need not count a break-in-service of seven years or more, two exceptions:
  - Fulfillment of military obligation;
  - a period of approved absences or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee;
- ▶ Time spent fulfilling an employee's military service obligations is counted toward the employee's 1,250-hour and 12-month requirements;
- ▶ An employee who is not eligible for FMLA protection at the beginning of his or her leave, may begin FMLA once he/she has met eligibility requirements.

# NATIONAL DEFENSE AUTHORIZATION ACT

- ▶ Amends the Family and Medical Leave Act
- ▶ Permit spouse, son, daughter, parent, or next of kin to take up to 26 workweeks of leave to care for a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment.
- ▶ Permits an employee to take FMLA leave for any qualifying exigency (as the Secretary of Labor shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.

- ▶ No more than 26 weeks of leave may be taken during any single 12-month period
- ▶ The leave year is based on a single 12-month period and begins with the first day the employee takes leave
- ▶ Certification process – Employer is permitted to obtain details about the service member's medical condition:
  - Whether the injury occurred in the line of duty
  - When it occurred
  - Duration
  - Amount of time the service member will require care

# EMPLOYEE NOTICE

- ▶ Employee must comply with an employer's usual and customary notice/procedural requirements for requesting leave
- ▶ Failure to comply with leave procedures can now be grounds for delaying or denying an employee's request for FMLA leave
- ▶ Employee seeking additional FMLA leave (for a previously certified condition) must specifically make reference to the FMLA or the previous condition for which FMLA leave was used.
- ▶ Notice of the need for unforeseeable leave must now must be given as soon as practicable (reference to 1 to 2 business days eliminated).

# MEDICAL CERTIFICATION

- ▶ Employer may request the following:
  - Information about a health care provider's specialization and fax number
  - Employee or family member's diagnosis
  - Certification from health care provider that intermittent or reduced leave is medically necessary
  - Statement pertaining to which essential job functions an employee cannot perform
  - More detailed information on the anticipated frequency and duration of intermittent and reduced schedule leaves

# AUTHENTICATION

- ▶ Employer may contact healthcare provider for purposes of authenticating information provided on a medical certification form without first obtaining an employee's permission.
- ▶ Persons who may contact healthcare provider: healthcare provider, HR professional, leave administrator, or management official.
- ▶ Direct supervisor is expressly prohibited from contacting healthcare provider.
- ▶ Incomplete or insufficient medical certification form – employer must advise employee in writing as to what additional information is needed and give the employee seven calendar days (or longer if unable to comply despite diligent good faith effort) to complete and return the form.

# RECERTIFICATION

- ▶ May request recertification no more often than every 30 days and only in connection with an absence (unless minimum duration of the condition is more than 30 days).
- ▶ Recertification may be requested in less than 30 days:
  - the employee requested an extension of his/her leave
  - circumstances stated in previous certification have changed significantly
  - information casting doubt on continuing validity of certification
- ▶ For intermittent or reduced leave for periods in excess of six months, an employer may request recertification every six months in connection with the absence.

# CHRONIC SERIOUS HEALTH CONDITION

- ▶ Incapacitated for more than three consecutive full calendar days – must show receiving continuing treatment from a health care provider:
  - Must see a health care provider within seven days of the first day of incapacity;
  - Must visit a health care provider two times within 30 days of the first day of incapacity (unless extenuating circumstances exist); and
  - With a chronic serious health condition, must visit a health care provider at least twice a year.

# FMLA DURING HOLIDAYS

- ▶ An employee taking a full week of FMLA leave during a week containing a holiday will have the holiday counted against FMLA allotment; and
- ▶ An employee taking less than a full week of FMLA leave during a week containing a holiday will not have the holiday counted against FMLA allotment unless the employee was otherwise scheduled and expected to work the holiday.

# SUBSTITUTION OF PAID LEAVE

- ▶ An employee may substitute paid leave for unpaid FMLA leave and employer may also require this substitution.
- ▶ Paid time substituted counts against FMLA entitlement.
- ▶ An employee who elects to take paid leave must follow the employer's paid leave policies.
- ▶ An employer must make employees aware of any additional procedural requirements in conjunction with the use of paid leave in the rights and responsibilities notice.

# BONUSES

- ▶ Distinction between bonuses based on the absence of occurrences (perfect attendance) and bonuses based on achievement of goals (production bonuses) eliminated.
- ▶ Employers are now permitted to disqualify an employee who has not achieved a goal (perfect attendance) due to use of FMLA leave:
  - Employees taking non-FMLA leave must be treated the same as employees taking FMLA leave; and
  - Employers are not prohibited from prorating such bonuses or awards, if they wish to do so.

# PRACTICAL TIPS

- ▶ Seek the advice of counsel.
- ▶ Thoroughly investigate and document the triggering event.
- ▶ Assume that all discipline will be reviewed by a court of law.
- ▶ Make the specific reason for discipline clear, i.e., avoid generalities such as "poor performance" or not "a team player."
- ▶ Provide all grievance or pre-termination hearings if required.
- ▶ Do not discipline employee for reporting sexual harassment.
- ▶ Use caution when disciplining for critical speech.

**Do not retaliate!**



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