


The Road to Court is
Paved with Good Intentions
Bates College

Human Resources
October 2011



The logo for Bates College Human Resources, featuring the letters 'HR' in a stylized font with 'BATES COLLEGE' above and 'DEVELOP LEARN COMMUNICATE' below.

Topics to be covered

- Civil Rights Act of 1964
- Family and Medical Leave Act
- Americans with Disabilities Act
- Fair Labor Standards Act
- Workers' Compensation
- OSHA

Civil Rights Act of 1964

- Title VII of the Civil Rights Act prohibits discrimination in employment:

It shall be unlawful for an employer - -

- 1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against an individual with respect to compensation, terms, conditions or privileges of employment, because of an individual's race, color, religion or national origin
- 2) to limit, segregate or classify employees or applicants in any way that would deprive any individual of employment opportunities or adversely affect his status as an employee.

Types of Discrimination

- **Overt** - Openly admitted and blatant.
- **Disparate Treatment** - An individual alleges that they have been treated less favorably because of their status

Four Element Prima Facie Test:

1. That the plaintiff belonged to a protected class.
2. That the plaintiff applied for and was qualified for the job.
3. That, despite being qualified, the plaintiff was rejected for the job.
4. That after the rejection, the position remained open or was filled by someone not in a protected class.

- **Disparate Impact** - A discriminatory practice which adversely affects a large number or class of people. (Griggs v. Duke Power Company)
- **Retaliation** - Discrimination against an individual who has brought forth a claim.

Check Your State and Federal Laws

- Age Discrimination Act – protects older workers.
- Pregnancy Discrimination Act – no discrimination against a pregnant woman.
- Nursing Mothers in the Workplace Act - provide breaks and places for mothers to express milk, specifically excluding toilet stalls.
- Whistleblowers Protection Act – protection for employees who report an employment or business practice.

Quiz Time!

What is wrong with the following?

- Steve worked 1450 hours during the 10 months since he started working for the company. He requested to take 12 weeks off to care for his newborn grandson. Should the company grant the leave?
- Sue took 10 weeks off to care for her ailing mother. When the perfect attendance bonuses were handed out, Sue didn't get one. Sue is demanding her certificate, citing the FMLA was her only time off.
- Bill requests an intermittent FMLA leave. He says privacy laws protect him from telling us about his problem. His supervisor wants to transfer him to another position to keep things running smoothly; maintaining his original salary. Bill says its illegal and we have to let him have his current job.

Family and Medical Leave Act (FMLA)

The federal **Family and Medical Leave Act (FMLA)** entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for qualifying health and/or family reasons.

The State of Maine FMLA also allows for 8 weeks of unpaid, job protected leave if the employee or a family member is the victim of violence, assault or stalking.



FMLA Eligibility

To be eligible for FMLA benefits, an employee **must**:

- have worked for their employer for a total of 12 months; and
- have worked at least 1,250 hours over the previous 12 months



FMLA Qualifying Events

FMLA Qualifying Events:

- for the birth and care of a newborn child of the employee;
 - for placement with the employee of a child for adoption or foster care;
 - to care for a spouse/partner, child, or parent with a serious health condition;
 - to take medical leave when the employee is unable to work because of a serious health condition; **or**
 - for qualifying situations arising out of the fact that the employee's spouse/partner, child, or parent is on active duty or called to active duty status as a member of the National Guard/Reserves in support of a military operation.
- Additionally, the law allows an eligible employee who is a spouse/partner, child, parent, or next of kin of a current member of the Armed Forces, including a member of the National Guard/Reserves, with a serious injury or illness up to a total of **26 work weeks of unpaid** leave during any rolling 12-month period to care for the service member.

Americans with Disabilities (ADA)

- Prohibits employers from discriminating against qualified individuals with disabilities in:
 - job application procedures
 - hiring, firing, advancement
 - compensation
 - job training
 - other terms, conditions, and privileges of employment.
- Restricts questions that can be asked about an applicant's disability before a job offer is made
- Requires that employers make reasonable accommodation to the known physical or mental limitations of otherwise qualified individuals with disabilities, unless it results in undue hardship

ADA Continued.....

- **An individual with a disability is a person who:**
 - Has a physical or mental impairment that substantially limits one or more major life activities;
 - Has a record of such an impairment; or
 - Is regarded as having such an impairment.
- **A *qualified* employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question.**
- **Reasonable accommodation may include, but is not limited to:**
 - Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
 - Job restructuring, modifying work schedules, reassignment to a vacant position;
 - Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.



ADA Continued.....

What is a reasonable accommodation?

- Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities.
- Accommodations vary depending upon the needs of the individual applicant or employee.

Note: Not all people with disabilities (or even all people with the same disability) will require the same accommodation.

Examples of Reasonable Accommodation:

- A deaf applicant may need a sign language interpreter during the job interview.
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
- A blind employee may need someone to read information posted on a bulletin board.
- An employee with cancer may need leave to have radiation or chemotherapy treatments

ADA Continued.....

When does an employer not have to provide reasonable accommodation?

- An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.
- An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.
- An employer *generally* does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation. Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

What Does This All Mean?

- **Major Life Activity**
 - Walking, hearing, seeing, speaking, breathing
 - Performing manual tasks
 - Learning
- **Conditions That May Qualify as a Disability**

<ul style="list-style-type: none"> - Epilepsy - Hearing loss - Mental Retardation - Learning Disability 	<ul style="list-style-type: none"> - Paralysis - HIV/AIDS - Mental Illness - MS
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- **Modifications That May be Required**
 - Restructuring a job
 - Providing interpreters
 - Buying adaptive equipment
 - Modifying a work schedule

Drug and Alcohol Abuse

- Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA.
- Employees are protected under ADA if they are entering rehab or currently in a treatment program.
- Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

Should we talk about this?

When maintenance worker, Ted Mantegna, returned from medical leave after sustaining a back injury, his doctor restricted him from heavy lifting. His manager, Bill Porter, gave him light duty work.

Then the doctor made the restriction permanent. The doctor's note said Mantegna was "a qualified injured worker requiring rehabilitation if modified work is not available."

"It doesn't appear that you can work anymore due to your back injury," said Porter.

"What do you mean?" Mantegna asked his manager.

"Sorry, but I have no choice but to let you go. Maybe you should go on permanent disability or get vocational training."

Should we talk about this?

Mantegna chose to bring the company to court for failing to provide a reasonable accommodation. He argued that Porter never discussed alternative jobs with him or how his existing job could be modified.

The company argued that Mantegna never asked for an accommodation and they are not required to engage in the interactive process.

What did the court decide???

Should we talk about this?

A company is required to engage in the interactive process, even if an employee does not specifically request an accommodation.

Fair Labor Standards Act (FLSA)

- Classification – Exempt vs. Non-exempt
- Non-exempt employees
- Record keeping requirements
- Overtime Compensation
- Volunteerism

Fair Labor Standards Act (1938)

- Enacted to protect workers
 - Who is an employee
 - Establishes minimum wage - \$7.25 as of 10/01/09 but is \$7.50 in the State of Maine
 - Overtime provisions for non-exempt employees
 - Establishes record keeping requirements
 - Exemptions
 - Enforcement of child labor laws

Classification – Exempt or Non-exempt

- **Exempt** - employees serving in positions exempt from the overtime pay provisions of the Fair Labor Standards Act because their executive, administrative, professional, or managerial responsibilities meet the exemption requirements of the Act.
- **Nonexempt Staff Members** - are non-faculty employees serving in positions covered by the overtime provisions of the Fair Labor Standards Act.
 - Subject to the record keeping and overtime requirements of law

Recordkeeping Requirements

Employer’s Responsibility

- Every employer must keep complete accurate records of time worked and time off
 - Work schedule
 - Daily/Weekly hours

Recordkeeping Requirements

Employee's Responsibility

- Complete timesheets daily/weekly
- Record time to nearest quarter of hour
- Hours worked, time off

Supervisor's responsibilities

- Approve overtime
- Verify hours worked and time-off
- Sign Timesheet

Work Week

- Fixed recurring period of 40 hours
- Employees must be paid overtime for all hours over 40 worked within the work week.
 - Employer/union contracts may decide if it includes:
 - Holiday
 - Personal
 - Vacation
 - Sick

Calculating Overtime

- Overtime Compensation (OT)
 - Hours worked > 40 in a work week
 - Paid at 1.5 X regular rate
- Compensatory time
 - For public employers only
 - There are NO requirements for compensatory time at private employers

Meals and Rest Periods

- FLSA does not require meals and rest periods
- Check your state law and union contracts.
In the State of Maine:
 - Employees must be offered a 30 minute paid or unpaid rest break after 6 consecutive hours of work.
 - No requirement for breaks.

Volunteerism

- Volunteers exempted from all of the statutory requirements of the FLSA.
- Individual must meet all criteria to be considered a “volunteer”
 - Services are totally unrelated to their work
 - Offer their services freely without pressure or coercion
 - Have not been promised and do not expect compensation for their services.

Summary

- Fair Labor Standards Act (FLSA) is a federal law.
- Each state has some modifications.
- Accurate and timely recordkeeping for all non-exempt staff is required.
- Overtime compensation for all hours worked over 40 is required for non-exempt staff.

Workers' Compensation

What supervisors need to know

Workers' Compensation

Employers generally have exceptional, collaborative, supportive, watchful and encouraging supervisors


Workers' Compensation

As employers we select self-directed, productive, efficient, effective and...

creative employees


Workers' Compensation

EMPLOYEE CREATIVITY



Workers' Compensation

EMPLOYEE CREATIVITY





STUFF HAPPENS!

Workers' Compensation

- In Maine, and generally in other states, the employer is responsible for injuries or illness "arising out of and in the course of employment"
 - Injuries don't have to occur on school property
 - Injuries could happen during scheduled breaks
 - Sometimes injuries occurring during school sponsored events may be WC injuries



Workers' Compensation

- In Maine, employers must file a "First Report of Injury" within 7 days of receiving notice of an injury resulting in days away from work.

NOTE

A casual verbal comment about pain directed to a supervisor often satisfies an employee's requirement...file an Incident Report.

Once employees learn that their injury requires more costly treatment or lost time, the benefits of Workers' Comp become more obvious to them.

Workers' Compensation

NOTE

Doctors often do not protect the employer's interests by supporting an employer's claim of lack of notice.

In Maine, WCB Hearing Officers are very forgiving of employees failing to make appropriate decisions early in the process, but less forgiving of employers.

Workers' Compensation

- **It is in the employer's best interest to investigate an injury or illness immediately**
 - Interview the employee and witnesses
 - Document all discussions
 - Photograph visible evidence
 - Be especially attentive to injuries in the following categories:

Workers' Compensation

- Monday morning injuries
- Injuries with no witnesses
- Injuries to employees nearing retirement
- Gradual injuries
- Heart Attacks
- Injuries during hunting or fishing season

Workers' Compensation


Four Types of WC Claims

- Medical Only Claims Accepted as Legitimate
- Medical Only Claims Not Accepted as Legitimate
 - Notice of Controversy Filed with WCB
- Incapacity Claims Accepted
- Incapacity Claims Not Accepted
 - Notice of Controversy Filed with WCB

Workers' Compensation

Keeping Claims Medical Only


- Find work for injured workers within their restrictions
- Use preferred occupational medicine providers
- Avoid using the emergency room if possible
- Follow up with an injured employee regularly
 - Are they working within their restrictions?
 - Are they continuing their treatment plan?



Workers' Compensation

Challenged Medical Only Claims

- Likely to go through mediation
- On to Hearing if not resolved in mediation
- Outcome depends on accuracy and thoroughness of documentation
- Often involves conflicting medical information
 - Occupational Health Provider selected by the employer vs doctors chosen by employee



Workers' Compensation


Incapacity Claims

- Incident Reports can prevent expensive claims
- Duration of incapacity is critical (in Maine)
 - Injured employees out less than 7 days receive no compensation
 - Compensation begins after 7th day
 - Employees out more than 14 days are paid retroactively to first day of lost time
 - Lost time can be minimized by providing light duty work
 - Provides continuation of pay for employee
 - Minimizes impact on WC insurance premiums to employer

Workers' Compensation

Communication

- Employer has the right to communicate with an injured employee about anything related to employment
- Do not discuss legal aspects of Workers' Compensation if the employee is represented by a lawyer
- Employees out of work should be invited to employer functions
- It is permissible to visit injured employees



Workers' Compensation

Light Duty Work

- Purpose of light duty work is to keep injured employees working in a positive, supportive environment
- The employee's doctor can be encouraged to review the work or the work area
- If an employee refuses light duty work benefits can be suspended
- Employees on light duty should be treated the same as other employees with regard to discipline and discharge

Workers' Compensation

ADA vs. Workers' Comp

- Workers' Comp injury does not necessarily meet the definition of an ADA disability
- Injury that prevents an employee from doing only one job is normally not a disability
- Workers' Comp medical information must be maintained in a separate confidential medical file
- Creating a light duty position is not a reasonable accommodation nor is it required in either ADA or WC

Workers' Compensation

Termination

- Injured workers may be terminated if guilty of misconduct not related to Workers' Compensation
- Workers discharged for misconduct have no reinstatement rights in Workers' Comp
- Employers are not required to accommodate work restrictions indefinitely
- Employees can be terminated for repeated unsafe practices in hazardous work

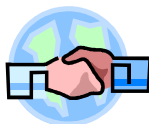
OSHA in 5 Minutes or Less

- Federal or State Program?
- Avoid or Collaborate?
- Written Programs
- Documented Training
- OSHA "visits"



OSHA Friendly Safety Strategy

- Keep written programs simple
- Do what you say you will do
- Make employees partners in compliance (and going beyond compliance)
- Correct hazards quickly (and encourage employees to do the same)
- Document



Questions?
