

# PRACTICAL TIPS FOR NAVIGATING THE COMPLEX DISCRIMINATION LANDSCAPE AND FLSA UPDATE

Wyoming SHRM Annual Conference, September 19-20, 2019

Amanda F. Esch  
Davis & Cannon, LLP

1

## When do laws prohibiting discrimination and harassment apply?

- All stages of the employment process:
  - *Hiring*
  - *During employment*
  - *Termination*

2

## Importance of Hiring

- Trust your gut
- Written application and job description
- Post if possible
- Interview tips
- Documentation

3

## What laws are we talking about?

- Title VII of the Civil Rights Act of 1964 (“Title VII”)
- Americans with Disabilities Act (“ADA”)
- Age Discrimination in Employment Act (“ADEA”)
- Wyoming Fair Employment Practices Act
- Genetic Information Nondiscrimination Act (“GINA”)

4

## Title VII

- The big Kahuna
- An employer cannot refuse to hire someone or discriminate against them in the “terms” of employment “because of such individual’s race, color, religion, sex, or national origin.”

5

## ADA

- Prohibits discrimination against employee or prospective employee due to “disability.”
- Only protects “qualified individuals.”
- Disability definition is extremely broad
  - *Includes:*
    - Actual
    - Perception
    - Record
- Unique aspect of ADA: Accommodation
- Procedure is important

6

# FMLA

- What is the FMLA?
  - *Who does it apply to*
    - Employers
      - *50+ Employees*
      - *Public Employers*
    - Employees
      - *Employees of covered employer*
      - *12 months*
      - *1250 hours in past 12 months*
      - *50+ employees within 75 miles*

7

## When is FMLA Activated?

- Birth or placement of a child
  - *Includes Care*
- Serious Health Condition
  - *Self of immediate family member*

8

## Potential Overlap with the FMLA

- What is the FMLA?
  - *Application*
    - Applies to public entities without regard to number of employees
    - Birth or placement of child, serious health issues for care of self or family member
    - Exigency leave for family of military members
    - Certain qualifications for employees in terms of work
- How can they overlap?

9

## ADEA

- Prohibits discrimination against individuals 40 and over
- No protections for younger employees

10

## Wyoming Fair Employment Practices Act

- Catch-all
  - *Disability*
  - *Age*
  - *Sex*
  - *Race*
  - *Creed*
  - *Color*
  - *National Origin*
  - *Ancestry*
  - *Pregnancy*

11

## GINA

- Genetic Information
  - *Can include things like family history*

12

## What does discrimination or harassment look like?

- Direct Acts of Discrimination
- Hostile work environment
- Treating classes of employees more or less favorable based on protected characteristic
- Retaliation

13

## Red Flags

- Treating similarly situated employees differently
- Failure to follow or enforce own policies
- “Favorites”
- Failure to act on complaints
- Negative action towards a party after a complaint is filed
- Comments about protected characteristics
- “I didn’t mean it that way”

14

## What to think about at each stage of employment

- Hiring
  - *Job Descriptions*
  - *Witness*
  - *Careful with questions*
- Employment
  - *Policies*
  - *Equal Enforcement*
- Termination
  - *Honesty*
  - *Witness*

15

And above all . . .

- DOCUMENT!
- DOCUMENT!
- DOCUMENT!
  - *If it is not written down, it may as well have not happened.*

16



## FLSA OVERVIEW AND UPDATE

- Federal law that requires:
  - *Payment of minimum wage*
  - *Payment for overtime when employee works in excess of forty hours per week*
    - In case of public employers, ability to use comp time in certain circumstances
    - Compensatory Time: Under certain prescribed conditions, employees of State or local government agencies may receive compensatory time off, at a rate of not less than one and one-half hours for each overtime hour worked, instead of cash overtime pay. Law enforcement, fire protection, and emergency response personnel and employees engaged in seasonal activities may accrue up to 480 hours of comp time; all other state and local government employees may accrue up to 240 hours.
    - No comp time for private employers

17

## Obligatory Minimum Wage

- Current federal rate is \$7.25
  - *State can impose higher*
  - *Wyoming's is only currently \$5.15, but federal applies in most circumstances*

18

## Potential Changes to FLSA

- 2014, President Obama proposed sweeping changes
- Primarily affecting FLSA “White Collar Exemption”
  - *Executive*
  - *Administrative*
  - *Professional*
    - No change in duties, but change in dollar amount
    - Changes were not implemented
      - *Federal Court Decision*
      - *Change in Administration*

19

## Trump Administration Proposed Changes

- Proposed Rulemaking
- Increase in salary test
  - *Current proposal would increase white collar exemption salary basis to \$35,308*
  - *No change in duties*
- Uncertainty with appointment of Scalia

20



QUESTIONS???