TOP WAYS AN EMPLOYER CAN VIOLATE
THE FMLA, ADA, FLSA AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

For whatever reason, we often see employers repeat the same labor and employment violations time and again; perhaps not surprisingly, since many of these legal principles/requirements are not self-evident or well-publicized. Thankfully, once made aware of them, compliance with these legal principles/requirements is not overly difficult.

This is particularly important since you, as a supervisor, can be held personally liable for a host of federal laws, including but not limited to FMLA, FLSA, USERRA, Section 1981(race discrimination) and Section 1983 (constitutional violations). This is certainly a factor to consider when deciding whether to pursue an aggressive versus conservative legal strategy when dealing with employee issues.

Here, we address the top ways employers can violate the following statutes and ways to avoid liability:

- Family & Medical Leave Act (FMLA)
- Americans with Disabilities Act (ADA)
- Fair Labor Standards Act (FLSA)
- Title VII of the Civil Rights Act of 1964

FAMILY & MEDICAL LEAVE ACT

Repeat Violation #1: Failing to Designate FMLA When the Employee Doesn't Want It Designated.

The U.S. Department of Labor has repeatedly held that an employee has no choice -- if a medical condition qualifies, an employer ***must*** designate the time as FMLA covered even if the employee does not want it covered. U.S. DOL Op. Ltr., FMLA 2019-1-A (Mar. 14, 2019).

You might be thinking – why wouldn't an employee want the protection of the FMLA? Think about it. Public employees have a multitude of leave banks, such that they often want to use those paid banks before "using" their 12 weeks of FMLA and instead "saving" the FMLA time until they have exhausted their paid banks and thereby potentially extending their time off from work. Unions often balk at forcing employees to use FMLA, alleging that CBAs entitle employees to pick and choose when to use FMLA. Arbitrations and litigation have resulted. *See Int'l Ass'n of Firefighters, Local No. 37 v. City of Springfield*, 378 Ill. App. 1078 (4th Dist. 2008)

Repeat Violation #2: Failing to Designate FMLA When an Employee is on Workers' Compensation or Some Other Extended Leave

Whether an injury is work-related or not and covered by workers' compensation is irrelevant; an employer has a legal obligation to designate leave as FMLA ***regardless*** of the work-related nature of the injury. It is advantageous to do so; otherwise, if you

reach the point where you need to terminate an employee due to a long-term inability to perform their job duties, the failure to designate it sooner may result in having to wait another 12 weeks before separating the employee.

Repeat Violation #3: Failing to Designate FMLA for "Psychological Comfort" of a Covered Family Member

Contrary to popular belief, an employee does ***not*** have to provide physical care to a loved one in order to qualify for FMLA. Simple "psychological care" is enough, like playing cards, reading, holding the loved one's hand, etc. Remember though that not all activities for a covered family member qualify. Carefully evaluate the FML paperwork and set parameters based on the medical documentation.

Repeat Violation #4: Requiring an Employee to "Work" While on FMLA Leave

It is best to avoid making an employee "work" during an FMLA covered leave. This would include activities such as brief telephone calls to discuss work-related issues; requiring an employee to appear for a workplace misconduct investigation and compulsory interrogation; and even ADA interactive process meetings. Instead, it's best to wait until after FMLA leave has been exhausted, if at all possible. Note: this does not preclude the sending of a letter explaining what is needed to return to work and the like.

AMERICANS WITH DISABILITIES ACT

Repeat Violation #1: Automatically Firing Someone After FMLA Has Been Exhausted

Prior to terminating an employee, the employer needs to engage in the interactive process to determine how much more leave is necessary and/or whether another reasonable accommodation exists. An employee cannot be fired simply because they have not returned from FMLA after the 12 weeks of FMLA leave have been exhausted. If the employee is unable to return to work, consider a virtual meeting, preparing questions for the employee's doctor to answer or even a fit for duty examination to determine the limitations on returning and when the employee may be able to return to work performing the essential functions the job. While an employer is not required to maintain an employee who cannot perform the essential functions of the job on the payroll indefinitely, if an employee will be able to return performing the essential duties of the position in the reasonably foreseeable future, the extra leave may be a reasonable accommodation. Don't forget to determine whether the employee is qualified for an alternative vacant position.

Repeat Violation #2: Mixing Background Investigations with Post-Conditional Offer Medical Exams

To be legal, medical exams in the hiring context must only occur ***after*** a conditional offer of employment. For a conditional offer to be *bona fide*, the only thing that can be considered once the offer is made is the employee's ability to perform his/her essential job duties. That means no "mixing" of criminal background checks or polygraph examinations after the conditional offer has been made; they must occur

before the conditional offer. There are some minor exceptions – check with legal counsel to see if they apply.

Repeat Violation #3: Automatically Rejecting Work-From-Home Arrangements Without Offering Alternative Accommodations

Courts are increasingly questioning whether working from the office is an essential function of the job; just because a job description states the position is an "in-person" position may not be enough. A past allowance of work from home, particularly post-Covid, could prove to be a problem if you are trying to change the "practice." Remember, even if working from home is not an option, there may be other reasonable workplace accommodations such as extended leave, alternative jobs within the organization, separate office, etc. What is reasonable under one set of circumstances may not be reasonable under another.

FAIR LABOR STANDARDS ACT

Repeat Violation #1: Omitting Ancillary Payments From the "Regular Rate"

An employee's overtime rate (beyond 40 hours actually worked in the employer's payroll week) isn't simply based on 1.5 times the employee's base salary. A variety of other ancillary payments must be added to the straight-time hourly rate in order to properly calculate the overtime rate. For example, the following types of ancillary payments must be counted as part of an employee's "regular rate": shift differentials, longevity pay, one-off production bonuses.

Repeat Violation #2: Failing to Compensate Employees for Working "Off-the-Clock"

Under the Fair Labor Standards Act, a non-exempt employee is entitled to be paid overtime for all hours actually worked over 40 (or the expanded overtime threshold under Section 7k for police and fire personnel), whether or not the time is approved. If you discover that an employee has worked more than 40 hours a week (or worse yet, you knowingly tolerate it without saying anything), you must compensate the employee. Consider implementing warnings/disclaimers requiring supervisory approval for overtime, encouraging employees not to report to work until starting time and to leave work at "quitting time" as well as encouraging employees to leave their desks for unpaid meal breaks. Also consider implementing workplace monitoring (e.g., time clocks, computer programs, sign-in and out sheets) to determine whether employees are reporting to work early, staying late, working through lunch, or perhaps returning to the office "after-hours." Be cautious about calling employees at home as well. This time can also fall within the definition of hours worked.

Repeat Violation #3: Failing to Properly Establish a 7(k) Work Period

For police and fire personnel, public employers are allowed to establish expanded overtime counting periods with larger-than-normal overtime thresholds beyond 40 hours in a week. Establishing 7(k) work periods is not difficult (no declaration of intent is necessary), but there has to be ***some evidence*** that the employer has a

"regularly recurring" period of work between 7 and 28 days. References in a CBA, handbook, ordinance, etc. are helpful but not absolutely necessary. Actual payroll practices that pay overtime over a certain hour threshold are key.

Repeat Violation #4: Failing to Approve Requests to Take Compensatory Time Simply Because They Will Result in More Overtime

The U.S. DOL takes the position that the possibility that taking FLSA compensatory time off will necessitate calling another person on overtime is not a legal justification for denying the compensatory time request. There has to be some adverse impact on operations in order to deny compensatory time. Remember, the FLSA does recognize the concept of other compensatory time that is earned under a more generous overtime formula that you may have in your contract if your base overtime on hours paid as opposed to hours worked. It does require that the time be designated as such and kept in a separate block but comes without the same challenges for denying it as FLSA compensatory time.

Title VII of the Civil Rights Act of 1964

Repeat Violation #1: Supervisors Failing to Report Complaints About Workplace Harassment/Discrimination

This failure deprives the employer of an affirmative defense under federal law. Additionally, if ignored long enough, it may allow harassment/discrimination to blossom into something that qualifies as "severe and pervasive" conduct. Most importantly, it deprives the employer of taking steps to stop objectionable conduct that may have an adverse impact on the victim and their work performance.

Repeat Violation #2: Failing to Prevent Retaliation for Making Some Type of Complaint in First Place

Retaliation can come from supervisors or other employees and can take many forms. The employer has an obligation to ensure that retaliation is not occurring. This requires supervisors to keep their eyes and ears open.

Repeat Violation #3: Making Assumptions

Title VII prohibits making employment decisions based on stereotypes or assumptions about the abilities, traits or performance of individuals based on any protected status. For example, an employer cannot conclude that a single mother with three children would not be dependable or available to work evenings or weekends.

Repeat Violation #4: Preferential Treatment

Giving preferential treatment to applicants or employees based on their race, sex or other protected statuses can lead to claims of discrimination as well as reverse discrimination. We are awaiting a decision from the United States Supreme Court in *Owens vs Ohio Department of Youth Services* where the Court will decide whether a

plaintiff from a majority group needs to show background circumstances to support the claim that the employer defendant is that unusual employer who discriminates against the majority group.

This article is not intended to provide legal advice. The facts of any case as well as the state is which a situation arises may render a different result. As always, consult your attorney if you have questions.

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