

# Federal Employment Law Overview

## AMERICANS WITH DISABILITIES ACT (ADA)/ADAAA

The Americans with Disabilities Act applies to employers in industries affecting commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It protects qualified individuals with disabilities from workplace discrimination. A qualified individual is defined as one who can perform the essential functions of the job with or without a reasonable accommodation.

### Defined Disabilities

Disabilities are defined as: a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

#### Considerations

- The ADA protects applicants and employees with defined disabilities.
- The Act also prohibits discrimination that occurs because an individual is associated with an individual with a disability, such as a family member.
- There is no exhaustive list of disabilities. This determination is made on a case-by-case basis.
- An employer may inadvertently establish a “regarded as” case if it discriminates against an individual based on the misconception that the individual has a disability.
- “Major life activities” include such things as caring for oneself, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, working, as well as important internal bodily functions.
- Under the Americans with Disabilities Act Amendments Act of 2008, and interpretive regulations, the focus is on whether an employer has complied with its obligations to provide reasonable accommodations and whether discrimination has occurred, not whether an employee’s impairment substantially limits a major life activity. Determining whether an impairment “substantially limits” a major life activity does not demand an extensive analysis.

### Essential Job Functions

- Essential job functions are those tasks that are fundamental duties for the position.
- An employer must be able to prove what the essential job functions are

since an employer does not have to eliminate an essential function to accommodate a disabled individual.

#### Considerations

- Employers can substantiate essential job functions with job descriptions, job advertisements, and evidence of the manner in which current employees perform the job.
- In some cases attendance can be an essential job function, depending on whether the time at which fundamental duties are performed is critical.

### Reasonable Accommodations

Employers need to provide a reasonable accommodation to an otherwise qualified individual with a disability to enable the person to perform the essential functions of the job, or to participate in the application process, unless it would pose an undue hardship on the employer. Depending on the circumstances, reasonable accommodations could include equipment modification, reduced work hours, leave from work, and reassignment to a different position.

#### Considerations

- Usually an employer must show that an accommodation would involve significant difficulty and expense in order to establish that it would cause undue hardship under the ADA.
- The size and resources of the employer, the nature and cost of the accommodation, and the type of business operations are factors that are considered in determining whether the accommodation would cause undue hardship.

### Employee Medical Information

- Essential medical information must be kept by employers in separate, confidential medical files, and only particular individuals may have access to the information.
- The ADA dictates when and what type of medical information an employer may obtain from applicants and employees.

#### Considerations

- Employers must avoid making pre-employment inquiries about the existence, nature, and severity of an applicant’s disability prior to making a conditional offer of employment. Pre-employment inquiries should focus on the applicant’s ability to perform the essential job functions of the position.

## TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (TITLE VII)

Title VII applies to employers in industries affecting commerce who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It prohibits discrimination on the basis of race, color, religion, sex, or national origin. This prohibition covers intentional (disparate treatment) and unintentional (disparate impact) discrimination.

### Intentional & Unintentional Discrimination

- Intentional discrimination occurs when an employer takes an adverse action against an employee because of a protected characteristic (i.e. not hiring a woman because she may decide to have children and quit).
- Unintentional discrimination occurs when an employer uses a facially neutral criterion for making an employment decision, but the criterion used statistically has an adverse impact on a protected group (i.e. a height requirement, which may eliminate women from job consideration).

### Sexual Harassment

The most common form of harassment under Title VII is sexual harassment. It is defined as unwelcome conduct of a sexual nature that affects the individual’s terms and conditions of employment. There are two types of sexual harassment:

- Quid pro quo harassment occurs when a supervisor or someone with power to affect the employee’s employment status requests sexual favors in exchange for certain terms and conditions of employment.
- Hostile work environment harassment occurs when someone unreasonably interferes with an employee’s work performance or creates an intimidating, hostile, or offensive work environment. This could be created by jokes and comments, crude or vulgar language, sexual flirtations, or pornographic material.

#### Considerations

- Employers who become aware of improper conduct should respond immediately. Failure to act can be construed as condoning the conduct, but taking prompt action to rectify the situation may provide the employer with

This overview is intended as a concise summary of Federal Employment Law. It is not intended to be all-encompassing and does not cover all situations and exceptions to general rules. To discuss the applicability or interpretation of any provision of the law to a specific situation, please contact an attorney at Hedrick Gardner Kincheloe & Garofalo, L.L.P.

a defense to a subsequent harassment claim.

- Display federal and state posters that inform employees of their rights in conspicuous places.
- Establish policies prohibiting all forms of harassment, provide examples of improper conduct, and clarify that such conduct will result in disciplinary action. Provide procedures for harassment complaints that prohibit retaliation for making a complaint.

### Other Types of Harassment

Under Title VII, the same principles for sexual harassment also apply to harassment based on race, color, religion, and national origin.

- Conduct that may create a hostile environment includes racial slurs, demeaning religious comments, actions to convert someone's religious beliefs, and ethnic jokes.
- An employer may need to accommodate an employee's religious beliefs by allowing that employee to celebrate a religious observance as long as it does not pose an undue hardship to the employer. "Religion" is broadly defined and does not need to be an organized religion.
- Generally a claimant must show pervasive offensive conduct. However, if sufficiently severe, a single incident can be enough to sustain a harassment claim.

## FAMILY AND MEDICAL LEAVE ACT (FMLA)

This Act entitles eligible employees up to 12 weeks of unpaid leave in a 12-month period for certain qualifying reasons. To be eligible, an employee must have: 1) been employed for at least 12 months with the same employer, and 2) have worked at least 1,250 hours during the 12-month period prior to the date leave is to commence at a site where the employer employs 50 or more employees within a 75-mile radius.

### Qualifying Reasons

- The birth, adoption, or placement for foster care of a child with the employee.
- To care for the employee's spouse, child, or parent with a serious health condition.
- The employee's serious health condition. A serious health condition is an illness, impairment, injury, or physical or mental condition that requires inpatient care or continuing treatment by a health care provider.

#### Considerations

- The right to take child-related leave applies to male and female employees.
- The FMLA requires employers to continue health care benefits for the employee during the leave.
- The employee generally has the right to reinstatement in the same or equivalent position after returning from FMLA leave.
- No condition is categorically excluded from coverage by the Department of Labor. Under certain circumstances, any illness could be considered a serious health condition.

## Notice Requirements

- Employers must display an FMLA poster in a conspicuous location in the workplace. The employer must also include its FMLA policy in the employee handbook, providing specific information on the employee's rights.
- If the need for leave is foreseeable, an employee must give a 30-day notice to the employer. If the leave is unforeseeable, the employee must let the employer know about the leave as soon as possible.
- Once the employee provides notice of the need for a leave, the employer must notify the employee within two business days whether the leave will be covered by FMLA. If there is not enough information to make this determination within two business days, leave can be provisionally designated as being covered by FMLA and a final determination made once additional information is obtained.

## Military Family Leave

- Certain family members of service members may be entitled to up to 26 weeks of unpaid leave in a single 12-month period to care for a service member recovering from a serious injury or illness incurred in the line of duty.
- Certain family members of reservists are entitled to up to 12 weeks of unpaid leave to address "qualifying exigencies" resulting from the service member's call to active duty. Examples of "qualifying exigencies" include attendance at military events, arranging childcare and tending to financial or legal matters.

## FAIR LABOR STANDARDS ACT (FLSA)

FLSA's three most important requirements are that covered employers 1) must pay employees at least minimum wage for all "hours worked," 2) must pay non exempt employees at least 1.5 times their regular hourly wage for all hours worked over 40 in a given workweek, and 3) must keep accurate records of employees' daily and weekly hours worked. While, at first, these requirements might sound simple, the FLSA's many exemptions, exceptions, regulations, and technicalities make it among the most difficult of all federal laws with which to comply.

### Common Exemptions

The FLSA provided that certain employees are exempt from some or all of its requirements. The most common exemptions exclude executive employees, administrative employees, professional employees, outside sales employees, and computer employees. Each of these exemptions require employees to meet specific tests in order to qualify for the exemption.

A common misconception among employers is that employees who are paid a salary do not have to be paid overtime. This is not the case. Unless an employee is specifically exempted from the FLSA's overtime requirements, that employee must receive overtime payment for hours worked over 40 in a given workweek. When determining whether an employee qualifies as exempt, you

must look at the employee's actual duties rather than his job title or description.

## AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

The Age Discrimination in Employment Act applies to employers in industries affecting commerce who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. It protects individuals over the age of 40 from discrimination in employment. It is enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Employers and their employees should avoid conduct that may be construed as discriminating on the basis of age. Examples are:

- Choosing a younger applicant over an older applicant because of a concern that the older worker will retire soon.
- Not hiring an older applicant based on an assumption that older people are less able to use new technology.
- Age-based harassment.

#### Considerations

- Do not ask applicants their ages or dates of birth.
- Do not make comments or jokes regarding age, even if you include yourself.
- Do not ask an applicant or employee about retirement plans.