



Massachusetts Medical Society

PPRC Talks 2016

Anatomy of a Healthy Workplace: Enhancing Compliance & Mitigating Risk

Kristin G. McGurn, Seyfarth Shaw LLP



Anatomy of a Healthy Workplace

- Understand how an employment law suit is brought and how employers can defend
- Understand the “best practices” that can keep you out of trouble
- Understand employment law suit “hot” topics



Warm Up Round (Cards up...)

- Physician Practices are subject to the employment laws in Massachusetts as well as the federal law.
- Supervisors (including Physicians) may be personally liable in a Massachusetts employment action.
- All employees are entitled to leave under the FMLA.
- Wage & hour law only applies to senior employees.
- Non-exempt workers have less important jobs.



Lets get started....

YOU HAVE BEEN SUED



What Happens in an Employment Law Suit (Cards up...)

- **“Discovery” is conducted. The plaintiff is entitled to ask for and receive many different documents.**
 - Personnel file?
 - All emails written by, sent to or about the plaintiff?
 - All texts or IM messages or social media by, sent to or about the plaintiff?
 - All emails written by, sent to or about others that the plaintiff compares himself or herself to?
 - Medical information regarding the plaintiff's co-workers?
- **Depositions are taken.**
 - Supervisors can be questioned for multiple hours?



The Case Begins

Think Tennis



Round One: Prima Facie Case

Plaintiff's Burden:

- In a Protected Class
- Something Bad Happened
- Did not happen to others similarly-situated
- Ta Da!



What are the protected classes?

- Race
- National Origin
- Ancestry
- Age
- Sex
- Color
- Gender Identity
- Sexual Orientation
- Disability
- Mental Disability
- Religion
- Sexual Harassment
- Genetic Information



Cards up...

Everyone is in a protected class.



Basic Rules (and the Exceptions)

- Treat everyone the same
- Except for disability, mental disability and religion
- Accommodation is the key



Highlight: Disability (ADA)

- Surprising definition:
 - A person with a disability is any person who has a physical or mental impairment that substantially limits one of more major life activities.
 - Includes people who have a record of such an impairment, even if they do not have a current disability.
 - Includes people who do not have a disability but who are “regarded as” having a disability
 - Law also says you cannot discriminate against someone because they are associated with someone with a disability
 - Disclosure
 - The person who is seeking protection under these laws must disclose or you must be on notice



Highlight: Sexual Harassment

- Quid Pro Quo
- Offensive, sexual hostile environment and the “reasonable” person standard
 - Comments
 - Email/Texts
 - Touching
 - Jokes
 - “Joining in” is not a defense



Round One: Prima Facie Case (RECAP)

Plaintiff's Burden:

- In a Protected Class
- Something Bad Happened
- Did not happen to others similarly-situated



Cards up...

- “My name is Betty, I did not get a raise and Bob, who is like me, did.” Does Betty have a claim?
- “My name is Bob, I don’t like my supervisor.” Does Bob have a claim?
- Betty asks for an accommodation for her disability. Supervisor Sam says no because other people don’t have what Betty is asking for. Does Betty have a claim?
- If someone brings a claim, the employer must be at least a little bit guilty.
- Hurt feelings are often the basis for claims.



Round Two: Employer Establishes a Legitimate Business Reason

Employer's Big Moment:

- Only Moment!
- Our Turn to Tell Our Story
- Better Be Good, Credible and Convincing



Cards up...

- “Legitimate non-discriminatory business decisions” are made every day, multiple times a day by employers.
- Examples of legitimate business decisions:
 - Performance?
 - Hair color of employee?
 - Tenure of employee?
 - Qualifications of employee?
 - Subjective preference of the employer?
- Subjective reasons qualify as legitimate business reasons but they are harder to prove.
- To win in Court, you need proof.



Round Three: Pretext -- The “Liar, Liar Pants on Fire” stage

Plaintiff’s Turn (Again):

- Is the Employer Trustworthy?
- Is the Employer Credible?
- Is the Employer Fair?
- Is the Employer Consistent?



Your BIG Moment (WHEN YOU BLOW IT)

Four Ways to Ruin Your Defense

1. Performance Reviews
2. Email, Email and Email
3. Text Messages
4. Stray Comments



Your BIG Moment (WHEN YOU DO IT RIGHT)

Four Ways to Bolster Your Defense

1. Be Consistent
2. Remember: Work is Work, not Play
3. Document (Not Obsessively)
4. DO NOT EMAIL/TEXT WHAT YOU WOULD NOT SAY



Cards up...

- In this Round, the plaintiff is looking for evidence that the employer may not be telling the truth.
- Email is usually the primary source of evidence against a company.
- What you say in text messaging or IM is safe.
- The “delete” button works.
- Documenting is always good.
- Weather and sports are the only safe things to talk about at work.
- The plaintiff cannot get access to your personal email and social media.
- As a supervisor, my job is to be quiet, stick to my duties and stay out of workplace banter and activities.



What if you LOSE? Damages = \$\$

- The jury decides based on “preponderance of the evidence”
- Definition of “losing”
- Attorney’s fees (the “gotcha”)
- Back pay
- Front pay
- Emotional Distress
- Punitive Damages
- Interest



Hot Topics for Plaintiff's Lawyers

- Independent contractors / misclassifications
- Wage & Hour Issues
- Leave Issues
- Retaliation
- Accommodations (disability especially)



New Overtime Rules (Cards Up...)

The Fair Labor Standards Act was enacted to:

- Regulate hours of work
- Eliminate substandard pay through minimum wage requirements
- Encourage employers to hire more workers by substantially increasing the cost of overtime work

That is all it was enacted to do.

The regulations recently were amended.

Massachusetts law is more stringent than the FLSA.



White-Collar Exemptions

- 29 U.S.C. § 213(a)(1):
 - Overtime requirements do not apply with respect to “any employee employed in a bona fide executive, administrative, or professional capacity, or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary)”



Hot Topics for Plaintiff's Lawyers

- Misclassification Cases.
 - Employee claims that Employer misclassified him either (a) by misapplying an overtime exemption or (b) by calling him an independent contractor.
- “Off-The-Clock” Cases.
 - The Employee claims that the Employer made him work off the clock or did not count all of his time.
- “Regular Rate” Cases.
 - Commissions or bonus was improperly excluded from calculation of overtime.



“Off the Clock” (Cards Up...)

Employee eats sandwich for 15 min. and returns to work.

Employee takes charting/scheduling home to finish.

Employee takes online training off shift.

Employee travels site to site throughout the day.

- Did Employee perform “work”?
- Did Employer know about the work?
- Should Employer have known?
 - Did Supervisor see it or have reason to believe it occurred?
- Does it matter that Employee violated work rules?
 - He never received permission to work OT or didn’t accurately record his time
- Does it matter work was performed away from job site?



New Overtime Rules (Cards Up...)

- Non-exempt (overtime eligible) employees must be paid hourly.
- Employees making at least \$47,476 will automatically be entitled to exemption from overtime as of December 1, 2016.
- Go ahead and dock salaries in full day increments.



New Overtime Rules: Prepare!

Plan for Financial Impact

- Assess ability to create IT/comp review processes to keep pace with annual increases
- Ensure these finances are taken into account on closures/openings/joint ventures
- Consider a privileged audit of other nonexempt pay practices to ensure compliance

Prepare for Salary Increase

- Establish baseline by identifying all managers under \$47,476 (with and without bonuses and commissions)
 - Gap analysis
 - Comp structure change
- Assess timekeeping/pay policies and practices to ensure they can accommodate new nonexempt employees
- Coordinate with the Recruiting Team on possible turnover issues



"I HAVE A HEADACHE, SO I'M GOING HOME.
YOU HAVE TO PAY ME!"

Source: <http://news1.org/2015/09/paid-sick-leave-king-obama-to-issue-eo-telling-private-companies-what-they-are-going-to-do/>



Earned Sick Time Law (Cards Up...)

PTO policies that provide at least 40 hours of leave per year comply with the ESTL.

Certain per diem employees are ineligible for sick time.

Under certain circumstances, employees may be required to take sick time in full-shift increments.



ESTL Review: Use of Sick Time

1. Care for the **illness** of the employee or the employee's child, spouse, parent, or parent of a spouse;
2. Attend **medical appointments** of the employee or the employee's child, spouse, parent, or parent of a spouse;
3. Address the psychological, legal or physical effects of **domestic violence** on the employee or the employee's child;
4. **Travel** to and from an appointment, pharmacy or other location related to the purpose for which the sick time was taken.



ESTL Review: The Basics

- Eligibility: All employees
- Accrual: 1 hour per 30 hours worked
- Yearly Cap: 40 hours
- Carryover Requirement: Yes, but use subject to cap
- Pay out at termination: Not required
- Employee Notice Requirements: Limited
- Certification: May be required in certain circumstances
- Record Retention: 3 years



ESTL Review: Prohibited Actions

Employers may not

- Require employees to make up hours or find a replacement.
- Exercise discretion over when an employee takes sick time.
- Deny sick time if employee fails to give notice.
- Retaliate.
- Require employees to use sick time in full-shift increments.
 - Exception if replacement is used



ESTL Challenges

➤ Accrual rate is strict

- Even policies that provide *more* sick time overall may not accrue at the required rate.

➤ Alternative schedules specified in regulations

- 40 hour employee: 5 hours per month for 8 months
- 24 hour employee: 4 hours per month for 10 months
- 16 hour employee: 3 hours per month for 10 months

➤ Lump sum grant

- Least administrative burden.
- Remember, no pay out required at termination.



ESTL Challenges: Enforcing Notification Procedures

- Except in an emergency, employees must notify their supervisor in advance of their intent to use sick time.
 - foreseeable use: employee must provide 7 days advance notice
 - unforeseeable use: if use is not foreseeable 7 days in advance, then employee must notify supervisor as soon as practicable
- tips:
 - use established call-in procedures
 - keep in mind privacy considerations
 - prepare “yes” or “no” questions regarding use



ESTL Challenges: Attendance and Limiting Abuse

- **Likely impact on attendance and disciplinary policies**
 - Absence/tardiness due to valid use of sick time cannot be held against employee.
- **Limit abuse**
 - Differentiate sick time under ESTL from other types of time off.
 - If you have a more generous bucket of paid time off, specify that only 40 of those hours may be used as protected time off under the ESTL.
 - One set of rules for time off under the ESTL.
 - Another set of rules for all other uses of time off.

Speedy exhaustion of earned sick time is beneficial



Hot Topics for Agency Enforcement

- EEOC Enforcement Guidance on Retaliation (August 29, 2016) – “Retaliation – Making it Personal”
 - guidance not law -- shapes investigation of retaliation charges
 - expansive view of EEOC jurisdiction
 - retaliation is asserted in over 40% of all charges
 - https://www.eeoc.gov/laws/types/retaliation_considerations.cfm
- more difficult to discipline employees for legitimate reasons
 - protection extends even if underlying charge has no merit, was untimely, lacked reasonable basis
 - internal complaints; work-related and non-work-related actions
 - “opposition” or resistance to perceived potential EEO violation (even without using “harassment” or “discrimination” language)



More on Hot Topics (Cards Up...)

- Applicant arrives to interview wearing religious clothing the violates uniform policy. HR asks about it right away.
- Religious Accommodation
 - key holding in *Abercrombie*: do not make an applicant's or employee's religious practice, confirmed or otherwise, a factor in employment decisions
 - if you believe – from any source – that an accommodation may be necessary, consider engaging in an “interactive process”
 - do not ask applicants/employees directly about religious practices and do not make assumptions based on stereotypes
 - if you suspect a potential conflict with a work rule, explain it and ask if the rule would pose a problem



Questions?