



Employment Law Overview

Your Rights and Obligations

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- **Ms. Dekker's background** includes a focus on government contract and construction contract litigation, representing clients in state and federal courts as well as the Armed Services Board of Contract Appeals. She has represented both management and employees in state and federal forums and has practiced extensively representing federal employees before the U.S. Equal Employment Opportunity Commission. She is admitted to practice in Maryland, Virginia and the District of Columbia. Ms. Dekker is the author of "Employee's Guide to Discrimination and Termination" and "Planning for Pets; Trusts, Leash Laws and More."

Learning objectives

- Review federal employment laws and learn how they may affect design professional firms;
- Discuss Title VII of the Civil Rights Act and other anti-discrimination laws;
- Understand the Family and Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA); and
- Hear updates on COVID-19 and its impact on the workplace

Federal Anti-Discrimination Laws Enforced by the EEOC

- Title VII of the Civil Rights Act of 1964 (covers race, color, national origin, religion and gender).
- Pregnancy Discrimination Act (“PDA”).
- Americans with Disabilities Act (“ADA”).
- Age Discrimination in Employment Act (“ADEA”).
- Equal Pay Act (“EPA”) (applies only to disparities in pay between men and women).
- Genetic Information Non-Discrimination Act of 2008 (“GINA”).

State and local laws may extend protections for employees

- States and localities may elect to expand and add workplace protections. Examples include:
 - Age (18 and over)
 - Military status
 - Marital status
 - Family Status
 - Personal appearance
 - Political affiliation
- Private employers may have their own policies that extend coverage.

What employers are covered?

Not all employers are covered by the federal EEO laws:

- Title VII, the ADEA, GINA and the PDA only apply to employers who have at least 20 employees.
- The ADA applies to employers with at least 15 employees.
- The EPA applies to almost all employers.

State protections

- Employers with less than 20 employees (or 15 for ADA) may be subject to state and local laws.
- Example: The District of Columbia Human Rights Act applies to an employer with only one employee.

What is illegal?

Disparate treatment: treating an employee differently from employees outside the employee's protected class.

Examples:

- Hispanic employees are not promoted because of their race or national origin.
- A school only hires women to be kindergarten teachers.
- An employer refuses to hire an applicant because the applicant has a speech impediment.

What is illegal?

Disparate Impact: A facially neutral employment policy that has a disproportionate negative effect on a protected class.

Examples:

- A delivery company requires that all employees must be able to lift 75 pounds. *Affected classes:* women, older workers and disabled workers. An employee working in accounting or IT does not need to lift heavy items as part of their job.
- A company requires all employees to work weekends. *Affected class:* religion.

Hostile Work Environment

A hostile work environment is created by unwelcome conduct based on an employee's protected class. Sexual harassment is a form of hostile work environment.

The federal standard is that the unwelcome conduct must be "severe and pervasive." Petty slights, annoyances and isolated incidents (unless severe) do not rise to the level of a hostile work environment.

- Montgomery County, Maryland, recently adopted a "reasonable person" standard.

Retaliation is illegal

Protected persons:

- Employees who report illegal activity directed against themselves.
- Employees who take part in an investigation, provide testimony, etc.
- Employees who report illegal activity directed at coworkers.

A claim for retaliation has four components:

- The employee must engage in protected EEO activity.
- The company must know about the protected EEO activity.
- The employee suffers an adverse employment action (*e.g.*, termination, demotion, bad job assignments, pay cut).
- There is a nexus between the protected EEO activity and the adverse employment action.

What should employers do?

- Employers should:
 - Have a policy that prohibits discrimination in the workplace.
 - Provide diversity training.
 - Post required posters in employee breakroom.
 - Have an effective policy for employees to report discrimination, harassment or retaliation.
 - Investigate and take appropriate action.

What should employees do?

- Employees should:
 - Be aware of company policies.
 - Be respectful of coworkers and our differences.
 - If you are harassed or discriminated against, tell the person to stop their conduct. If that doesn't work, follow the company's procedures for reporting harassment and discrimination.
- ❖ If you don't report the harassment or discrimination, the company may avoid liability to you because you did not give the company an opportunity to investigate and correct the alleged illegal actions.

The ADA and Reasonable Accommodations

The ADA requires that employers provide reasonable accommodations to qualified individuals with a disability who can perform their essential job functions with or without a reasonable accommodation unless doing so would cause the employer to incur an undue hardship.

- An individual is “qualified” if they have a physical or mental impairment that substantially limits a major life activity.
 - While disabilities such as vision loss or being confined to a wheelchair may be obvious, physical disabilities such as epilepsy and diabetes are also covered by the ADA.
 - Mental impairments may include PTSD, panic attacks or autism as these all affect the major life activity of thinking.

The ADA and Reasonable Accommodations

Employees and employers must engage in an interactive process to determine what, if any, accommodation would allow the employee to perform his or her essential job functions. An employer's failure to engage in the interactive process may open the employer to liability.

Examples of reasonable accommodations:

- Providing specialized computer screens, desks, chairs or lighting.
- Allowing an employee to take intermittent leave to attend medical appointments for dialysis or chemotherapy.
- Provide an employee with a quiet, private area if they realize they are about to suffer an epileptic seizure.

The ADA and Reasonable Accommodations

Service Animals are Protected Under the ADA

- Only dogs and miniature horses are ADA “service animals.”
- Emotional support animals are not protected under the ADA.
- Service dogs are trained to perform a specific task for their person.
 - They are Seeing Eye dogs.
 - They carry and pick up items for their person.
 - They assist their person with their mobility.
 - They can detect a change in the blood chemistry of people with epilepsy or diabetes and alert their person to find a safe place to recover.
 - Service dogs can be any breed, size or age.
 - Service dogs are “working dogs;” they are not pets.

The ADA and Reasonable Accommodations

- There is no “one size fits all” for reasonable accommodations. The interactive process is designed to determine what works best for both the employee and the employer.
- Undue hardship. The burden is on the employer to prove that accommodating the employee will be too expensive or disruptive.
- An employer can offer alternative accommodations. If more than one accommodation works, then the employer may choose which one to provide.

Additional information on federal anti-discrimination laws:

- The U.S. Equal Employment Opportunity Commission has the authority to investigate charges of discrimination against employers who are covered by the laws. The EEOC's website, www.eeoc.gov, provides information for both employers and employees.
- For companies with less than 20 employees, check your state's official webpage.

USERRA – The Uniformed Services Employment and Reemployment Rights Act

- USERRA protects civilian job rights and benefits for veterans and members of the active and Reserve components of the U.S. armed forces.
- USERRA requires that returning service-members must be promptly reemployed in the same position that they would have attained had they not been absent for military service. They must have the same seniority, status and pay and any other rights and benefits determined by seniority.
- USERRA prohibits discrimination, harassment or other retaliatory actions directed against returning service members. Employers may not retaliate against returning service members because they were on military leave.

USERRA (continued)

- Who is eligible for reemployment?
 - The person must have been absent from their civilian job because of service in the uniformed services;
 - The person must give advance notice to the employer that he or she was leaving the job for service in the uniformed services, unless such notice was precluded by military necessity or otherwise impossible or unreasonable;
 - The cumulative period of military service with that employer must not have exceeded five years;
 - The employee must not have been released from service under dishonorable or other punitive conditions; and
 - The person must report back to the civilian job in a timely manner or have submitted a timely application for reemployment, unless timely reporting back or application was impossible or unreasonable.

USERRA (continued)

USERRA provides protections for disabled veterans.

- Health insurance: employees who have been called up have the right to elect to continue their existing employer-based health plan coverage for the employee and their dependents for up to 24 months while the employee is in the military.
- Returning employees who did not elect to continue their medical coverage during their military service may be reinstated to the employer's health plan upon reemployment. Waiting periods or exclusions for pre-existing conditions generally do not apply (except for service-connected illnesses or injuries).

THE FAMILY AND MEDICAL LEAVE ACT



What is the FMLA?

- The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave.

FMLA (continued)

Eligible employees are entitled to:

Twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition; a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;" **or**

Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Who is a covered employer?

The FMLA only applies to employers that meet certain criteria. A covered employer is a:

- Private-sector employer, with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including a joint employer or successor in interest to a covered employer;
- Public agency, including a local, state, or Federal government agency, regardless of the number
- of employees it employs; or
- Public or private elementary or secondary school, regardless of the number of employees.

FMLA (continued)

The requirement for 20 or more work weeks:

- Mostly seen in seasonal employment situations.
- A design firm with less than 50 employees could qualify if it hires additional temporary employees for a big project for 20 work weeks.
- Joint employer: The design firm uses a temporary staffing agency to hire employees who perform work for the firm. The temp agency is the employer or record but could be a joint employer with the firm
- Successor in interest: Seen with mergers or takeovers.

FMLA (continued)

Who is an eligible employee?

- Works for a covered employer;
 - Has worked for the employer for at least 12 months;
 - Has at least 1,250 hours of service for the employer during the 12 month period immediately preceding the leave; and
 - Works at a location where the employer has at least 50 employees within 75 miles.
- ❖ The 12 months of employment do not have to be consecutive. That means any time previously worked for the same employer (including seasonal work) could, in most cases, be used to meet the 12-month requirement.

Additional FMLA information:

- FMLA leave is unpaid. Eligible employees may use accrued paid time off. Employers may require employees to use paid vacation time before using paid sick leave.
- Your job is protected for up to 12 weeks. If you do not return to work after the 12 weeks you may lose your job.
- Intermittent leave or reduced schedule leave: Eligible employees may take intermittent leave. Going to physical therapy or taking a family member to regular medical appointments for chemotherapy or dialysis may be covered.
- Employees who are out on FMLA leave should not be working. That means no business calls, emails or remote working.
- Your health benefits will continue while you are out on FMLA, provided that you continue to pay your share, if any, of health insurance premiums.

State FMLA considerations

States may expand coverage:

- The District of Columbia FMLA applies to employers with at least 20 employees and provides for 16 weeks of unpaid medical and 16 weeks of family leave during a 24-month period. Eligible employees must work 1,000 hours within the previous 12 months.
- Effective January 1, 2022, the Connecticut FMLA applies to employers with 1 employee. Eligible employees must work for the preceding 3 months (no minimum hours) and allows up to 16 weeks of unpaid leave in a 24-month period (or up to 24 weeks if you are a state of Connecticut employee) and an additional 2 weeks may be available for pregnancy-related conditions. Leave is also available for military caregivers and victims of domestic violence.
- In Washington State, workers are eligible for up to 12 weeks of paid leave a year, with some employees eligible for up to 16 weeks. Eligible employees who take paid leave can receive as much as 90 percent of their weekly wages, with a cap of \$1,000 a week. Employees must work at least 820 hours over the previous year. Full-time, part-time, temporary and seasonal workers are covered.

What should employers do?

- All employers should check their State's laws with respect to FMLA coverage.
- Provide employees with information about how to apply for FMLA leave and have a process in place for reviewing and approving requests for time off.
- Be prepared to “fill in” for an employee who is going out on FMLA leave, especially if it is for an extended period of time. Consider hiring a temporary employee or reassigning job duties.
- Remember – the employee is on leave.

What should employees do?

- Be aware of your rights and responsibilities when asking for and taking FMLA leave. You may have to provide medical or other information to support your request for FMLA leave.
- Provide your employer with as much as notice as reasonably possible that you will need FMLA leave. Accidents and emergencies happen, so family members or friends may have to step in to work with your employer.
- Remember that you are on leave. You should not be checking emails, calling work or completing projects.

Fair Labor Standards Act

The FLSA covers employees in the private sector, federal, state and local governments.

- Minimum wage.
- Overtime pay.
- Recordkeeping.
- Youth employment standards.

Fair Labor Standards Act (continued)

The FLSA applies only to employers whose annual sales total \$500,000 or more or who are engaged in interstate commerce.

- “Interstate commerce” is broadly defined.
- Using the U.S. mail to send or receive interstate mail subjects an employer to the FLSA.
- Using company phones to make or accept interstate calls or computers to place or accept orders can subject to an employer to the FLSA.

FLSA – Minimum Wage Requirements

The current federal minimum wage is \$7.25 per hour.

Many states have enacted their own minimum wage requirements:

- California - \$14/hr. if less than 25 employees, \$15/hr. for 26 or more employees. Some localities have higher rates.
- District of Columbia - \$15.20.
- Ohio - \$9.30
- Colorado - \$12.56
- Georgia and Wyoming - \$5.15 (unless the employer is subject to the FLSA).
- Workers who work for federal contractors - \$15/hr.
- 18 states follow the established federal minimum wage.

FLSA - Overtime

Covered (“non-exempt”) employees must receive overtime pay at time and a half for all time worked in excess of 40 hours in a workweek.

- A “workweek” is a fixed and regularly recurring period of 168 hours, *i.e.*, seven consecutive 24-hour periods. It can be whatever the employer decides: Monday to Sunday, Wednesday to Tuesday, *etc.*
- Employers may establish different workweeks for different groups of employees, *e.g.*, factory workers vs. factory administrative staff.
- Employers do not have to pay overtime rates for weekend or holiday work *unless* the employee’s hours exceed 40 hours in the workweek.
- There is no limit on the number of hours employees over the age of 16 may work in a workweek.
- Employers who “suffer” (*i.e.*, allow) a non-exempt employee to work in excess of 40 hours in a workweek must pay overtime.

FLSA vs. State Overtime

In addition to having higher minimum wage requirements, some states also extend overtime requirements.

- California: overtime pay of time-and-a-half must be paid for hours worked over 8 *in a day*, 40 in a week, and for the first 8 hours of the seventh day worked in a week. Double pay is required for any hours worked over 12 in a day or in excess of eight hours on any seventh day of a workweek.
- Colorado: In addition to paying overtime for over 40 hours worked in a workweek, employers must pay overtime for over 12 hours in a given work day, or for over 12 consecutive hours.
- Alaska: Overtime paid for more than 10 hours in a workday.

FLSA – Exempt v. Non-Exempt Employees

Determining who are exempt or non-exempt employees generally depends on:

- how much they are paid,
- how they are paid, and
- what kind of work they do.

With few exceptions, exempt employees must three tests:

- be paid at least \$23,600 per year (\$455 per week),
- be paid on a salary basis, and
- perform exempt job duties.

Most employees must meet all three "tests" to be exempt from overtime.

Exempt vs. Non-Exempt Employees (continued)

There are several categories of exempt employees:

- Executive
- Administrative
- Professional
- Computer Employee
- Outside sales
- Highly-compensated employees

Exempt vs. Non-Exempt Employees (Continued)

Executive employees:

- Paid on a salary basis of not less than \$684/week;
- Primary duties are to manage the business;
- Must customarily and regularly manage the work of at least two other full-time employees;
- Must have the authority to hire or fire or have input into hiring/firing decisions.

Exempt vs. Non-Exempt Employees (Continued)

Professional Exemptions:

A “learned professional” must meet *all* of the following tests:

- Paid on a salary basis of not less than \$684/wk.,
- Primary duties are to perform work requiring advanced intellectual knowledge and which requires the consistent exercise of discretion and judgment,
- The advanced knowledge must in a field of science or learning, and
- The advanced knowledge is usually acquired by a prolonged course of specialized education or instruction.

Exempt vs. Non-Exempt Employees (Continued)

Professional exemptions:

A “creative professional” must meet *all* of the following tests:

- Paid on a salary basis of at least \$684/wk.;
- Primary duty must be in the performance of work that requires invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Exempt v. Non-Exempt Employees (Continued)

Administrative exemption: (e.g., accounting, HR, IT)

- Paid on a salary basis of at least \$684/wk.,
- Primary duties are the performance of office or non-manual work related to the management of the business, and
- Primary duties also include the exercise of discretion and independent judgment with respect to matters of significance.

“Highly compensated employees” have annual compensation of at least \$107,432 and regularly perform at least one duty of the duties of an exempt executive, professional or administrative employee.

Proper Classification of Independent Contractors

- The general rule is that an individual is an independent contractor if the “Payor” has the right to control or direct only the result of the work, not what will be done and how it will be done
- Misclassifying workers as independent contractors instead of employees makes a company liable for paying employment taxes. Misclassification can also open the company to paying overtime and benefits.

Proper Classification of Independent Contractors (continued)

- Behavioral control factors: type and degree of instruction or training provided to the contractor: more instruction from the company suggests that this is an employment situation.
- Financial control factors: independent contractors generally pay their own expenses and use their own equipment; they are free to seek other business opportunities; the opportunity for profit or loss (rather than just collecting a paycheck) indicates an independent contractor; payment for services may be paid a flat fee for a project.
- Relationship: An agreement stating the worker is an independent contractor does not by itself determine the worker's status. Benefits such as insurance, 401K and vacation pay are generally not available to contractors. An expectation that the business relationship will continue permanently rather than ending after the completion of the project strongly suggests that there is a employer/employee relationship. A worker performing "key activities" of the business also suggests an employment relationship.

Additional FLSA Considerations

- Independent contractors are not covered by the FLSA. They are not entitled to overtime or benefits.
- Private employers may not pay non-exempt employees in “comp time” to avoid paying overtime.
- Employers may only “dock” an exempt employee’s pay under specific circumstances, usually involving serious disciplinary action.
- The FLSA requires employers to give non-exempt nursing mothers reasonable breaktime to express breastmilk for one year after the child’s birth. Employers must also provide mothers with a private place - *other than a bathroom* - that is shielded from view and free from intrusion by coworkers and the public to express breast milk.
- Exempt mothers do not have this same protection under the FLSA, although State laws may provide additional protections.
- From the DOL website: “The Department encourages employers to provide breaks to all nursing mothers regardless of their status under the FLSA.”

What Employers Should Do

- Make sure your employees are properly classified as “exempt” or “non-exempt.”
- Require non-exempt employees to accurately record their hours worked. If you don’t want them working overtime, send them home. If an employer “suffers” a non-exempt employee to work outside normal work hours, the employer may be liable for overtime.
- Know the differences between “employees” and “independent contractors.”

What Employees Should Do

- Know and understand your employment status within the company.
- Follow company requirements regarding timekeeping procedures. (Don't clock in for someone else!)
- Exempt employees: you are not entitled to receive overtime if you work more than 40 hours in a workweek. If you work less than 40 hours in a workweek, your employer may not dock your pay, but you may face disciplinary action if you routinely work less than 40 hours.

COVID-19 AND THE WORKPLACE



Covid-19 and the workplace (continued)

- COVID-19 has changed the way employers – and the world – look at the workplace.
- As we become more knowledgeable about the disease and importantly, how to stop its spread, employers and employees are rethinking what the “new” workplace looks like.

COVID-19 and the workplace (continued)

- Employers may require that all employees who enter the physical workplace be vaccinated.
- Employers may ask all employees who physically enter the workplace if they have been diagnosed with or tested for COVID-19.
- Employers may not ask an employee who is physically coming into the workplace if they have family members who have COVID-19 or symptoms associated with COVID-19. This would violate the Genetic Information Nondiscrimination Act (GINA). Employers may ask if the employee has been in contact with anyone who has been diagnosed with COVID-19.
- Employers may require employees (and others) entering the physical workplace to wear a mask.

❖ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



COVID-19 and the workplace (continued)

- Employers that encourage or require vaccinations must consider requests for reasonable accommodations based on health considerations or religious beliefs. Collective bargaining agreements may also factor into employer decisions.
 - Religious accommodations: employees who have a sincerely held religious belief, practice or observance may be entitled to an accommodation unless it would cause an undue hardship on the business.
 - Health related accommodations: many pregnant women and individuals with auto-immune diseases or other disorders are advised by their health care providers not to be vaccinated.
- If no reasonable accommodation is available, an employer may prevent an employee from physically entering the workplace.
- Requiring unvaccinated employees to provide a negative COVID-19 test or to wear a mask while in the workplace are reasonable accommodations.

COVID-19 and the Workplace (continued)

Other considerations:

- Employees who have previously been denied telework as an ADA reasonable accommodation may now be eligible for telework.
- Employers can encourage employees to get vaccinated: provide paid time off for employees to get the vaccine and recover from side effects of the vaccine; cover costs associated with getting the vaccine (e.g., transportation costs); provide other incentives.
- Have an ample supply of hand sanitizers and masks available to employees and guests.
- Stay current with CDC guidelines.

DISCLAIMER

Disclaimer: This information is not legal advice and cannot be relied upon as such. Any suggested changes in wording of contract clauses, and any other information provided herein is for general educational purposes to assist in identifying potential issues concerning the insurability of certain identified risks that may result from the allocation of risks under the contractual agreement and to identify potential contract language that could minimize overall risk. Advice from legal counsel familiar with the laws of the state applicable to the contract should be sought for crafting final contract language. This is not intended to provide an exhaustive review of risk and insurance issues, and does not in any way affect, change or alter the coverage provided under any insurance policy.

Questions?

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