



Tuesday, May 23
11:00 am–12:30 pm

701 Hot Topics in Employment Law *New to In-house Track*

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Hot Topics in Employment Law

Session Number 701

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The in-house bar association.SM



PRE-EMPLOYMENT

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Hiring Do's and Don'ts

- **Job Applications**
 - Age, year of graduation
 - Marital Status
 - Citizenship
 - Criminal Convictions
- **Conducting Interviews Lawfully**
 - Protected Categories
- **Immigration Law Compliance: I-9 Forms**
- **References and Background Checks**
 - Fair Credit Reporting Act
 - Criminal Records
 - What references should we give, and who should give them?



Affirmative Action

➤ Good Faith

- Remedy past discrimination or a manifest imbalance
- Obtain a diverse workforce (risky proposition?)
- Race and gender considered in addition to, not in place of, other qualification requirements.

➤ Voluntary vs. Mandatory Programs

- 29 C.F.R. 1608 states the EEOC's position on voluntary affirmative action plans under Title VII.
- Executive Order 11246 mandates federal contractors and subcontractors to develop, implement and maintain affirmative action programs.
 - A company is a federal contractor or subcontractor if it does business directly with the federal government or with a company that contracts directly with the federal government.
 - Affirmative action initiatives apply to "applicants" and compensation for federal contractors and subcontractors.

➤ When Affirmative Action Becomes Discrimination

- Quotas
- Preferential treatment given to women and minorities based solely on the distinguishing characteristic is illegal.



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At-Will Employment

- **Indefinite term**
- **May terminate with or without cause**
- **Statutory Exceptions:**
 - Discrimination/Harassment
 - Retaliation
- **Common Law Exceptions:**
 - Public Policy



Employment Agreements: Key Components

- **Compensation & Key Terms**
- **Non-Competition**
- **Non-Solicitation**
- **Confidentiality**
- **Intellectual Property**
- **Arbitration**

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Releases of Claims

Key Provisions:

- Full, general release of existing claims
- Confidentiality
- Non-disparagement
- Taxability of any settlement monies
- “Knowing & Voluntary” Waiver of Age Claims:
 - 21-Day Consideration Period (45 days if part of group buyout program)
 - 7-Day Revocation Period



Employee or Independent Contractor?

- **Worker's Compensation**
- **Taxes**
- **Liability for Title VII, FLSA, FMLA, etc.**
- **Agreements**
- **Multi-factor test**
- **Right to Control**

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Union / Labor Relations Issues

- **Covered Employees**
 - **What are their rights?**
 - **What are their remedies?**
 - *Hoffman Plastic Compounds, Inc. v. NLRB*

- **Discrimination Suits and the Duty of Fair Representation**
 - **A possible partnership opportunity**
 - **Union liability**



ADMINISTRATIVE CONSIDERATIONS

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Employee Handbooks & Policy Manuals:

Key Provisions:

- Harassment & EEO
- FMLA
- Electronic Communications
- Safe Harbor
- At-Will, No Contract
- Workplace Violence
- Acknowledgement Form

Pitfalls to Avoid:

- “Probationary Period”
- Progressive Discipline
- Grievance Procedure

Hot Topic: Safe Harbor Policy

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Leave Issues

- **Family and Medical Leave Act (FMLA)**
 - What Triggers FMLA
 - Proper Forms
 - Training
- **Military Leave (USERRA & states)**
- **Civil Duty Leave (jury duty, voting)**
- **Other Leave (vol. emerg. servs., school activs., subpoenas, victims or witnesses of crime)**
- **Pregnancy Leave**



Wage/Hour Issues

- **Hot Topic: FLSA Collective Actions**
- **Classification (Exec, Admin, Prof'l, Computer Prof'l & Outside Sales)**
 - Rule against partial-day salary deductions
- **Working “Off-the-Clock”**
 - Donning & doffing work clothing
- **Meal & Break Periods**
- **On-Call Time**
- **Calculation of OT/“Regular Rate” of Pay**



OSHA

- **State-Federal Relationship**
- **General Duty Clause & Standards**
- **Inspections**
- **Citations & Penalties**
- **Defenses**
- **Consultation Programs & Alliances**
- **Injury & Illness Log**
- **Hazard Communication & MSDSs**

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EMPLOYMENT CHALLENGES

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Harassment/Discrimination Overview

➤ Overview

- **Title VII** (race, sex, pregnancy, religion, national origin, compensation)
- **Age Discrimination in Employment Act (ADEA)**
- **Americans with Disabilities Act (ADA)**

➤ **Hot Topics:** Same race discrimination, Neutral conduct with adverse impact, 3rd party harassment, Paramour favoritism, etc.



Harassment / Discrimination Prevention

- **Comply with Posting Requirements**
- **Develop an Anti-Harassment/Discrimination Policy** (include definitions, examples of unacceptable behavior, instructions on how to lodge a complaint, limited confidentiality, the complaint resolution procedure, the range of possible consequences for violating the policy, and a prohibition against retaliation).
- **Train All Employees on the Policy**
- **Create and Maintain Contemporaneous Documentation**
- **Uniformly Apply All Policies**
- **Hot Topics:**
 - **What's the employer's duty when the complainant asks that the matter not be investigated or that no action be taken against the alleged wrongdoer?**
 - **Is there an obligation to report allegations of harassment or discrimination that are made off duty?**



Accommodation of Disabilities

- **Who is “Disabled” Under the ADA?**
 - **Substantial limitation of a major life activity**
 - **Hot topic: Mental Impairments**
- **Reasonable Accommodations**
- **Interactive Process**

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Religious Accommodation

- **Observance of Sabbath**
- **Clothing, Head Coverings and Body Piercings**
- **Reasonable Accommodation**
- **Lower standard than ADA**
- **Hot Topic: Workplace Religious Freedom Act**

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Employee Discipline & Discharge

- **Importance of Contemporaneous Documentation**
- **Prompt Action**
- **Uniform Application of Company Policies**
- **Legitimate Business Reasons**
- **Final Steps**
 - **Union Arbitrations**
 - **Exit Interviews**
 - **Eligibility for Rehire**



Retaliation Claims

- **Retaliation may occur after employee complaint or disclosure**
- **Most claims filed under EEO laws & whistleblower statutes (OSHA, envir. laws, SOX)**
- **Underlying claim need not have merit**
- **Hot Topic: Sarbanes-Oxley**
- **Internal Complaint Mechanism & Training**



Internal Investigations

- **Who Conducts: Legal, Compliance, Trained HR Staff, or Outside Counsel**
- **Attorney-Client Privilege**
- **Interviews, Document Reviews, Opportunity for Witnesses to Rebut**
- **Written Report**