

HR Essentials Every Emerging Leader Should Know



Disclaimer

Nothing in this presentation is legal advice and should not be construed as such. The purpose of the presentation is education only. Please consult with in house or external counsel on the specific issues that may come up within your organization.

Why is this important???

Me...



Most people...





By the Numbers...



- From October 1, 2016 through September 30, 2017
 - CLAIMS
 - 540,000 calls, 155,000 field office inquiries
 - 85,254 discrimination charges filed
 - 99,109 charges resolved
 - MONETARY RELIEF
 - \$398 million secured for victims of discrimination
 - 184 lawsuits filed, 242 cases on the docket
 - (Public relations NIGHTMARE)
 - REASONS
 - Retaliation
 - Termination
 - Harassment
 - Terms and Conditions of employment
- Wage and hour claims on the rise

This IS important.

- Filing a claim will initially cost an employee nothing (only a little time) for almost every type of claim - the employer's costs begin to add up immediately
- Supervisors are closest to the employees and the situations that occur and are the best line of defense to protect the Bank/organization from potential lawsuits and protect staff members from bad situations
- Supervisors can be personally liable if they “knew” or “should have known” under many employment laws including wrongful discharge and employment discrimination



Federal vs. State Law

- Often differ
- Generally the protection most generous to the EMPLOYEE is what applies (Marijuana legalization is testing this)
- Even federal agencies sometimes differ - currently sexual orientation as a protected class (DOJ vs. EEOC)
- We will talk about both



What about Employment At Will?!

HEY!

- Wisconsin is an “employment at will” state meaning we can terminate for a good reason, a bad reason or no reason at all ---- RIGHT?!
 - Yes but there is one major exception: You cannot take an adverse action for an illegal reason. Both the state and federal government have put in place **MANY** reasons that a termination or other adverse employment action might be illegal.

Equal Opportunity Employer

- 15 or more employees (20 employees for age discrimination)
- Through the course of employment - we cannot discriminate (in hiring, firing and anything in between) based on:
 - Age (over 40) (specific - ADEA)
 - Disability (specific - ADA)
 - Genetic Information (specific - GINA)
 - National Origin
 - Pregnancy
 - Race
 - Color
 - Veteran Status
 - Religion
 - Sex
 - Equal Compensation
 - Sexual Harassment

Also in Wisconsin...

- Marital status (employers can prevent reporting relationships)
- Sexual Orientation
- Arrest and Conviction Record (must substantially relate)
- Member of national guard/military reserve
- Off duty use or nonuse of lawful products



Harassment

- Harassment is a type of discrimination and can be based on any protected class
 - Example: Sexual harassment is discrimination based on sex
- Unwelcome conduct
- Not just employees! (*Shatzer v. Rite Aid Corp. (W.D. Pa., 2015)*)
- Two types:
 - Quid pro quo - enduring the harassment is a condition of continued employment
 - Hostile work environment - the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive
 - Almost always more than one incident

Family and Medical Leave

- Unpaid (unless under policy - can be required under federal), job protected leave for a specific family and medical situations - employee must be returned to a substantially similar position
- State and federal run concurrent (must say that!)
- Eligibility (lookback)
 - Wisconsin
 - 52 consecutive weeks
 - 1000 hours in 12 month period (approx. 19 hours per week)
 - Federal
 - 12 months (method determined by employer)
 - 1250 hours worked in prior 12 month period prior to leave beginning (approx. 24 hours per week)

What is covered under FMLA?

- Birth or placement of child for adoption or foster care
 - Both males and females
 - Federal must be taken within 12 months of birth or placement, Wisconsin must be within 16 weeks (before or after)
 - 6 weeks under WI, 12 weeks under Fed
 - May be taken prior to birth or placement under WI (16 weeks before or after)
 - Intermittent leave - allowed WI, up to employer Fed
- Serious health condition of the employee
 - Many types of serious health conditions including but not limited to:
 - Inpatient care
 - Period of incapacity of more than 3 calendar days
 - Chronic condition which cause episodes of incapacity
 - Permanent or long term condition which requires continuing treatment
 - Pregnancy
 - Can be taken in increments as directed by doctor
 - 2 weeks under WI, 12 weeks under Fed

What is covered under FMLA?

- Serious health condition of the employee's immediate family
 - Federal:
 - **Parent** - A biological, adoptive, step or foster father or mother, or someone who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent for FMLA purposes does not include in-laws.
 - **Spouse** - A husband or wife as defined or recognized in the state where the employee was married and includes individuals in a same-sex marriage or common law marriage.
 - **Son or Daughter** - *For leave other than military family leave*, a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis* who is either under 18 years of age, or 18 or older and incapable of self-care because of a mental or physical disability.
 - State: same but included parent in law
 - May be taken in increments
 - 2 weeks under WI, 12 weeks under Fed

What is covered under FMLA?

- Exigency for Military Leave
 - 12 weeks under Federal
 - Includes spouse, son, daughter, or parent on or *called to active duty*
 - Time can be used to deal with almost anything related including childcare, legal, financial, counseling, rest and recuperation, post deployment activities, military events and activities, etc
- Care for a Covered Service Member with a Serious Injury or Illness
 - 26 weeks under Federal
 - Spouse, son, daughter or parent or next of kin

What can leaders do?

- Be aware of the employee's legally protected rights.
- Always document date and reason the employee gives for calling in - if they say "I'm sick" - write that down! This does not qualify them for FMLA, per se.
- If an employee mentions a situation that you think might qualify or if there is a question or concern - contact HR or counsel.
- Remember that you may not know the whole story and the employee is not obligated to tell you the whole story!

Americans with Disabilities

- Prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications and governmental activities
- Employment portion enforced by the Equal Employment Opportunity Commission (EEOC)
- Covers all employees (part time, full time, temporary) and applicants including during recruitment and hiring, job assignments, pay, leave or benefits, promotion, licensing, training, lay off, all other employment related decision

Requirements

- Employee must be qualified for the position and be able to perform the essential functions of the job, with or without an accommodation and is then entitled to:
 - Protection from discrimination based on a disability
 - “reasonable accommodation”
 - Some protection against unreasonable medical inquiries

What is a disability?

- Not everyone with a medical condition is protected by the law. In order to be protected, a person must be qualified for the job and have a disability as defined by the law.
- A person can show that he or she has a disability in one of three ways:
 - A person may be disabled if he or she has a physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning).
 - A person may be disabled if he or she has a history of a disability (such as cancer that is in remission).
 - A person may be disabled if he or she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he does not have such an impairment).
 - WISCONSIN: Physical or mental impairment that makes achievement unusually difficult or limits the capacity to work

Interactive Process

- Accommodation not required if undue hardship on employer
- There must be a communication and exchange of information between employee and employer in an effort to arrive at a reasonable accommodation
- Employer does not have to provide the accommodation that is requested - if alternatives are available the employer may decide
- Limits on medical information employer may request (nothing of applicants)

Examples of Accommodations

- Lower music
- Standing desk
- Exceptions to Dress Code
- Sitting versus standing
- Enhanced equipment to assist with vision or hearing
- Regularly scheduled breaks
- Time away from work (could be beyond FMLA)



What can leaders do?

- Be aware of potential situations where an employee or applicant has a disability and proactively anticipate accommodation
- If an employee discusses a disability with you, inform HR or counsel immediately
- Keep an open mind during the interactive process
- Do not share any information with other staff members

Wage and Hour Issues

- Exempt vs. Non exempt
 - Not the same as hourly vs. salaried
 - Eligibility for overtime
 - Based on job duties and pay - pay may change or may not
- Overtime must be paid at 1.5 normal hourly rate for non exempt staff
 - Work week determined by employer

Fair Labor Standards Act

What is *Paid Time*?

- Hours worked (non-exempt) include:
 - Motivated employee - taking work home including training from home
 - Waiting time if for our benefit/donning and doffing
 - On call time if on employer's premises or substantially limits mobility
 - All rest periods 20 minutes or less (federal)
 - Meal periods of 30 minutes or less (state)
 - Meal periods if **ANY** work is required
 - Lectures, meetings and training IF required and job related
 - Travel time
 - NOT home to work
 - Travel away from home should be looked at closely

What can leaders do?

- Do not allow work from home (knew or should have known standard) unless paid for non-exempt staff
- Be cautious with work required during unpaid lunch periods
- When an employee asks if they are paid for time doing XYZ, carefully assess whether it is for the benefit of the company
- Carefully track time



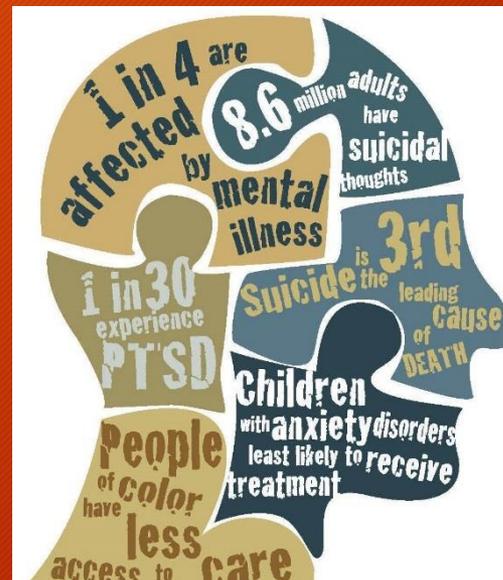
National Labor Relations Act

- Not just for unions
- “Protected, concerted activity”
 - Generally speaking, there is protected concerted activity when two or more employees act together to improve their terms and conditions of employment, although it is (on rare occasions) possible for conduct to be so egregious that it becomes unprotected
- Take complaints about wages, working conditions, etc seriously
- Social media can be a valuable place to collect information but we must proceed with caution - both employees and employers must be cautious

Trending Hot Topics



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Active Shooter
Preparedness

Misconduct Allegations



SOURCE: <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations>

Gender Identity



- The EEOC has ruled that discrimination against a person who is transgender is discrimination under “sex” discrimination
- Brings about many workplace questions such as use of pronouns, names and when to change them both legally and preferred name (is George going by Jenny any different than Jennifer going by Jenny?), bathrooms, etc.
- Diversity and inclusion training is highly recommended for ALL workplaces

Can I “take a knee”?



- The First Amendment is often misunderstood to mean that we have a full and complete right to free speech. That is not the case. The First Amendment prohibits the government from suppressing speech - not private employers.
- New but not new issue - Oliver Wendell Holmes Jr. spoke of this issue in 1891
- A union contract may cover specifics of speech rights
- Employees can typically be terminated for political speech, gesture, etc in the workplace
- Must be balanced with rights to grieve workplace issues under the NLRA and protected religious rights

Legalization of Marijuana



- 29 states and D.C. have legalized in some way, 9 and D.C. have legalized recreational use (possession of small amounts and growing plants for those 21 and older)
- Illegal at the federal level (for now) and some employers are still firing for failed drug test in states in which it is legalized and some state laws even allow that! But....is it a reasonable accommodation? A Massachusetts court ruled YES!
- Strategy: if legalized treat like a prescription medication (medical) or alcohol (recreational)
 - Employees cannot be impaired while working
 - Employees cannot sell on company property/company time

Download Your Doctor's Note



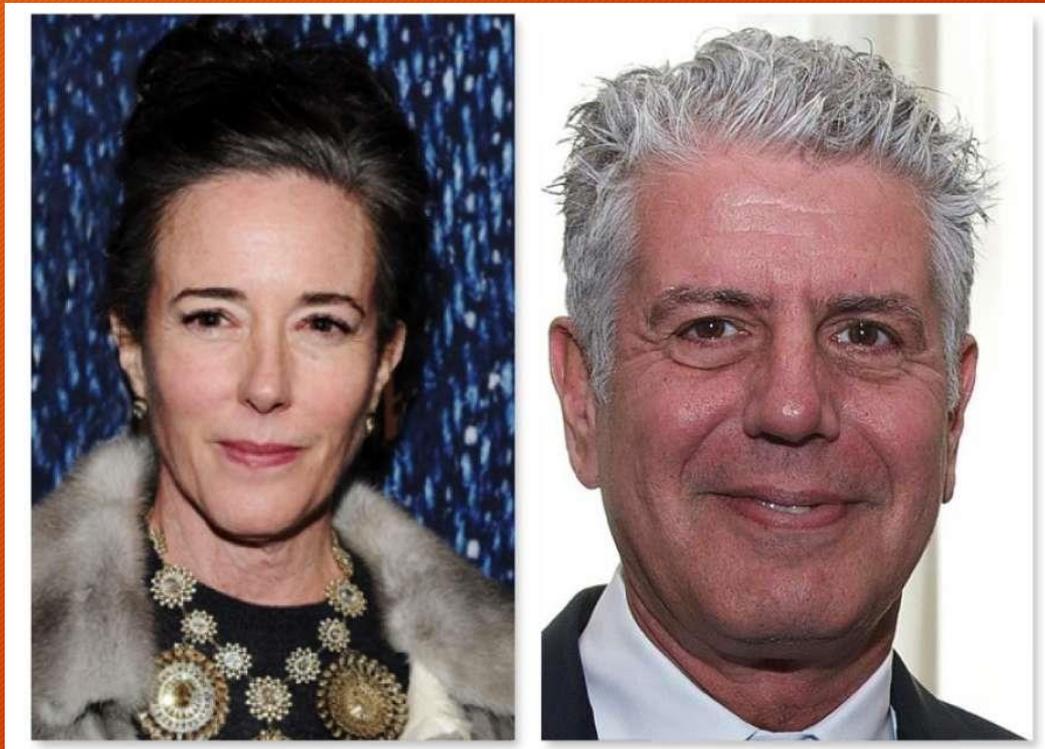
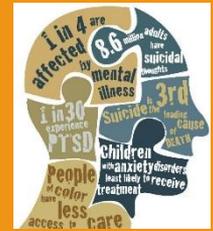
- Doctor's "notes" play a part in almost everything we talked about today in terms of protecting an employee from repercussions for missed work or adjustments to work
- A simple Google image search finds MANY free documents
- For a fee there are companies that will even answer calls
- Search for facility and/or doctor online and call number provided there
- Don't let guilt or "feeling bad" get in the way of doing appropriate due diligence on situations that arise

Active Shooter Training

Active Shooter
Preparedness

- Banks almost always have a procedure for robbery but do you have a clear distinction from an active shooter situation? The strategy in dealing with each situation is dramatically different (comply vs. NOT comply)
- Liability may exist if there is an active shooter situation at your workplace and staff was not trained properly. A procedure should also be in place.
- This training benefits employees beyond the workplace

Mental Health Crisis



Best Way to Avoid Litigation...

- Before taking adverse action think through what protections an employee might have
- **Document, document, document**
- Follow policies and procedures within your organization
- Recognize that fair \neq equal
- Avoid bad timing
- Always try to make an employee successful in any way you can
- Avoid stray comments
- Do not ignore bad behavior or poor performance
- Take every complaint seriously - even if you think it is just whining
- Communicate much and often
- Use “common” sense and logic in your interactions with employees

Questions?

For a copy of this presentation please give me your
business card or e-mail me your request!