

EMPLOYMENT LAW 101

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THE MUNICIPAL LAW FIRM

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FEDERAL EMPLOYMENT LAWS

- Title VII
- Fair Labor Standards Act (FLSA)
- Pregnant Workers Fairness (PWFA) and PUMP Act
- Age Discrimination In Employment (ADEA)
- Fair Credit Reporting Act
- Equal Pay Act
- Uniformed Services Employment and Re-employment Rights (USERRA)
- COBRA
- HIPAA
- Family Medical Leave Act (FMLA)
- *Americans With Disabilities Act (ADA)*

FEDERAL EMPLOYMENT LAWS (Continued)

- ERISA (Some Cities are exempt)
- Occupational Health and Safety Act (OSHA)- Not applicable to governmental entities.
- NLRA - Not applicable to governmental entities



STATE EMPLOYMENT LAWS

- ▶ Texas Commission on Human Rights Act
- ▶ Texas Unemployment Compensation Act
- ▶ Texas Labor Code
- ▶ Texas Government Code (Ch.614)
- ▶ Texas Pregnancy Discrimination Act
- ▶ Texas Healthcare Privacy Act
- ▶ PayDay Law does not apply to government entities

This list is not exhaustive; others may also apply



DOL/TWC/EEOC: THE ENFORCER

- ▶ **Equal Employment Opportunity Commission** - Federal agency charged with enforcing most federal anti-discrimination laws.
- ▶ **Texas Workforce Commission** has overlapping authority; may refer actions to EEOC.
 - ▶ Texas employees have 300 days to bring either a an EEOC/TCHRA complaint,
 - ▶ Both agencies have e-filing - Complainants & Respondents
- ▶ The **Department of Labor** and the **TWC** investigate and prosecute wage claims.

AT-WILL EMPLOYMENT

- Texas is an “At-Will Employment” State:
“...absent a specific agreement to the contrary employment may be terminated by the employer or the employee at will, for good cause, bad cause, or no cause at all.”
 - ▶ Policies or Handbooks can compromise the at will relationship by creating contracts unless the contract is explicitly denied. (*City of Houston v. Williams* and *City of Denton v. Rushing*.)
 - ▶ Developing area: If policies are not contracts, are the policies enforceable?

AT-WILL EMPLOYMENT (Continued)

Employers may not discipline or terminate an employee if the Employer's action is the result of:

- ▶ Discrimination
- ▶ Retaliation for filing a claim or asserting rights
- ▶ Refusal by employee to perform an illegal act
- ▶ Any illegal reason



INDEPENDENT CONTRACTORS

- ▶ Usually vendors for a specific service.
- ▶ Having a business risk/interest in the business for which they are contracting.
- ▶ Have ability to set their own hours or determine the amount of time to spend on the project or work.
- ▶ Are not supervised.
- ▶ Generally, furnish their own materials/equipment to accomplish the job.
- ▶ NOT seasonal or temporary employees.

Public Information Act

- ▶ Personnel files are generally public documents, including wage information.
- ▶ Exceptions are applied on a record-by-record basis:
 - ▶ Protected Health Information
 - ▶ Social security numbers and birthdates are considered confidential.
 - ▶ Disciplinary files are generally considered public unless the underlying facts trigger a right to privacy.

TITLE VII AND THE TEXAS LABOR CODE



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DISCRIMINATION AND HARASSMENT

- ▶ Mirroring statutes seek to prohibit three types of workplace conduct:
 - ▶ Discrimination
 - ▶ Harassment
 - ▶ Retaliation



WHO'S COVERED BY TITLE VII?

- ▶ **Title VII** of the Civil Rights Act of 1964 is a federal law which prohibits employers from discriminating against employees on the basis of
- ▶ Sex, race, color, national origin, and religion.
- ▶ It generally applies to employers with 15 or more employees, including federal, state, and local governments.
- ▶ The word "sex" in Title VII of the Civil Rights Act of 1964 has been extended to mean “sexual identity” and “sexual orientation and expression.”

DISCRIMINATION

- ▶ Discrimination - generally unlawful to refuse to hire, to fire, or to treat differently in compensation or work conditions *based upon a protected classification*:
 - Race, color, national origin, gender, disability, age, religion, etc.
 - “[e]mployers are ‘entitled to be unreasonable’ in terminating their employees ‘so long as [they] do[] not act with discriminatory animus.’”
 - Defense: legitimate non-discriminatory business reasons.



Discrimination Actions

Disparate Treatment

- ▶ Allegation must be based on a protected class status
- ▶ Comparison between similarly situated employees
- ▶ Ultimate employment action no longer required to sustain a claim

Hostile Work Environment

- ▶ Allegation Must be based on a protected class status
- ▶ Environment must be severe and pervasive enough to affect the terms and conditions of employment
- ▶ Bystander claim can apply



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Hamilton v. Dallas County (5th Cir. 2023)

Disparate Impact

- ▶ Three judge panel dismissed disparate impact action filed by nine Dallas County Deputies (female) alleging the gender-based scheduling policy had a discriminatory impact to females preventing them from having a full weekend off.
- ▶ Dallas County claimed scheduling was for safety reasons;
- ▶ All deputies performed the same duties;
- ▶ Case dismissed because the deputies did not show they experienced an *adverse (disciplinary) action* by Dallas County as the employer;
- ▶ En Banc panel revised standard - ultimate employment decision no longer required.



HARASSMENT

Harassment is prohibited conduct *distinct* from hiring and firing decisions.

Two Types:

- ▶ Quid quo pro sexual harassment: An advantage promised or given in return for providing or agreeing to a sexual demand.
- ▶ Hostile Work Environment: Must be based on a protected characteristic and conduct must be **severe and pervasive** to a reasonable person. Stand alone incidents do not typically create a hostile work environment. Employer's response should be **“prompt and remedial.”**
- ▶ September 1, 2021: Texas Labor Code adopted **“immediate and corrective”** standard for harassment complaints.

EXAMPLES OF HARASSING CONDUCT

These behaviors have been determined by various courts to be constituted illegal harassing conduct:

- Comments about clothing, personal behavior or a person's body;
- Sexual or sex-based jokes and use of sexual innuendos;
- Requesting sexual favors;
- Repeatedly asking a person out despite multiple rejections;
- Spreading rumors about a person's personal life or sexual conduct;
- Threatening a person;
- Sending emails or text messages of a sexual nature.



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RETALIATION Defined

When Employer takes an **adverse action** against a **covered individual** because he or she **engaged in a protected activity**.

Title VII - Retaliation

- ▶ **Covered Individual** - people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability.

Retaliation

- ▶ **Protected activity includes:** complaining about alleged discrimination; threatening to file a charge of discrimination; expressing opposition to an employment practice believed to be unlawful by the employee; refusing to undertake an act believed to be illegal by the employee

PROTECTED BY AGE: ADEA

- ▶ ADEA: Prohibits discrimination against employees over the age of 40.
- ▶ Some professions like law enforcement (18/45) or fire protection (18/36) are subject to Bona Fide Occupational Qualifications which can exempt an employer from age related restrictions.

AMERICANS WITH DISABILITIES ACT

- ▶ ADA: Prohibits discrimination against disabled people.
- ▶ What is regarded as a disability:
 - ▶ a person with a physical or mental impairment that *substantially limits* one or more major life activity.
 - ▶ a person who has a history or record of such an impairment; or
 - ▶ A person who is perceived by others as having such an impairment.
 - ▶ Major Life activities include: caring for oneself, walking, seeing, hearing, speaking, working, sitting, standing, lifting, sleeping, thinking or concentrating, interacting with others.

ADA - Qualified Individual

- ▶ Who is a Qualified Individual?
 - ▶ A qualified individual is a person who meets **legitimate skill, experience, education**, or other requirements of an employment position that s/he holds or seeks, and **who can perform the essential functions of the position with or without reasonable accommodation.**

ADA

- ▶ **Interactive Process:** Employer has an **obligation to engage** the employee in discussion about what accommodations the employee is seeking and make a determination as to the reasonableness of the request.
 - ▶ Employer can ask questions
 - ▶ Seek input from healthcare provider
 - ▶ Negotiate accommodation or provide a different accommodation
- ▶ Individuals can be held liable under the Public Services Provision of the Act.

FAIR LABOR STANDARDS ACT (FLSA)

- Establishes minimum wages and overtime payments for “covered” employers and employees.
- What Does FLSA Provide? - Federal Minimum Wage: \$7.25/hour effective July 24, 2009 (Texas minimum mirrors federal wage)
- ▶ General Overtime: 1 ½ times the regular rate of pay for all hours worked over 40 in a work week - If Texas law or union agreement provided greater protection or pay to the employee, those provisions apply. Fire and Police have a different schedule to earn overtime.
- ▶ **Individuals can be held liable under the Act.**

FLSA (Continued)

▶ *Exempt v. Non-Exempt Status*

- ▶ Worker Classification is the most litigated issue in federal courts.
- ▶ The FLSA has approximately 30 separate exemptions from minimum wage and/or overtime requirements.
- ▶ Complex, case-by-case, analysis: Ex: Texas Fireworks Stands held to be covered by FLSA because they do not fall under “seasonal amusement or recreational establishment” exemption.

THE EQUAL PAY ACT

- ▶ The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment.
- ▶ The jobs need not be identical, but they must be substantially equal.
- ▶ It is *job content*, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require **substantially equal skill, effort and responsibility**, and that are performed under similar **working conditions** within the same establishment.
- ▶ **Individuals can be held liable under the Act.**

Family Medical Leave Act

FMLA provides eligible employees to take up to 12 weeks of unpaid, job protected leave in a twelve-month period for the following reasons:

- The birth of a child or placement of a child for adoption or foster care
- To bond with a child for one year after the child's birth or placement
- To care for the employee's spouse, child, or parent who has a serious health condition
- For the employee's own qualifying serious health condition that makes the employee unable to perform the employee's job
- For qualifying reasons related to the deployment of a military member who is the employee's spouse, child or parent
- **Supervisors can be held liable.**

HEALTH INSURANCE PORTABILITY ACCOUNTABILITY ACT (HIPAA)



- ▶ The Privacy Rule does not apply to employers or employment records, with the exception of health plan records.
- ▶ Information contained within unprotected records **MAY** be protected.
- ▶ Employers may have an obligation to keep Protected Health Information (PHI) confidential under other laws, so continue to treat all health care records as PHI.
- ▶ **Individuals can be held liable under the Act.**

CIVIL RIGHTS

- ▶ Public employers can be held liable for civil rights violations under 42 USC 1983 when
 - ▶ A person subjected the employee to conduct that occurred under color of state law.
 - ▶ (Pattern and Practice can create state law.)
 - ▶ The conduct deprived the employee of rights, privileges or immunities guaranteed under federal law or the United States Constitution
 - ▶ Cities are persons under the Act.
 - ▶ **Individuals may be held liable under the Act.**

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THE FIRST AMENDMENT

- ▶ Establishes freedom (right cannot be abridged or denied) from governmental regulation of:
 - ▶ religion (Ex: time off for religious holidays)
 - ▶ speech (Ex: Public employees/officials get to engage in social media use.)
 - ▶ the press (Ex: Employees have a right to speak on a matter of public concern.)
 - ▶ to peacefully assemble (Case law merges with the right of petition)
 - ▶ to petition the government (Ex: grievance policy)
- ▶ First Amendment applies to public employers through the 14th Amendment. It does not generally apply to private industry.

THE FIRST AMENDMENT

- ▶ **Prior Restraint-** government action which prohibits speech or expression before it happens.
 - ▶ Ordinances
 - ▶ Policies
 - ▶ Established practice
- ▶ **Retaliation**
 - ▶ The employee engaged in protected speech (ex: political, whistleblowing, grievances)
 - ▶ The employee was subject to adverse action (ex: termination, loss of wages)
 - ▶ The action would keep a reasonable person from continuing to engage in the speech or conduct. **FACT QUESTION!**
 - ▶ There is a cause-and-effect relationship between the speech and the adverse action. **FACT QUESTION!**

FOURTH AMENDMENT- DRUG TESTING

▶ *Drug testing*

- ▶ *Pre-employment*- No clear guidance for government as an employer.
- ▶ *Random*- 4th Amendment limits public entities
 - ▶ DOT guidelines
 - ▶ Safety-sensitive positions may be excepted from search rule.
- ▶ *Reasonable Suspicion*- requires witnesses articulate basis for testing
- ▶ *By consent*- Employee has right to refuse without consequence for refusal

Thank You!

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