



Transparency in Your Nonprofit Organization: Issues in Employment Law

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TRANSPARENCY IN YOUR NONPROFIT ORGANIZATION

Issues in Employment Law

A. Sexual Harassment

1. Types:

a. Quid pro quo - Occurs when submission to or rejection of an individual's advances is used as the basis for employment decisions. Usually occurs with supervisors.

b. Hostile environment - Occurs when employee is subject to unwelcome sexual conduct which unreasonably interferes with an individual's job or creates an intimidating or hostile work environment. Can occur with supervisors, co-workers, or even non-employees, such as customers and vendors.

2. Employer Liability: Employers can be held liable for sexual harassment in the following situations¹:

a. In a quid pro quo situation, the employer will be held liable for any economic loss suffered by the victim, regardless of whether it had actual knowledge of the situation.

b. In a hostile work environment situation, the employer will be held liable if it knew or should have known about the harassment, regardless of whether the victim suffers any economic loss.

3. Practical Tips for Employers:

a. Have strong statement against sexual harassment in employee handbook but do not commit to too many procedures regarding the handling of complaints.

b. Follow-up on all complaints IMMEDIATELY and always allow for due process and confidentiality. Keep a good paper trail.

¹ An association is generally liable for harassment by supervisors.

B. Discrimination

1. Types: Sex, race, color, religion national origin, marital status, veteran status, age, or disability.

2. Key laws:

a. Civil Rights Act of 1991: This Act expanded protections against race and ethnic discrimination given under Title VII of the Civil Rights Act of 1964. It also provides additional instances in which plaintiffs may recover compensatory and punitive damages, as well as fees paid for expert witnesses.

b. Americans with Disabilities Act of 1991 -- Title I: Employment Provisions

1) As of July 26, 1994, "ADA" applies to employers with 15 or more employees. Although there is no provision in ADA concerning employers with fewer than 15 employees, state and local laws may require these employers to comply with ADA-like laws and regulations.

2) Prohibits discrimination of "*qualified individuals with disabilities*". This has been defined to mean an individual who can perform the essential functions of the job with or without a reasonable accommodation.

3) A "*disability*" is defined as a physical impairment that substantially limits one or more of the major life activities of the individual. Disabled persons also include those with a record of such an impairment and those regarded as having the impairment. A disabled person does not include a current illegal drug user.

INCLUDES:

- Substantial hearing or sight impairments
- Heart conditions
- Epilepsy
- Mental retardation

- Learning disabilities
- HIV disease (symptomatic or asymptomatic)
- Drug addiction
- Alcoholism

DOES NOT INCLUDE:

- Minor or temporary impairments (e.g. sprained or broken limbs, colds)
- Pregnancy
- Current illegal drug use
- Homosexuality and bisexuality (or other genetic identity or behavior disorders)
- Compulsive gambling
- Kleptomania or pyromania

4) Employers may not ask if an applicant for employment is disabled. Employers also cannot ask about an applicant's health or past medical history. Employers may only ask about the applicant's ability to perform the essential functions of the job. Therefore, employers are encouraged to develop detailed job descriptions of essential functions for each job.

5) Employers may not ask applicants to take a job-related medical exam. Employers may require current employees or individuals who have been extended an offer of employment to take a medical exam.

6) Covered employers are required to make reasonable accommodations for employees with known disabilities unless the accommodation would cause an "*undue hardship*" on the employer's business. Reasonable accommodations may include one or more of the following:

--Making existing facilities accessible to and usable by an individual with a disability (including non-work facilities such as restrooms and vending machines);

--Rearranging or modifying work schedules (including possible use of part-time employees);

--Restructuring a job (for example, by changing when or how an essential function is to be performed);

--Acquiring or modifying equipment;

--Allowing employee-provided aids in the workplace (such as guide dogs);

--Providing qualified readers or interpreters (and maybe even assistants to help with personal needs at work such as eating or using a restroom); and

7) Accommodations that will not permit an individual to perform the "essential functions" of a job are not required. In this regard, employers can require employees or applicants to demonstrate the benefits of a particular accommodation.

8) The obligation to make reasonable accommodations for an otherwise qualified individual does not require an employer to:

--Quantity or quality standards need not be *lowered* for a disabled employee, as long as such standards are uniformly and consistently applied to all employees.

--Employers are not required to provide *personal* items in order to satisfy the reasonable accommodation requirement. These are items used off the job as well as on and may include glasses, hearing aids, wheelchairs, and prosthetic limbs. All of the above may be non-personal, however, if they're specifically designed or required to meet job-related needs.

--*Implement Hiring Preferences* - The ADA does not require that an employer give preference to a qualified individual with a disability over other employees or applicants. Employers remain free to select the most qualified individuals for hiring or

advancement, provided the employers rely on criteria necessary to the successful performance of a job's essential functions. An employer cannot discriminate between employees or job applicants because one needs a reasonable accommodation in order to be considered as qualified as another. When two job applicants are equal, except for the fact that one requires a reasonable accommodation, an employer must choose between them on a basis that is not discriminatory.

9) The reasonable accommodation requirement is also limited to those accommodations that would not work an "undue hardship" on the employer. An "undue hardship" is a significant difficulty or expense, based on consideration of the nature and cost of the accommodation in relation to the size, resources, and structure of the employer's business; it may involve an accommodation that is unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature of the operation of the employer's business.

--Whether a proposed accommodation constitutes an undue hardship for an employer in terms of cost is largely determined by analysis of what resources are available to the employer. In determining what cost is "undue," the relationship of the cost of the accommodation to the value of the employee position at issue will not be considered.

--Private employers will certainly face requests for production of books and records to verify any claimed financial hardship anticipated by a proposed accommodation, and some may be required to reveal information they have always considered sacred and confidential.

New expansion of ADA in 2008 means more employees and applicants will be covered:

- Determination of disability to be made without regard to effects of corrective measures like medications or hearing aids.

- Expands interpretation of what “substantially limits” major life activity means, and what “major life activity” means.
- March 2009 EEOC guidance:
<http://www.eeoc.gov/policy/docs/psych.html>

Other laws impacting employers

Age Discrimination in Employment Act (20 or more employees)
Drug-Free Workplace Act
Equal Pay Act
Fair Labor Standards Act
Family and Medical Leave Act (50 or more employees)
Health Insurance Portability and Accountability Act
Uniformed Services Employment and Reemployment Rights Act

Special consideration for pregnancy

1. Normal pregnancy is a temporary disability, not covered by ADA.
2. The federal Pregnancy Discrimination Act (PDA) recognizes discrimination based on pregnancy as a form of sex discrimination.
3. PDA does not require that you hire pregnant women, but that you treat them the same way as other applicants with temporary disabilities.
4. Note there is some overlap of coverage under the Family and Medical Leave Act.

Discrimination Laws means certain questions should never be asked during employment interviews:

1. Maiden name or marital status
2. Children or dependents, or intention to have children
3. Daycare planning for such children
4. Picture or physical description (e.g. height or weight)
5. Health history
6. Whether the applicant is fluent in a foreign language (unless relevant to the position)
7. An actual or perceived disability, including past or current medications or how many sick days applicant took from a previous job



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