

OVERVIEW OF LAWS GOVERNING THE EMPLOYMENT RELATIONSHIP

There are a number of laws, federal, state and common law, that an employer should be aware of before making any employment decision.

1. Age Discrimination in Employment Act (“ADEA”)
 - a. The ADEA prohibits employers from discriminating against employees over 40 years of age. The federal act covers employers with 20 or more employees. (Ohio discrimination laws apply to employers with 4 or more employees.)
 - b. Age discrimination claims include disparate treatment claims where workers over 40 have been treated differently from younger workers. A minority of federal circuit courts also recognize disparate impact claims where facially neutral policies have an adverse impact on specific workers because of their age.
 - c. Employees claiming age discrimination must first establish a *prima facie* case by demonstrating that he or she was (1) over the age of 40, (2) suffered an adverse employment action, and was (3) replaced. The replacement employee need not be under 40. *O’Conner v. Consolidated Coin Caterers Corp.*, 1165 S.Ct. 1307 (1996) (Under Ohio law, the replacement must be under the age of 40). The replacement element may

be difficult to establish in a large downsizing if no one has been hired to replace the complaining employee.

- d. Once an employee has established a *prima facie* case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision. This burden is one to produce evidence of a legitimate reason, not to prove it.
 - e. The burden then shifts back to the employee to prove beyond a preponderance of the evidence that the employer's offered reason for discharge was merely a pretext for age discrimination.
 - f. There are also four statutory defenses available to an employer accused of age discrimination: business necessity, direct threat to health and safety, religious basis and infectious/communicable disease.
 - g. Often, employers require departing employees to sign waivers or releases of their claims under the act. The Older Workers Benefit Protection Act, an amendment to the ADEA, regulates such waivers.
2. Title VII of the Civil Rights Act of 1964 ("Title VII"); the Americans with Disabilities Act ("ADA"); and the Family Medical Leave Act ("FMLA")
- a. When making employment decisions, employers may not discriminate against candidates or employees on the basis of race, color, nationality, religion, gender, handicap or disability. Title VII, of The Civil Rights Act of 1964, prohibits an employer from retaliating against an employee who files a discrimination claim even if the claim itself is insufficient to establish a violation. Furthermore, the same burden shifting analysis

discussed under the ADEA applies to Title VII claims. Under Title VII, waivers generally follow similar standards as required under the Older Protection Workers Benefit Act. However, the 21 day consideration period and the 7 day revocation period are not mandated by statute.

- b. The ADA prohibits employers from discriminating against employees with handicaps or disabilities and requires employers to provide reasonable accommodation for such employees. The Act also prohibits discrimination against employees who are regarded as disabled or who are associated with handicapped individuals. In hiring, employers cannot use qualification standards that screen out or tend to screen out individuals with disabilities. Nor can employees be fired because of those disabilities. Instead, an employer must provide a reasonable accommodation to a person with a disability, unless that accommodation would be an undue hardship on the employer or in several statutory exceptions. The ADA includes statutory exceptions, however, for qualifications which are “shown to be job-related...and consistent with business necessity.” The ADA does not protect current drug users but it does protect employees who successfully undergo drug rehabilitation.
- c. The FMLA, which applies to employers with more than 50 employees, requires employers to allow employees twelve weeks of medical leave to care for themselves or their families. Employees must have been employed for at least a year before receiving an FMLA leave and worked at least 1000 hours.

3. The Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”) and The Employment Retirement Income Security Act (“ERISA”)
 - a. Under COBRA, employers with 20 or more employees must provide employees who had been covered by a group health care plan, the opportunity to continue group rate coverage at the former employee’s own expense for at least 18 months. Within 30 days of termination, the employer must notify the group coverage plan administrator that a “qualifying event” has occurred, and then must notify the employee of his or her right to continue the coverage. Employee has 60 days to make his election. Ohio has a similar statute for employers with less than 20 employees.
 - b. ERISA prohibits the firing of an employee in order to deny the attainment of any right to which the employee may have become entitled under a benefit program. If an employee is approaching a vesting or attainment date for certain benefits, the employer must be wary of discharging the employee if it cannot show a legitimate reason for the discharge. Reasons for dismissal should be carefully documented to preserve a legitimate business reasons defense for any ERISA claim.
4. Equal Pay Act (“EPA”)
 - a. The EPA prohibits employers from paying men and women unequal wages for equal work in most circumstances.
 - b. However, the EPA includes four statutory exceptions, and allows

unequal wages predicated upon: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.

5. Occupational Safety and Health Act (OSHA)

- a. The general duty clause of OSHA requires employers to furnish a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

OSHA's safe workplace requirement extends not only to hazards posed by the work itself but also to violence within the workplace.

- b. OSHA Guidelines further require employers to implement programs which provide systematic policies, procedures, and practices adequate to recognize and protect their employees from occupational safety and health hazards. This includes the systematic evaluation, prevention, and control of potential hazards which "may arise from foreseeable conditions".

6. Military Leave – Uniformed Services Employment and Re-Employment Act of 1994 (USERRA)

- a. Provides certain rights and obligations for employees who request a leave of absence to fulfill service related duty.
- b. USERRA covers all employers.
- c. Employees are covered whether the military service is voluntary or involuntary. Coverage extends beyond active duty to inactive duty training.

- d. The Act prohibits discrimination or taking any adverse employment action against employers serving, having served or having applied to serve.
- e. Employers must grant leaves of absence up to a total of five years. (Time with the regular National Guard, military reserve training, or service during times of war or national emergency do not count towards the five years).
- f. An employee who takes a military leave of absence is entitled to re-employment, so long as the employee provides a notice of his intent to return to work and the employee actually reapplies for the job. Then the employer must re-employ the applicant unless circumstances have changed that make re-employment not possible, unreasonable or creates an undue hardship or prior employment was for a brief period of time in which the employee had no reasonable expectation that employment would continue for a significant duration.
- g. USERRA requires that the employee be returned to the job they would have performed in the absence of military service. This allows for promotions the employee would have received. Employers must provide reasonable accommodations for employees who become disabled during their military service.
- h. Employers are prohibited from terminating returning military employees without just cause for up to one year, if their military leave exceeds 180 days.

- i. Returning military employees also retain their seniority and any other rights or benefits as if they had remained continuously employed.

7. Additional Remedies for Discrimination and Protection of Civil Rights Violations by State and Local Governments.

Additional remedies for discrimination and protection of civil rights violations by state and local governments are provided by two federal statutes enacted shortly after the Civil War, 42 U.S.C. §§ 1981 and 1983. Section 1981 protects the rights of minorities to make and enforce employment contracts and pursuant to a 1991 amendment, also provides protection for activity that occurs after the formation of the contract. Section 1981 applies to all employers regardless of size, has a two year statute of limitations (in Ohio), and does not require the exhaustion of administrative process prior to filing suit. Section 1983 also provides a remedy for an employee terminated by a state or local government employer. The employee has a private cause of action subject in Ohio to a two year statute of limitations. The employee must claim a deprivation of his federal rights due to the acts of a state or local government. Note that there are some limitations to bringing such an action as provided by the Eleventh Amendment and certain immunities applicable to some local officials and governments.

8. Ohio Statutory Requirements under the Ohio Civil Rights Act (O.R.C. Chapter 4112)

- a. Remedies for discrimination on the basis of race, color, religion,

national origin, handicap, age or ancestry can be had through the Ohio Civil Rights Commission (“OCRC”) and through civil action.

- (1) The OCRA prohibits any employer from discriminating against a person because of the person’s race, color, religion, national origin, handicap, age, or ancestry.

O.R.C. § 4112.02(A)

- (2) O.R.C. § 4112.05 contains the procedures for an administrative charge pursuant to § 4112.02(A). It specifies that all employers with four or more employees are covered by the Ohio Civil Rights Act, and sets forth the provisions for a hearing by the OCRC, conciliation and complaint procedures, appeals procedures and available remedies (a cease and desist order, reinstatement, and/or compensation).

- (3) O.R.C. § 4112.99 authorizes civil action under 4112.

- (4) Remedies under § 4112.99 include back pay, reinstatement, front pay, compensatory damages and possibly punitive damages.

b. Age discrimination claims have additional recourse and remedies.

- (1) O.R.C. § 4112.02(N) provides for legal and equitable remedies for a claim relating to age discrimination within six months of the alleged discrimination. Filing under § 4112.02(N) precludes filing under § 4112.05 or § 4112.14.

(2) O.R.C. § 4112.14 forbids employers to discriminate in hiring or discharging “without just cause” against a person forty years of age or older if that person is physically able to perform the duties and otherwise meets the requirements of the job. A claim filed under § 4112.14 precludes filing a complaint with the OCRC or filing a lawsuit under § 44112.02(N). The statute also provides defenses to employers for termination. “Just cause” exists when termination or refusal to hire is not based on age. Claims are barred where the employee has the opportunity to arbitrate the discharge or an arbitration of the discharge finds that it was with good cause.

c. Whistleblowers in Ohio are protected by the Ohio Whistleblower’s Act, O.R.C. § 4113.52. This is another very complicated statute protecting an employee from retaliation who provides the proper notice to his employer or authorities of a violation of state or federal law likely to cause an imminent risk of physical harm or a hazard to public health, or an act that constitutes a felony. The employee must have a reasonable belief that a violation has occurred. The Act provides for a private cause of action which must be brought within 180 days of the employer’s retaliatory action. Strict compliance with the written notice provisions of the Act is required.

9. Workers' Compensation Retaliation.

Workers' compensation retaliation is prohibited by O.R.C. § 4123.90. Generally, this statute prohibits employers from taking negative action against an employee who files a workers' compensation claim. In a similar fashion, the Occupational Safety and Health Act, 29 U.S.C. § 660 (OSHA), prohibits an employer from disciplining or discharging an employee for filing a safety complaint or for refusing to perform a work assignment which he believes will subject him to danger. This federal statute does not create a private cause of action; any claim must be filed directly with the OSHA.

10. Common Law Tort of Invasion of Privacy.

- (a) Surveillance techniques implemented by private employers are susceptible to challenge under common law privacy doctrines. Courts use the "reasonable expectation of privacy" standard in determining whether an employee's right has been violated.
- (b) To establish a violation, employees are generally required to establish (1) an intrusion upon the solitude or seclusion of another, or into a person's affairs or concerns, and (2) that the intrusion would be "highly offensive to a reasonable person".
- (c) The public nature of the workplace generally makes it difficult to establish a violation, due in main part to employees having no reasonable expectation of privacy in such open work areas.
- (d) A Court has found no invasion of privacy claim exists when an employee

is terminated for e-mail that his employer found offensive, even if the employer has assured employees that e-mail was confidential. The Court found that there is no reasonable expectation of privacy in e-mail messages.

- (e) Even if an employee can establish some expectation of privacy, it will be very difficult to also prove that the employer's action was "highly offensive to a reasonable person".
- (f) Closed-circuit television may raise privacy issues for private employers and constitutional issues for public employers, depending on the location of the cameras. Cameras in parking lots and work areas are generally permissible. Cameras in dressing rooms, locker rooms and rest areas may pose problems.

11. Respondent Superior.

Employers should recognize that they may be vicariously liable to third parties for the acts of their employees committed in the discharge of their employment responsibilities. Employers are not liable for actions committed by employees who are acting outside the scope of their employment.

12. Negligent Hiring or Retention.

- (a) Third parties may recover against an employer for this tort by proving the existence of an employment relationship, the employee's incompetence, the employer's knowledge (actual or constructive) of the employee's incompetence, an improper act by the employee and the

employer's negligence in hiring or retaining the employee as the proximate cause of the injury.

- (b) The employee's actions must have been foreseeable.
- (c) An employer's failure to conduct a background check may expose it to liability under this tort.

13. Miscellaneous Torts.

- (a) Fraud/misrepresentation.
- (b) Assault and battery.
- (c) False imprisonment and arrest.

14. Public Policy and other Exceptions to the Employment at Will Doctrine.

Discussed beginning on the next page.

