

EMPLOYMENT LIABILITY BEST PRACTICES HOW THINGS GO WRONG HOW TO MAKE THINGS RIGHT

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DISCRIMINATION AND HARASSMENT SOLUTIONS LLC

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AGENDA

- Employment liability best practices:

Understanding the MCAD

Overview of Discrimination

Identifying Protected Classes

Reviewing recent trends at the MCAD

What to expect at the MCAD

AGENDA

Training

Investigating

Understanding new laws

An Act to Establish Pay Equity

Act Relative to Domestic Violence

MA Pregnant Worker's Fairness Act

What is the MCAD?

- Massachusetts Commission Against Discrimination
 - The states chief civil rights agency
 - We will focus on employment
 - Required to file a Charge within 300 days;
 - May award damages, fines, attorney's fees, interest, mandatory training
 - No right to a jury

Protected Categories

- Age
- Criminal records (inquiries only)
- Disability
- Gender
- Gender identity
- Genetics
- Military status
- National origin or ancestry
- Race or color
- Religion
- Retaliation
- Sexual orientation



FORMS OF UNLAWFUL DISCRIMINATION

- Disparate Treatment
- Harassment
 - Sexual or Non-Sexual
- Disparate Impact
- Accommodation
 - Disability or Religion

Sexual Harassment

- Quid Pro Quo “this for that”
- Hostile Work Environment

QUID PRO QUO

- Submission to or rejection of sexual advances, requests for favors or other sexual conduct is explicitly or implicitly a term or condition of employment
- Submission to or rejection of conduct is a basis for employment decisions

HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- Sexual advances, requests for sexual favors, or other verbal or physical conduct that unreasonably interferes with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment

EXAMPLES: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- Written or verbal sexual remarks or jokes, including posters, emails, and text messages
- Comments on one's body
- Leering, whistling, brushing against the body, gestures,
- Inquiries into or discussions of sexual activities
- Repeated requests for dates
- Grunts, whistles or catcalls
- Terms of endearment such as “babe, “honey,” or “sweetie”

Preventing Harassment

- Never assume friendliness equals sexual interest
- Do not assume your behavior is okay just because no one has objected to it.
- If someone indicates your behavior is unwanted, STOP immediately.
- If in doubt, don't say it/don't do it. Err on the side of caution.

WORKPLACE RELATIONSHIPS

- Consensual relationships among coworkers are not unlawful, but can cause liability
- Proceed with extreme caution!

HOSTILE ENVIRONMENT HARASSMENT: *OTHER FORMS*

- Verbal or physical conduct that unreasonably interferes with an individual's work performance by creating an intimidating, hostile, or offensive work environment based on their membership in a protected category

WHO IS COVERED?

- Employees protected from all forms of discrimination by anyone who enters the workplace
 - Other employees
 - Vendors
 - Customers

WHAT IS A HOSTILE WORK ENVIRONMENT?

- Does the wrongful conduct involve a protected class?
- Does the conduct effect the individual's ability to perform the job?
- Would a reasonable person find the wrongful conduct to be severe and pervasive?

What to expect at the MCAD

- Receive Charge of Discrimination
- File Position Statement
- Investigative Conference
- Finding of PC or LOPC
- If PC – immediate conciliation
- If no resolution – short discovery order
- Public Hearing

Damage Awards?

- Back Pay and Front Pay;
- Emotional Distress;
- Fines at the MCAD;
- Punitive damages in Court;
- Attorney's fees;
- Costs;
- Interest 12%
- Injunctive Relief

Recent Trends at the MCAD

- Discrimination by association;
- Service Animals/Emotional Support;
- English Only;
- Retaliation, retaliation, retaliation;
- Mental Illness;
- Accommodation – interactive process;
- Public Accommodation –Investigation requirements.

HOW TO MAKE THINGS RIGHT

- Issue harassment policy
- Provide Training
 - Educate Supervises
- Investigate all complaints
 - Prepare findings
- Take Corrective Action

Key Steps to an Investigation

- Investigate promptly
- Maintain confidentiality as *Practicable*
- Interview relevant parties and review relevant documents
- Prevent retaliation
- Take interim measures pending the results
- Reach a determination and write up report
- Take remedial action and follow up

DECIDE WHAT CLAIMS TO INVESTIGATE

- Investigate when there is....
 - A formal or informal complaint
 - Suspicion of misconduct (“rumor”)
 - Receipt of a grievance or MCAD/EEOC complaint.

STAGE I – INVESTIGATOR’S ROLE

Who should conduct the investigation:

- Human Resources
- If a conflict hire out

Where should the investigations be conducted:

- Conference room without windows
- Possibly offsite or at headquarters

Stage 2 – Planning and Conducting the Interviews

- Explain:
 - What you are investigating
 - To whom you will report your findings
 - Not confidential
 - They will not get a copy – unless they are being disciplined
 - Do not retaliate

STAGE 3 – FINDINGS OF FACT, WRITING REPORT & CORRECTIVE ACTION

- Writing Report
 - Scope of the Investigation
 - Summary of Allegations
 - Witnesses Interviewed
 - Documents and Material reviewed
 - Findings of Fact
 - Policy Violations and Conclusions
 - Recommendation

STAGE 3 – FINDINGS OF FACT, WRITING REPORT & CORRECTIVE ACTION

- Notifying the Parties
 - Notify the parties that the investigation is over
 - Document any disciplinary action
 - Inform reporter that appropriate action was taken
 - Remind reporter to immediately report any further problems, including retaliation

STAGE 3 – FINDINGS OF FACT, WRITING REPORT & CORRECTIVE ACTION

- Possible Ways to Correct Effects of Discrimination
 - Restore leave taken due to discrimination
 - Expunge negative evaluations that arose from discrimination
 - Reinstatement
 - Apology by the perpetrator
 - Correct other harm caused by discrimination, such as loss of compensation

Understanding New Laws

- An Act to Establish Pay Equity
- Act Relative to Domestic Violence
- Act Relative to Gender Identity
- MA Pregnant Worker's Fairness Act

An Act to Establish Equity

- On July 31, 2016 Governor Baker signed into law an Act to Establish Pay Equity that will take effect January 1, 2018. The new law updates the Massachusetts's equal pay law, G.L. c 149 Section 105A which was passed in 1945.
- If a wage differential exists do not reduce the pay of any employee in order to comply.
- Not required to file at the MCAD
- There is a three year statute of limitations
- Damages = the amount of unpaid wages plus an equal amount in liquidated damages as well as attorney's fees

An Act to Establish Equity

- **What An Interviewer Can Not Do:**
- Require salary history during a job interview (job applicant can voluntarily disclose that information);
- Forbid workers from discussing their salaries with each other;
- Screen job applicants based on their wage or require an applicant's prior wages as a condition of being interviewed;
- Retaliate; against employee for exercising protected rights;
- Post a notice in the workplaces notifying employees of their rights under section 105A of chapter 149.

MA PREGNANT WORKERS FAIRNESS ACT

- Effective April 1, 2018, the Massachusetts Pregnant Workers Fairness Act (“PWFA”) imposes new obligations on employers to accommodate an employee’s pregnancy or a condition related to pregnancy.
- **A new protected class:**
- Pregnancy and pregnancy-related conditions are now protected classes in Massachusetts.
- **Employee Rights:**
- No discrimination based on pregnancy or a pregnancy related condition;
- Reasonable accommodation must be provided in the same manner as it would be to a disabled employee.

MA PREGNANT WORKERS FAIRNESS ACT

- **Employer Responsibilities regarding accommodations:**
- Some examples of reasonable accommodations include:
- Provide a private, non-bathroom room for expressing breast milk
- Provide light duty and schedule modifications (longer and/or frequent breaks)
- Provide a modified work schedule
- Provide assistance with manual labor

MA PREGNANT WORKERS FAIRNESS ACT

- **What should Employers do?:**
- Train managers and Human Resources personnel on the requirements of the PWFA;
- Conduct physical space planning to ensure access to private, non-bathroom space for employees to express breast milk
- Evaluate and revise employee handbooks to incorporate pregnancy and pregnancy-related conditions as protected categories;
- Provide notice to all employees of their rights under the PWFA, as well as to:
 - new employees prior to commencement of employment; and
 - any employee who has notified the employer of a pregnancy or a pregnancy-related condition, within ten (10) days of such a notification.

CONCLUSION

- Thank you and I hope this was helpful!