



Steering Through the Storm: Employment Law Issues

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How do you steer an accurate course both legally and spiritually? By staying current with key legal issues, taking a practical look at possible responses in difficult situations, and gathering information to evaluate situations well.

Joint Employment Update

1. In April, 2019, the Department of Labor published a Notice of Proposed Rulemaking to discuss its proposed four-factor test.
 - ✔ Can the entity hire or fire the employee?
 - ✔ Does the entity supervise or control either the work schedule or conditions of employment?
 - ✔ Does the entity determine rate and method of payment?
 - ✔ Does the entity maintain employment records?
2. This would be a test of actual control—and if the entity can do these things and never does, it still may not be a joint employer.

Vaccines and Religious Discrimination

1. The EEOC settled a case with a hospital in Michigan over religious discrimination and vaccines for \$74,418.¹ In this case, the hospital refused to hire a medical transcriptionist who did not believe in vaccines because of her Christian faith and would not get the flu shot. The hospital allowed those who had medical problems with the flu shot to wear a mask. But it did not allow her this accommodation.
 - ✔ Employers must accommodate religious beliefs unless the accommodation would be an undue hardship.
 - ✔ Employers cannot evaluate the “quality” or “reasonableness” of the religious belief—it only has to be sincere.

¹ <https://content.govdelivery.com/accounts/USEEOC/bulletins/24d7ec9>

- ✔ If exceptions are made for non-religious reasons, they should be made for religious reasons.

Sexual Harassment Again

1. Sexual Harassment Charges Increasing

- ✔ The EEOC reports that sexual harassment charges jumped 13.6% last year, to 7,609. The EEOC also obtained a record \$56.6 million in settlements and awards.

2. Retaliation charges were actually 51.6% of all charges filed with the agency.

- ✔ What is the best way to avoid retaliation charges?
- ✔ Thoroughly document the reasons for the underlying action so you can show later that it is not retaliation.

Bullying—and Apologizing

1. An interesting case in the news this summer involved the New York Mets. Both the manager and a pitcher were rude to a reporter—rude involving curse words and threats to knock him physically out of there. While the COO of the Mets called the reporter to apologize, the pitcher refused to say anything, and the manager called the incident a “misunderstanding.”

2. Takeaways on Apologies:

- ✔ Apologies are very important after a bullying episode, to demonstrate that this type of behavior is not tolerated in the workplace.
- ✔ Apologies can fall flat. Here are common mistakes:
 - › If the offense or slight occurred in public, the apology should not be in private;
 - › If you are apologizing, include the words “I’m sorry”;
 - › Don’t include excuses and finger-pointing. Even if true, it makes you sound insincere;
 - › Don’t gloss over the details, as that also sounds insincere;
 - › Ask for forgiveness and make whatever restitution is appropriate.

Sex Stereotyping and Transgender Status

1. Title VII does not provide workplace protection on the basis of sexual orientation or gender identity, but it does prohibit discrimination on the basis of sex. It’s unsettled whether sexual orientation and gender identity are protected under this particular part of Title VII. (They are protected under many state and local laws, plus discrimination based on gender stereotypes is

definitely prohibited: ie, you can't discriminate based on sex stereotypes, including clothes, mannerisms, etc.)

2. The U.S. Supreme Court has granted cert to hear three employment cases that will establish whether Title VII's prohibitions against sex discrimination apply to sexual orientation or gender identity.²
 - ✔ One case involves a transgender funeral home director who was fired (based on the owner's religious beliefs).
 - ✔ One involves a skydiver who was accused of and dismissed for sexual harassment and defended himself on the basis that he was gay.
 - ✔ The third involves a social worker who says he was unlawfully dismissed because of his sexual orientation (his ex-employers said being gay had nothing to do with it).
3. What to do?
 - ✔ Have an anti-discrimination and anti-harassment policy.
 - ✔ Also have a religious code of conduct policy, and define where you stand on these issues as a religious organization.
 - ✔ Be sure you train to the policies.

Pointers on Policies

1. As you know, the NLRB backed off to some degree on controlling handbook provisions. Here is some of the recent guidance from the NLRB.
2. A rule saying that the Handbook is confidential is presumptively invalid—any truly confidential or proprietary information could be separately protected.
3. A rule restricting workers' non-business use of company email violates the law, because it extends to non-working time like lunches and breaks. The “no personal email” rule impedes the employees' core right to communicate.
4. You cannot include “payroll” in the list of confidential trade secret information that cannot be disclosed. You can, however, require that other trade secret information like customer lists, profits, and costs, be confidential.
5. You can have a rule requiring employees to cooperate with company investigations, whether related to child abuse or other misconduct. This rule falls into the category of rules that NLRB assesses on a case by case basis. Employees cannot be legally compelled to participate

² *Bostock v. Clayton County, Ga.*, 723 Fed. Appx. 964 (11th Cir. 2018); *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017); and *R.G. and G.R. Harris Funeral Homes Inc. v. EEOC*, 884 F.3d 560 (6th Cir. 2018).

in an investigation of an unfair labor practice, but they can be required to cooperate in investigations of misconduct.

6. You can have a rule outlawing inappropriate clothing (such as dirty, transparent, too casual, or too revealing clothing) including “inappropriate commercial advertising or insignia.” The NLRB did not agree that this rule could be reasonably read to include union logos.
7. You can have a rule requiring workers to exercise a “high degree of caution” in handling specific sensitive information and in designating a company spokesperson. This is because the sensitive information comes from employee files—this does not restrict employee rights to communicate.
8. You can require employees to stay off their cell phones while engaged in work activities, but not during “working hours,” because that would include lunch or break periods.

Disabilities of Various Types

1. Obesity—is it a disability?

- ✔ Over the last few years, there has been considerable argument about whether obesity is a disability.
 - ▶ Based on a recent 7th Circuit decision, it seems that obesity probably only qualifies as a disability if it is caused by an underlying physiological disorder or condition.³
 - ▶ A bus operator weighed 350 pounds in 2005 and had gone up to 566 pounds in 2009. A study determined that he was unable to operate the bus safely because of physical constraints involving parts of him getting in the way. The court concluded, in line with three other circuits, that obesity is an ADA impairment only when it is a result of an underlying physiological disorder or condition.
- ✔ What are the implications? It’s probably now somewhat safer to set bona fide job requirements regarding physical health and environment issues. Though not all courts agree—Washington state recently went the other way, stating that obesity is a disease.
- ✔ If a person raises obesity as a disability, the key is to have an interactive discussion, including whether there is an underlying physical problem. It would be wise to seek legal counsel.

³ *Richardson v. Chicago Transit Authority*, 292 F.Supp. 3d 810 (N.D. Ill 2017).

2. Is attendance an essential function of the job? Yes, it can be.⁴

- ✔ A locomotive engineer for Union Pacific had missed work quite a bit due to chronic back pain. Eventually, he missed so much work that they terminated him. The court found that because regular attendance was an essential job function, he was unable to perform that essential function with or without a reasonable accommodation.

FMLA Leave

1. Three employees of the City of Chicago (in the same office) all took FMLA leave. They then headed down to the Caribbean for a “booze” cruise, ate out, attended night clubs, toured the island, went horseback riding, and rode jet skis. Two of these employees took a combined 10 cruises over 7 years. They did all get terminated!

2. How to prevent this kind of abuse?

- ✔ Prepare a list of questions about medical leave of absence for all employees:
 - › What is the reason they need to take leave?
 - › What essential functions of the job can the employee not perform?
 - › Will they see a doctor?
 - › Have they taken leave before for the same condition?
 - › When will they return to work?
- ✔ Have regular call in procedures.
- ✔ Require employees to certify their absence for FMLA with a doctor’s note.
- ✔ Follow up on problems in certifying leave.
- ✔ Check in on them while they are gone.
- ✔ Review records to identify patterns of absences and check up on these.
- ✔ You are allowed to require employees to remain in the immediate vicinity while on FMLA leave, without specific permission.

3. Do you include holidays in the calculation of FMLA leave? If the leave is continuous, the holiday counts as a day in the FMLA week. If the FMLA leave is intermittent and using increments of less than one week, the holidays will not count if the employee was expected to take the day off.

4. Do you pay holiday pay for holidays that happen under FMLA leave? If you would pay for the holiday if the employee were on vacation, you do the same for FMLA. If the holiday would count as a vacation day, not a paid holiday, you would also not pay the FMLA holiday.

⁴ *Higgins v. Union Pac. R.R. Co.*, No. 18-1902 (8th Cir. July 24, 2019).

Pregnancy Accommodation

1. Pregnancy accommodation may vary under federal, state, and local law.
2. A woman may have a pregnancy-related disability under the ADA that needs accommodation, for instance.
 - ✔ A woman may need workplace accommodations for lactation.
 - ✔ And of course, there can be many pregnancy-related illnesses and difficulties that could require accommodations.
3. The FMLA and other medical leave acts may apply.
4. Pregnancy can include other reproduction-related issues, like getting pregnant, miscarriage, birth and recovery, and lactation.
5. Accommodations may relate to:
 - ✔ Bathroom breaks;
 - ✔ Food issues;
 - ✔ Modifying work stations or seating;
 - ✔ Temporary transfer;
 - ✔ Scheduling;
 - ✔ Work hours;
 - ✔ Break time and facilities for expressing breast milk.
6. However, the accommodation can still take into account that the employee has to perform essential functions of the job (though maybe not marginal functions).
7. Reasonable accommodations relate to the employer's financial resources and the impact on the employer. But you should also consider employee loyalty and purely being nice...and whether you have a theological position that God loves babies!

Arbitration Clauses

1. When there is an arbitration clause with employees, will it stick?
 - ✔ Arbitration clauses are generally enforceable, but should be clear as to who is subject to them, and as to the process.
 - ✔ Christian conciliation clauses, for mediation and arbitration, should also be valid.
2. The NLRB takes the position that arbitration agreements which interfere with an employee's right to file charges with the NLRB are invalid (and other federal agencies might say the same). How does this affect Christian conciliation clauses?

3. They may still be valid under free exercise and RFRA, as a particular type of Christian conciliation.

Fun Facts About Communication in the Workplace:

4. According to a Ranstad study, Gen Z and Millennials have some interesting traits:⁵
 - ✔ In order of preference, Gen Z and Millennials prefer to communicate with co-workers: in person (39%), by email (16%), by phone (7%), by instant messaging (10%).
 - ✔ Both Gen Z and Millennials say that most important leadership qualities are: communication (30% GZ, 32% M); being supportive (24% GZ, 27% M); and honesty (23% GZ, 25% M).
 - ✔ The top three benefits they prefer are work flexibility, health care, and training and development.

⁵ <https://www.randstadusa.com/workforce360/managing-gen-y-z/>