

10 Things Every Government Lawyer Should Know About Employment Law

Presented by: Nicholas D. Palmer, Sr. Assistant City Attorney,
Dallas City Attorney's Office

No. 1: Employment At Will

- Default rule in the State of Texas
- Employer/ee may terminate the employment relationship at any time – with or without a reason – absent an express agreement to the contrary
 - *E.g., Fed. Express Corp. v. Dutschmann*, 846 S.W.2d 282 (Tex. 1993); *E. Line & R.R.R. Co. v. Scott*, 72 Tex. 70 (1888).
- There are both procedural and substantive limitations on the employment at will doctrine

No. 2: Constitutional Due Process

- Government may not deprive a person of life, liberty, or property without due process of law.
 - U.S. Const. amend. XIV, § 1.
- Two issues to be aware of:
 - (1) Does the employee have a property interest in the employee's job; and
 - (2) If so, what process is owed to the employee before the employer may terminate the employee?

No. 2: Constitutional Due Process

Property Interest in Governmental Employment

- Not all government employees have a property interest in their jobs, and those without a property interest are not entitled to due process.
- To have a property interest, employees must have a legitimate claim of entitlement to their job, which is established through state law, municipal ordinances, civil service rules, etc.
 - *E.g., Bd. of Regents of State Coll. v. Roth*, 408 U.S. 569 (1972)

No. 2: Constitutional Due Process

So I have a property interest, what process am I due?

- Employees who have a property interest in their jobs are entitled to notice of the grounds on which termination is being considered, and an opportunity to respond to those grounds.
- Generally, due process is satisfied where an employee is given a pre-termination opportunity to respond to the allegations against her coupled with more thorough post-termination appeal procedures.
 - *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).
 - See Tex. Loc. Gov't Code §§ 143.001, *et seq.*

No. 3: Statutory Due Process

- Peace officers and fire fighters are entitled to the statutory due process requirements in Chapter 614 of the Texas Government Code.
- Complaints against a peace officer or fire fighter must be in writing and signed by the person making the complaint.
 - Tex. Gov't Code § 614.022.
- Disciplinary action may not be taken against a peace officer/fire fighter, unless a copy of the complaint against her is given to her within a reasonable time after the complaint is filed.
 - Tex. Gov't Code § 614.023(a)-(b).
- Peace Officer/fire fighter may not be demoted or indefinitely suspended unless an investigation uncovers evidence to prove the allegations in the complaint.
 - Tex. Gov't Code § 614.023(c).

No. 4: Non-Discrimination Statutes

- Even at will employees may not be disciplined for unlawful reasons.
- An employee may not be discharged, nor may her compensation, terms, conditions, or privileges of employment be effected because of the employee's race, color, religion, sex, national origin, disability, or age (over 40).
 - Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (race, color, religion, sex, and national origin)
 - The Americans with Disabilities Act, 42 U.S.C. § 12112(a) (disability)
 - The Age Discrimination in Employment Act, 29 U.S.C. § 623(a) (individuals over forty)
 - Tex. Lab. Code § 21.051 (all categories)

No. 5: Disparate Impact Discrimination (Unintentional Discrimination)

- Generally, non-discrimination statutes prohibit not only intentional discrimination; they prohibit unintentional discrimination – disparate impact discrimination – as well.
- Disparate impact occurs where a facially non-discriminatory policy or practice of the government effectively discriminates against a certain class of individuals.
- Once disparate impact is established the employer bears the burden to show that the challenged policy/practice is job related and consistent with business necessity.

No. 6: Non-Retaliation Statutes

- It is unlawful to retaliate against an employee who has opposed a discriminatory practice, files a charge of discrimination with the EEOC/TWCCRD, or participates in an investigation, proceeding, or hearing concerning a claim of employment discrimination.
 - 42 U.S.C. § 2000e-3(a) (Title VII); 29 U.S.C. § 623(d) (ADEA); Tex. Lab. Code § 21.055.

No. 7: The Family Medical Leave Act

- Eligible employees are entitled to 480 hours of unpaid leave per year to treat a serious health condition, to care for an immediate family member with a serious health condition, or for the birth of a child.
 - 29 U.S.C. § 2612(a).
- To be eligible, employee must have worked for employer for at least twelve months and have worked 1,250 hours during previous twelve months.
 - 29 U.S.C. § 2611(2)(A).
- Leave may be taken as a block of time, or intermittently.
- Upon conclusion of leave, employee is entitled to be restored to the same or an equivalent position.
 - 29 U.S.C. § 2614(a)(1).

No. 8: The Fair Labor Standards Act

- Non-exempt (hourly) employees are entitled to the minimum wage, as well as an overtime wage of at least one and one-half times their regular hourly wage for any hours worked in excess of forty in a work week.
 - 29 U.S.C. §§ 206-207.
- Public entities may give compensatory time of one and one-half hours for each hour worked in excess of forty in a work week in lieu of paying employees an overtime wage; however, the issuance of compensatory time is only an option if it is enshrined in a meet and confer agreement, collective bargaining agreement, or other similar agreement.
 - 29 U.S.C. § 207(o).
- Special rules for calculating hours worked for members of police or fire departments.
 - *See* Tex. Loc. Gov't Code §§ 142.001, *et seq.*

No. 9: The *Garrity* Rule

Garrity v. New Jersey, 365 U.S. 493 (1967)

- The government, acting as an employer, may require an employee to give statements in response to allegations raised against the employee.
- If the employee fails to provide a statement, he may be disciplined, up to and including termination.
- Any statement provided to the government employer under the *Garrity* rule cannot be used against the employee as evidence against the employee in any related criminal proceedings.

No. 10: Sovereign/Governmental Immunity in Employment Law

- State and local governmental entities are generally immune from suit absent an express waiver of their immunity.
- Although Chapter 21 of the Texas Labor Code contains a waiver of immunity for governmental employees/former employees to pursue claims of discrimination or retaliation against their governmental employer, the waiver is a limited one. Employee must be able to plead and establish a prima facie case of discrimination/retaliation or the governmental employer retains its immunity.