A Manager's Pocket Guide to Employment Law

BusinessManagement DAILY

A Manager's Pocket Guide to Employment Law

Author, Contributing Adviser
Anniken Davenport, Esq.

Editor
Robert Lentz

Editorial Director
Patrick DiDomenico

Associate Publisher
Adam Goldstein

Publisher
Phillip A. Ash

Every organization, from the smallest mom-and-pop operation to the largest multinational conglomerate, must be aware of current developments in employment law to understand which personnel policies and practices are appropriate and which could plunge them into legal hot water. They must also know when to implement or amend policies and practices so as to keep current with changing laws and regulations.

Keep in mind that our employment laws are all based on the simple concept of fundamental fairness in the workplace. Employers who treat their employees with respect will have a better relationship with them, which will, in turn, translate into increased productivity and profitability.

A good employee handbook is essential for effective people management and litigation prevention. Without one, employees don't know where to turn for basic information on your company policies. Managers and supervisors may be tempted to make up rules on the fly, creating a patchwork of confusing rules that may even be contradictory.

Federal laws have created a labyrinth of employee protections, and employers that even unintentionally discriminate will find themselves tangled in expensive litigation.

Title VII of the Civil Rights Act of 1964 protects workers from discrimination based on race, color, sex, religion or national origin. Some courts have interpreted Title VII's protections to extend to discrimination based on sexual preference and/or sexual identity. Check with your attorney to determine the legal precedent in your area.

Sexual harassment is a form of sex discrimination outlawed under Title VII of the Civil Rights Act. The EEOC, which enforces the Civil Rights Act, defines sexual harassment this way: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile or offensive work environment."

Employers must also comply with the **Equal Pay Act** of 1963, which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination, and the **Pregnancy Discrimination Act** of 1978, which makes it illegal to discriminate on the basis of pregnancy, childbirth or related medical conditions. The **Age Discrimination in Employment Act** of 1967 protects individuals who are 40 or older. The **Americans with Disabilities Act** of 1990 protects qualified disabled individuals from discrimination and mandates that employers provide reasonable accommodations for their disabilities. The **Genetic Information Nondiscrimination Act** bars employers from using an employee's genetic information in any employment decisions.

The **Family and Medical Leave Act** provides up to 12 weeks of unpaid leave

for the birth or adoption of a child, the serious health condition of an employee or an immediate family member, as well as military-related leave for employees who have family members in the armed services or reserves. The **Uniformed Services Employment and Reemployment Rights Act (USERRA)** protects individuals who are members of the reserves or National Guard from discrimination based on their service status, and protects their rights to be rehired after they have completed their active duty service.

If you employ more than 15 full or part-time workers, you must comply with Title VII of the Civil Rights Act, the Pregnancy Discrimination Act and the Americans with Disabilities Act. You are covered by the Age Discrimination in Employment Act if you employ more than 20 workers. The Equal Pay Act applies to all organizations covered by the Fair Labor Standards Act, which includes virtually all employers.

The **Equal Employment Opportunity Commission (EEOC)** enforces most federal employment discrimination laws, while the U.S. Department of Labor enforces most federal wage-and-hour laws.

To stay out of legal trouble, organizations must make it a priority to understand federal, state and local laws. Ignorance of the law is no excuse and can even subject your organization to additional penalties for willfully disregarding worker rights.

Hire Legally

To stay out of court, managers should build their hiring process around these principles:

1. Review job ads for traces of bias. If you write employment ads for new job openings, be aware that a few poorly chosen words could spark a discrimination case. For example, see if you can recognize the three problems with the following ad:

"Waiters/busboys. Looking for energetic, recent H.S. grad to work midnight shift at 24-hour restaurant. Great potential for growth. Apply in person or via mail to Ms. Willis, 100 Columbia Way."

The three mistakes: (1) Using age as job-selection criterion ("recent H.S. grad") violates the Age Discrimination in Employment Act. (2) The terms "waiter" and "busboy" are not gender neutral and could be viewed as discriminatory. (3) Requiring a high school -diploma may be seen as discriminatory because it could be argued that a diploma is not a bona fide occupational qualification for this job.

2. Avoid discriminatory words in interviews. Every interview question you ask should somehow relate to this central theme: "How are you qualified to perform the job you are applying for?" Managers usually land in trouble when they ask for information that's irrelevant. Examples: Are you married? How old are you? Do you have children? What are your day care plans? Do you own or rent your home? Have you had a major illness recently? Never "wing it" during interviews. Instead, create a list of questions and make sure each one asks for job-related information.

3. Don't oversell the job. Comments like "This position offers lots of job security" or "You can work here a long time if you're successful" are dangerous. That's

because a spoken promise can carry just as much weight as a signed document. Courts may conclude that you entered into an "implied contract" if you directly or indirectly allude to that person's long-term job security. Spoken promises of job security can even supersede a written "at-will" statement, which says employees can be terminated at any time for any legal reason. That could crush the organization's ability to fire people if needed.

4. Don't show preferences during interviews. Provide only neutral comments until you're ready to offer the job. Why? Even one statement to a candidate hinting about who you think is the "most qualified" can show preference. Later on, that statement can be used in court as proof of your discrimination.

Pre-employment Testing

Pre-employment testing carries risks: Unless you can demonstrate that you are measuring job-related qualities and that the tests fulfill a business necessity, you could be exposing your company to charges of discrimination.

Follow the advice in the federal government's *Uniform Guide-lines on Employee Selection Procedures* (29 C.F.R. §§1607.1 *et. seq.*), issued in 1978 and available online at **www.uniformguidelines.com**. These nonbinding guidelines set standards for employment test design, validation, security and utility. The guidelines suggest that employers track test results to determine whether a selection procedure is discriminatory. Tests with a "disproportionate adverse impact" on certain groups of individuals protected by equal opportunity laws are illegal unless the employer can demonstrate a business necessity.

Drug Testing

Drug testing and substance abuse prevention programs can pose substantial legal liability if they are not managed and administered properly. Employers can safely administer drug testing in three situations: before hire but *after* a conditional job offer; during a fitness-for-duty test; and after a preventable accident.

Drug tests for illegal substances aren't considered medical exams under the ADA, so employers can conduct them at any time during the pre-employment stage. But because those tests can reveal the presence of legal drugs in an applicant's system, this could tip you off to a person's disability. In fact, to avoid liability, wait to test until you make a conditional job offer. Because applicants who test positive for illegal drugs aren't covered by the ADA, you can withdraw a job offer based on those results.

Always inform applicants and employees of the specifics of your anti-drug policies, and obtain a signed, dated consent form before you administer any drug tests. Notify applicants on the application form that you will drug-test. That will turn away many drug users.

The Fair Credit Reporting Act

The FCRA requires employers to notify and receive written consent from applicants or employees before obtaining credit reports or other background information on them from a consumer

reporting agency (CRA). The law, as interpreted by the Federal Trade Commission, applies only to third-party background checks, not to an employer's own investigation of, say, an applicant's references, educational degree or driving records.

If you are requesting an "investigative consumer report"—a more in-depth investigation than just a credit report—you must provide the applicant with a disclosure revealing the applicant's right to request information about the "nature and scope" of the report. Should the applicant make such a request, the employer has five days to provide that information.

If the employer chooses not to hire the individual based on information obtained in the report, the employer must provide a "pre-adverse action" notice to the applicant. This notice must include a copy of the consumer report and the Consumer Financial Protection Bureau's (CFPB) Summary of Rights. The applicant may challenge the pending decision by presenting evidence that the information in the report is false or inadequate.

Hiring and Immigration

Two laws govern U.S. immigration policy: the **Immigration and Nationality Act** of 1952 and the **Immigration Reform and Control Act (IRCA)** of 1986, which was amended in 1990. For each new employee hired, U.S. employers must complete a Form I-9, Employment Eligibility Verification. The I-9 establishes the employee's identity and his or her legal work status. Employers can hire only those eligible to work legally in this country. New employees must fill out Section 1 on their first day of work. Employers must complete Section 2 within three business days after their employment begins. You must keep an em-ploy-ee's I-9 on file for three years after his or her hiring date or for one year after the date of termination, which-ever comes later. Failure to complete I-9 forms can lead to significant penalties.

The FLSA

The Fair Labor Standards Act (FLSA) covers the federal minimum wage, rules on overtime pay and child labor regulations.

The FLSA has strict rules regarding the minimum wage, overtime pay and child labor. The law applies to every enterprise having two or more employees if it's a public agency; hospital, health care facility or school; or a business with gross income of $500,000 or more. Even if your business doesn't meet those criteria, you may still have employees covered by the FLSA if those workers engage in "interstate commerce." And the child labor and minimum-wage provisions apply to virtually every worker.

On January 1, 2020, the minimum overtime salary threshold rose 50% from the previous level of $23,660. That means exempt administrative, executive and professional employees are eligible for overtime pay as long as they don't earn more than $35,568 per year ($684 per week). White-collar employees who earn that amount or less are eligible for overtime pay when they work more than 40 hours in a workweek.

If you want to take advantage of the FLSA's exemptions from overtime pay, you will have to design jobs or analyze existing job duties to see if the positions

will fit neatly into one (or more) exempt classifications. While you are not required to do so—you have the option of paying everyone on an hourly basis along with any overtime due—most employers choose to classify employees as exempt if their job duties fit into an exempt classification. Designating a worker as exempt means you won't have to pay overtime or carefully track every hour and minute worked. Exempt workers aren't entitled to overtime pay. You pay them based on the job they do, not how long it takes them to do it. Generally, you must meet three requirements before properly classifying a workers as exempt:

- Pay the worker a DOL set minimum salary level amount per week
- Pay the worker on a salary basis
- Show that the worker holds a position that included duties outlined in DOL regulations for specific exempt classifications. These classifications include executive, administrative, professional, computer, outside sales and highly compensated employees.

To comply with the FLSA, it's important to understand the definition of "hours of work." Any hour when an employee is on duty is considered time worked. The only period usually excluded: when an employee uses the time for personal reasons.

You don't need to count meal periods lasting 30 minutes or more as work time if the employee is completely relieved from duty. But if, for example, you require someone to assist customers or take business calls during lunch, you must count those minutes as paid time. Coffee breaks or other rest periods lasting 20 minutes or less are also considered time worked.

Federal law doesn't require rest or meal breaks for workers over age 18. Nearly half the states, however, mandate that you must provide rest or meal breaks for a specified minimum period each day. Some states set very strict rules for when meal breaks must occur and penalize employers for not providing those meal breaks on time.

Caution: If you require employees to wear paging devices or be recalled to duty during meal breaks, you must pay them for that time. You may incur significant liability if you're not paying entire units of employees on call during breaks. You can be hit with back pay for up to three years, plus an equal amount as liquidated damages—not to mention attorneys' fees.

When an employee engages in his regular duties, you must count the time as work even if it falls before or after his usual shift. (A mere few minutes of work may be excluded as unsubstantial.) If an employee is working at home or any other place outside the job site, you must also count that time if you know, or have reason to believe, that the employee is performing work.

Before the workday begins or after it ends, you don't need to pay for time when an employee may engage in certain activities related to his regular job but not integral to it: for instance, travel between a logging camp and the site of logging operations.

In 2005, the U.S. Supreme Court said manufacturing workers must be paid for the time they spend changing into and out of protective clothing and safety gear, a "principal activity … integral and indispensable" to their work. They must

also be paid for time spent walking between their workstations and locker rooms where they put on and remove their gear. However, the court didn't order employers to pay for the time workers spend in line at the beginning of the day to get their clothing and safety gear; this is "preliminary activity" for which they needn't be paid. However, in 2014, the U.S. Supreme Court said there's an exception to "donning and doffing" cases under the FLSA. It said workers need not be paid to change into and out of protective gear if a union contract has already specified that the time isn't compensable.

Also in 2014, the Supreme Court ruled that employers do not have to pay their employees for time they spend undergoing (and waiting for) security screenings at the end of their shifts.

The FMLA

The Family and Medical Leave Act provides qualified employees of covered employers who have been on the job for at least one year up to 12 weeks of unpaid, job-protected leave per year for the birth, adoption or foster care of a child; caring for a child, spouse or parent with a serious health condition; or for the employee's own serious health condition.

Additionally, the Act provides up to 26 weeks of unpaid military caregiver leave in each 12-month period to care for a family member with a service-related illness or injury. The law covers activated reservists; National Guard and Reserve members may take up to 12-weeks of unpaid leave to deal with specific service-related events.

Any company with 50 or more employees working within a 75-mile radius of the "work site" and "engaged in commerce" must comply with the FMLA. The courts have interpreted the term "engaged in commerce" so loosely that virtually all types of businesses meet the definition. The regulations specifically bar employers from shifting employees from one work site to another to evade the employee limit. The 50 or more workers must be employed "for each working day during each of the 20 or more calendar workweeks in the current or preceding calendar year."

To be eligible for leave, an employee must have worked for the same employer for at least 12 months. That time need not be continuous service. Employers should count any time the employee worked for the company within the last seven years. Additionally, the employee must have clocked at least 1,250 hours of service (slightly more than 24 hours per week) during the 12 months leading up to FMLA leave.

On-call time counts toward the 1,250 hours, but paid time off, such as vacation or sick time, does not. **Note:** In 2008, the DOL determined that time spent in "light duty" work does not count against an employee's FMLA leave entitlement.

Employees who have had a break of service do not start over with the one year of service requirement if the break in service is less than seven years. Employers then must go back and count all prior service during that seven year period. In addition, if the break in service is due to an employee's fulfillment of military obligations, the employer must go back to the original service date.

The **National Defense Authorization Act** of 2008 (NDAA) granted new leave

rights to family members of men and women who serve in the military. Because the NDAA amended the FMLA, the changes apply only to employers with 50 or more employees.

The law creates a new qualifying reason for leave. Eligible employees may take up to 12 weeks of unpaid leave over a single 12-month period for "any qualifying exigency" arising from the active military service or call to service of a spouse, child or parent. The provision is intended to help employees meet family needs that arise as service members prepare for or return from deployment.

USERRA

The Uniformed Services Employment and Reemployment Rights Act requires employers to re-employ someone returning from duty in the uniformed services if he or she meets five criteria:

1. **The person must** have held a civilian job.
2. **He or she must have given** notice to the employer upon leaving the job for duty in the uniformed services, unless giving notice was precluded by military necessity or otherwise impossible or unreasonable.
3. **The cumulative period** of service must not have exceeded five years.
4. **The person must not** have been released from service under dishonorable or other punitive conditions.
5. **He or she must have reported** back to the civilian job in a timely manner or submitted a timely application for re-employment.

USERRA establishes a five-year cumulative total on military service with a single employer, with certain exceptions allowed for situations such as call-ups during emergencies, reserve drills and annually scheduled active duty for training.

The ADA

The ADA prohibits discrimination against qualified individuals with disabilities: those who can perform the job's essential functions with or without reasonable accommodation. (An accommodation is considered reasonable if it doesn't place an undue hardship on the employer.)

All employers that have 15 or more employees must comply with the ADA. **Note:** Business partners who aren't involved in the day-to-day operations of a firm are not counted as employees under the ADA.

Covered employers must not discriminate against disabled applicants or employees who meet the definition of "qualified individual with a disability." Further, the ADA prohibits employers from regarding a non-disabled person as disabled because this would further society's stereotypes about people with handicaps.

In interview situations, under no circumstances should an employer ask a question likely to elicit an answer that would reveal an applicant's disability. For example, if a job requires a person to lift 50 pounds, it is permissible to ask the applicant whether or not he or she can lift that much. By contrast, it's not permissible to ask applicants what prescription drugs they are taking.

Employers may not conduct medical exams on job applicants until after they make a conditional offer of employment. If a medical test reveals a disability after the offer was made, the employer and employee must begin an interactive process to determine what reasonable accommodations are available that would allow the applicant to perform the essential job functions. If they can agree on an accommodation, the employee is hired.

When making a hiring decision, you may not consider whether an applicant requires an accommodation. You should thoroughly document any decision regarding reasonable accommodation or hiring a disabled applicant.

Any medical information obtained from medical tests, medical certification of a disability or freely volunteered by the individual is confidential. This information should be kept in a confidential file, separate from the applicant or employee's general file. Access to the file should be restricted to company employees who must see it to carry out the accommodation, or to government officials in the normal and proper course of their duties.

GINA

Passage of the **Genetic Information Nondiscrimination Act** (GINA), which took effect in 2009, grew out of concern that employers could use genetic information to discriminate against employees.

The EEOC defines genetic information as "information about an individual's genetic tests and genetic tests of an individual's family members, as well as information about any disease, disorder or condition of an individual's family members." In effect, genetic information is anything that might indicate a probability that a person may develop a disease or condition in the future.

The law prohibits employers from discriminating against employees or applicants based on their genetic information in any aspect of "employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment."

Similarly, employers may not harass employees because of their genetic information and may not retaliate against employees who bring genetic information discrimination charges.

OSHA

The main law addressing workplace safety is the **Occupational Safety and Health Act,** enacted in 1970 and enforced by OSHA. The act requires all employers to provide a safe and healthy workplace. It also mandates specific guidelines for certain industries and protects workers who file whistle-blower complaints about hazardous conditions in their companies. The "general duty" clause of the statute requires you to provide workers with a workplace free of hazards that could cause death or serious physical harm.

OSHA also enforces whistleblower provisions of 22 different federal statutes. Whistleblowers are protected from retaliation by employers for filing

complaints with OSHA, participating in OSHA inspections, or testifying in any inspection-related proceeding. Whistleblower discrimination can include:

- Firing or laying off
- Assigning to undesirable shifts
- Blacklisting
- Demoting
- Denying overtime or promotion
- Disciplining
- Denying benefits
- Failing to hire or rehire
- Intimidation
- Transfer or reassigning work
- Reducing pay or hours

Conducting Legal Terminations

Under the law in most states, if there's no employment contract a worker is employed on an "at-will" basis. That means the worker has the right to leave the company at any time, and, conversely, the employer has the right to terminate the employee at its discretion.
If a worker is under contract, however, the terms of the contract apply. A written contract may specify the reasons the employee can be terminated, while an oral contract usually implies that termination can occur only for cause. Usually, that means the employer can terminate the worker only for poor performance, dereliction of duty, an act of dishonesty or insubordination, or because the company needs to eliminate the position the employee holds.

A contract may be a formal, signed agreement, a collective bargaining pact or an implied contract. Not all states recognize implied contracts. If your state does honor such agreements, a court might conclude that an implied contract exists if an employee handbook, policy manual or verbal statement alludes to job security. Other courts have held that the totality of the parties' relationship must be reviewed to determine whether the employer's conduct constitutes an implied promise that it would not arbitrarily terminate an employee.

When you dismiss an employee, be sure to minimize your exposure to charges that you broke a contract, violated public policy, acted vindictively or engaged in discriminatory practices. These steps will help you avoid litigation or support your case in court:

- **Publicize your policies.** Policies that are effectively drafted, communicated and enforced uniformly can help you justify a dismissal. Communicate your policies and any associated penalties for noncompliance clearly. If an employee was never informed of your company's policies, or if those standards were communicated poorly, you may be forced to overturn his or her termination or pay a large settlement.
- **Conduct employee performance reviews regularly.** Ensure that you or anyone acting on your company's behalf adheres to your company's strict anti-discrimination policy. Statements from managers and supervisors must be free of any overtones of discrimination. Even just-cause terminations can be jeopardized by discriminatory remarks.
- **Use consensus decision-making:** One of the best ways to make sure a discharge decision sticks is to adopt a consensus approach to the

decision-making. It's best to include someone from the HR department as well as someone outside the employee's immediate chain of command.

Some supervisors try to get around the whole issue of firing by resorting to constructive discharge. Their logic: If we make an employee's time at work so intolerable, he or she will choose to resign. This is not a wise strategy. For starters, your company becomes vulnerable to charges of discrimination by the targeted employee. After all, he or she was specifically singled out for special treatment—the essence of discrimination. In such cases, a former employee will allege that the working conditions were so intolerable that a reasonable person would have been forced to resign.

The WARN Act

The term "layoff" or "reduction in force" is often used interchangeably with "firing" or "termination." Yet there are important distinctions between these terms. A layoff occurs when workers are let go for reasons beyond their control—for example, the company has suffered an economic downturn or it has been restructured, bought out or shut down.

A wave of corporate mergers and downsizings in the 1980s led Congress to pass the **Worker Adjustment and Retraining Notification (WARN) Act** of 1988. The act requires certain employers to give 60 days' notice of an impending layoff or plant closing to affected employees. You can be liable for back pay to employees for any portion of the 60-day notice period.

Under the WARN Act, a "plant closing" is defined as a temporary or permanent shutdown that results in 50 or more full-time employees losing their jobs. A "mass layoff" is a workforce reduction that is not the result of a plant closing but causes employment loss at a site for any 30-day period for one-third—but not less than 50—of the full-time workers, even if the plant remains open. If 500 or more full-time employees are affected in the layoff, the one-third requirement does not apply.

WARN's provisions apply to any employer that has 100 or more full-time employees or has 100 or more employees, including part-time workers, whose total work amounts to at least 4,000 hours per week, not counting overtime. Keep in mind that many states and municipalities have notification laws more stringent than the federal law.

COBRA Obligations

Under the **Consolidated Omnibus Budget Reconciliation Act (COBRA)** of 1985 you are required to continue offering medical insurance benefits to workers and their covered dependents for a specified period of time after they leave the company. The law applies to all companies that have 20 or more workers and have group health insurance plans (including self-insured plans). Note that some states have lower minimums concerning the number of employees.

Under COBRA an employee and any of his or her qualified beneficiaries may elect to continue health coverage if one of the following qualifying events occurs. The length of time coverage will continue depends on the qualifying event.