

MANAGING EMPLOYEES 101

Presented by:

Suzanne W. King

Pierce Atwood LLP

617.488.8159

sking@pierceatwood.com

September 21, 2023

Agenda

Part I:

10 Things Every Manager Should Know
About Employment Law

Part II:

Managing Employees within this Legal
Framework



10 Things Every Manager Should Know About Employment Law



Employment Law Covers Many Areas

Discrimination
Retaliation
Accommodation

Wage and Hour

Leave

Right to
Organize

1. Federal and state laws prohibit discrimination based on protected characteristics.



Characteristics Legally Protected From Discrimination

race, color ,
national origin

sex, pregnancy,
sexual
orientation,
gender identity,

age

religion,
creed

physical or
mental disability,
genetic
information

military service,
application for
military service

Proving Disparate Treatment

Method # 1: Direct Evidence

- Statements by the decision-maker, relating to the protected class, made close in time to the employment decision at issue, and relating to the employment decision at issue.
 - › “You’re too old to keep up; we have to let you go.”
 - › “This is why I don’t like hiring women.”
- Express classifications – *e.g.*, conditioning the receipt of benefits or burdens on a protected characteristic.
 - › Paid parental leave for women only.

Proving Disparate Treatment

Method # 2: Circumstantial Evidence

- Employee's "prima facie case":
 - › I am [insert protected characteristic]
 - › I was [insert adverse employment action]
 - › A causal connection between these things exists because ...
- Employer articulates legitimate, lawful, reason for adverse employment action
 - › Poor attendance, policy violation, position elimination, misconduct.
- Employee introduces evidence of "pretext" –*i.e.* articulated reason isn't the real reason.

Common Methods of Proving Pretext

Comparator
evidence

Implausibility of
employer's
articulated basis
for adverse action

Shifting rationale
for adverse action

Absence of
contemporaneous
documentation

Failure to
investigate

Failure to follow
policies (*e.g.*
progressive
discipline policy)

Other indicia of
unfairness

Stray Remarks

- Discriminatory comments made by non-decision-makers or by decision-makers, not related to the decision at issue.
- Not direct evidence but can be powerful circumstantial evidence useful in proving disparate treatment.
 - › Decision-maker refers to a female coworker as “too emotional.”
 - › Younger employee comments “OK, Boomer, I get it that you don’t know what Twitter is, but can you at least turn on this iPad.”
 - › “John’s out again. When will he run out of FMLA?!?”
 - › Supervisor says with an eye-roll, “I assume you aren’t interested in being put on this team – we have to work on Saturdays, and I know you love to go to church on Saturdays.”

Common Challenges in Responding to Discrimination Claim

- Inflated performance evaluations
- Absence of progressive discipline
 - › Supervisor comes to HR for advice when they've "had it"
- Failure to obtain and investigate the employee's side of the story
- Misapplication of employer's policy
- Absence of documentation or inconsistent documentation
- Stray remarks in emails from supervisor to HR

Rachel Returns

Rachel works in the finance department of a software company. When Rachel returned from a maternity leave, Joel, her manager who has 3 young children and understands how hard it is to balance work and family responsibilities, decided not to assign Rachel to a high-profile project because of the long hours it would require. Rachel was initially relieved but after a few months began to feel isolated and out of the loop because everyone else was working on the project. When she talked with Joel about it, he said, "Don't feel badly about this, I am just trying to help you."

Rachel decides to go to HR to discuss her concerns. Is there a problem here?

2. Harassment is one form of discrimination and is unlawful.



Sexual Harassment

Conduct of a
sexual nature



That is
unwelcome



Adverse Action

- Submission to conduct is necessary to obtain/keep your job;
- Submission or rejection adversely affects your job; or
- Conduct unreasonably interferes with your ability to do your job

Important Details

Does intention matter?

- “I didn’t mean to offend you”
- “I was only kidding”

How can you tell if the conduct is unwelcome?

- Often, you can’t tell
- Consider body language/participation
- Don’t forget about bystanders

How bad does the conduct have to be?

- Severe or pervasive
- Objectively and subjectively offensive
- But NY is changing this standard

Examples of Actions That May Create a Hostile Work Environment

Verbal or Written

- Requests for sexual favors
- Sexual comments or innuendos
- JOKES
- Sending/forwarding sexually explicit emails, text messages, or photos

Non-Verbal

- Leering, staring
- Sexual gestures
- Displaying sexually suggestive images

Physical

- Sexual advances
- Massaging a person's neck
- Hugging or kissing

Harassment – Things to Remember

- Harassers can be anyone, including customer / supervisor/ co-worker.
- Harassment that occurs entirely outside the workplace can nonetheless have effects in the workplace and must be addressed.
- While bullying (equal opportunity harassment) is not yet unlawful, employees do not want to feel disrespected at work even if the conduct is not unlawful.

Reporting Harassment

Many policies direct employees to report harassment if they see or experience it

- Managers/supervisors may receive complaints
- “Thank you for bringing this concern to our attention. We take employee complaints seriously. HR will follow up promptly.”

Manager/supervisor should always pass along the complaint to Human Resources

- Don't delay – investigations must be conducted promptly
- Don't conduct your own investigation

Investigations

Report

- Does NOT have to be “formal”
- Inform HR immediately
- Investigations to be conducted “promptly”

Investigate

- Interviews
 - Complainant, accused, witnesses
- Document review
 - Emails, policies, timesheets, etc.
- Maintain confidentiality
- Generally handled by HR or designee

Results

- Discipline if violation of policy
- Limited follow-up information provided to complainant

“Let Me Know if You Need Me to Do Anything”

Melanie is a new manager. She encourages her direct reports to bring any issues of concern to her. Anika recently told Melanie that Josh, the new IT person assigned to the help desk, has been texting her a dozen times a day to share cartoons or reels or news articles. He has also been asking her out a few times a week. She says no over and over again, but he seems to think it is a game and keeps it up. Anika is in a relationship and is not interested in Josh. She doesn't have time to respond to all of Josh's text messages but it seems like when she doesn't respond, he acts offended and is rude to her. She avoids IT so that she won't have to interact with Josh, but her computer is acting up and she really needs to get it fixed. Anika tells Melanie that she does not want to make a formal complaint and is not going to bring this to HR. Anika is so grateful that Melanie gave her a chance to vent, and asked her not to tell anyone. Melanie assured Anika that this would stay “between the two of them” and she ended the meeting by saying – very warmly – “let me know if you need me to do anything.”

- What do you think of Melanie's response to Anika?

Not Just About Sex Anymore

- Harassment based on any other protected characteristic is also prohibited:
 - › Sexual orientation
 - › Gender identity or expression
 - › Race
 - › Religion
 - › Disability
 - › National origin
 - › Age



Transgender Employees

- Emerging best practices:
 - › Employees permitted to use restroom of sex with which they identify.
 - Not “birth sex” and not single stall restroom if multi-stall restrooms are available.
 - › Respect pronouns.
 - Repeated and deliberate “mis-pronouncing” may give rise to hostile work environment.
 - › Accommodate religious views without discriminating on the basis of gender identity or expression.

What Do You Think?

Sally is a great employee who consistently receives excellent reviews. She is a Black manager and has recruited several BIPOC candidates for her team. Their co-workers affectionately refer to Sally's team as the "UN." Sally's team gets along very well and often sits together at conferences and social events. At the holiday party last year, one employee who is not on the team said loudly, "Don't you know it's rude to always sit together? You're supposed to mingle."

Is this harassment?

A New Name?

Carl, who has been a manager for 5 years, approaches another manager, Terry, and tells him that she identifies as a transgender woman and is beginning the process of transitioning at work. Carl would like to be called Kay, will be wearing clothing consistent with an identity as a woman, and prefers the use of feminine pronouns. As the weeks pass, Kay's co-workers become accustomed to her new name and appearance and, although they sometimes get her name or pronoun wrong, they are quick to correct themselves. Terry, however, pointedly says "Good morning, Carl" whenever Kay passes by, and makes comments like "nice dress, dude."

Is this harassment?

Return From Leave

Vivian is a research assistant at a lab. She just came back from parental leave. She has to take breaks throughout the workday to pump breast milk. When she takes breaks, her male coworkers say things like: “Hey Vivian! Can I get milk with my coffee? How about you do one, and I’ll do the other!” Vivian feels horrible and demeaned at work but is afraid to report this because she doesn’t want to make matters worse.

Is this harassment?

Too Close for Comfort

Keisha, an inventory specialist, has noticed that her new boss, Sarah, leans extremely close to her when they are going over the reports that she prepares. She touches her hand or shoulder frequently as they discuss work. Keisha tries to move away from her in these situations, but Sarah doesn't seem to get the message. Before Keisha gets around to complaining, Sarah brushes up against her back in the conference room before a meeting. Keisha is now getting really annoyed but still puts off doing anything about it. Later Sarah "traps" Keisha in her office after they finish discussing work by standing between her and the door of the small office. Keisha doesn't know what to do, so she moves past her to get out. As she does so, Sarah runs her hand over Keisha's stomach.

Is this harassment?

Ivan the Terrible

Ivan is the Director of Operations and thinks of himself as a people person. He is high-energy and speaks loudly and enthusiastically about everything and everyone. He likes to tease his direct reports and thinks his humor helps to establish camaraderie in his department. Tim, who reports to Ivan, is very private and tends to keep to himself. When Ivan starts to tease Tim publicly about his haircut and his shoes, Tim feels insulted and embarrassed in front of his peers.

Is this harassment?

3. Employers must affirmatively accommodate employees based on disability and religion.



Overview of the ADA

- Requires employers to make **reasonable accommodations** for the known physical or mental disabilities of otherwise **qualified** individuals unless the accommodation would cause an **undue hardship**
- To make reasonable accommodation, employer must engage in **interactive process**



Who is Protected by the ADA?

- Discrimination prohibited against any:
 - › Qualified individual with a disability
 - › Individual with record of disability; or
 - › Individual who is regarded as disabled
- If the employer is a covered employer, every employee who is disabled is covered!
 - › No length of service threshold
 - › No hours threshold
 - › All employees, all positions

Examples of Reasonable Accommodations

Making physical facilities accessible, acquisition/modification of equipment or devices

Job restructuring

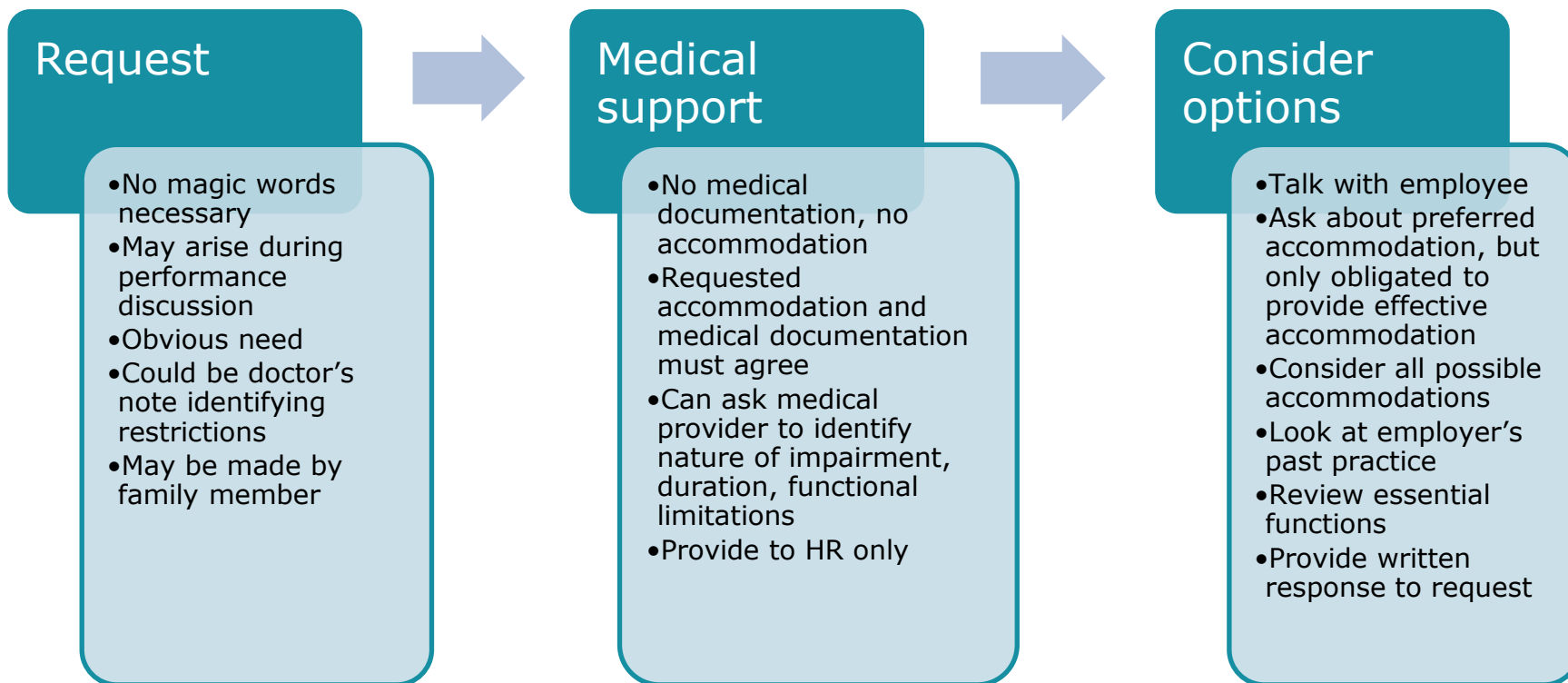
Reassignment to a vacant position

Part-time or modified work schedules

Leave of absence

Appropriate adjustment or modification of examinations, training materials or policies

Managing the Interactive Process



Manny in the Morning

The Assistant Sales Manager, Manny, is a solid performer who generally meets or exceeds expectations. The one frustration his manager, Jill, has with him is that he seems to be disengaged during sales meetings. The meetings are scheduled every Tuesday and Thursday afternoon and Jill wants Manny to take a more active role in the important discussions during the meetings. When Jill includes this feedback in Manny's annual performance evaluation, Manny confides that he was recently diagnosed with ADD and he has a hard time paying attention in the afternoons – he believes that mornings are a much better time for him to be actively engaged in a meeting. He says he wants to be successful and asks Jill to move the meetings to the mornings. Jill is miffed because she wants Manny to be a more active participant and does not want to disrupt the entire schedule just to accomplish that.

- Does Jill have to change the meeting schedule?

Tina the Traveler

Tina is the Controller of a large company. She has Multiple Sclerosis that is generally well controlled. Four times a year, Tina has to travel to a three-day finance meeting which is usually held at a conference center near one of the company's facilities. Tina's boss schedules the kickoff to the meeting at 2:00 p.m. on a Tuesday to enable everyone to work in the office on Monday to get the week started and then travel to the meeting in the morning on Tuesday. Traveling is exhausting for Tina and she asks to go to the conference center on Sunday so that she can recover from the travel before the meeting starts. That schedule results in two extra nights of hotel expenses for each meeting.

- Does the company have to provide this accommodation?

Accommodating Religion

- Employers also required to make reasonable accommodations for sincerely held religious beliefs
- Interactive process required
- Typical accommodations:
 - › Leave
 - › Change in schedule to permit religious observance
 - › Dress code/grooming
 - › Change in duties?
 - › Time to pray at work
 - › Vaccine exemption?

Accommodations: Responsibilities of Managers

- Review accommodation policy in Handbook
- Pay attention to anything that sounds like a request for an accommodation
- Contact HR if you think an employee needs or has requested an accommodation
- Honor all approved accommodations
- Address any impacts on co-workers
- Maintain confidentiality!

4. Federal and state laws prohibit retaliation based on certain protected activities.



Broad Sources of Protection

State laws

SOX

Title VII

ADEA

ADA

FMLA

False
Claims Act

OSHA

FLSA

ERISA

USERRA

More...

Proving Retaliation

- “Temporal proximity” – adverse employment action follows relatively closely on the heels of adverse employment action.
 - › Gives rise to an inference of causation.
 - › Inference weakens and evaporates with passage of time.



5. There are limits to at-will employment.

- Employers may terminate at-will employees “for any reason or no reason at all”
- But . . . may not fire for an unlawful reason
- Unlawful reasons include:
 - › Discrimination
 - › Retaliation
 - › Social media use protected by NLRA
 - › Medical issues



At-Will Employment

Important tips:

- Generally best to hire employees with an offer letter/at-will employment instead of a contract (except for C-suite)
 - › Don't promise a job for any period of time
 - › "We never fire anyone around here"
- Cannot require any particular notice for resignation, but can request it (2 weeks is typical)

6. Employee Handbooks and written policies should be followed.

- Not a contract
- But, in most situations should be strictly followed
- Examples:
 - › Time off approval process
 - › Pay practices (e.g. overtime approval, business expenses)
 - › Conduct rules

7. Nonexempt employees must be paid for all hours worked.



Classification Issues

Exempt (Executive, Professional, Administrative, Outside Sales, Computer)

- Salary basis (\$684/week; \$35,568/year)
- Primary duty meets the definition
- No overtime; and no reduction based on hours worked

Nonexempt (Everyone else!)

- Must be paid for all hours worked
- Minimum wage and OT for hours over 40 in a workweek

Hours Worked

- Nonexempt employees must be paid for all hours worked, including
 - › Hours recorded by employee and
 - › Unauthorized work that is performed with the knowledge and acquiescence of management



Meal Periods

- If unpaid, must be relieved of duty
- Know your state law



Overtime

- Review Handbook – does overtime have to be pre-authorized?
- Under wage and hour laws, if employee works overtime without authorization, must be paid, but employer may take disciplinary action for failure to follow policy
- If you know employee is working off the clock, take action

8. Federal law provides job protected leave.



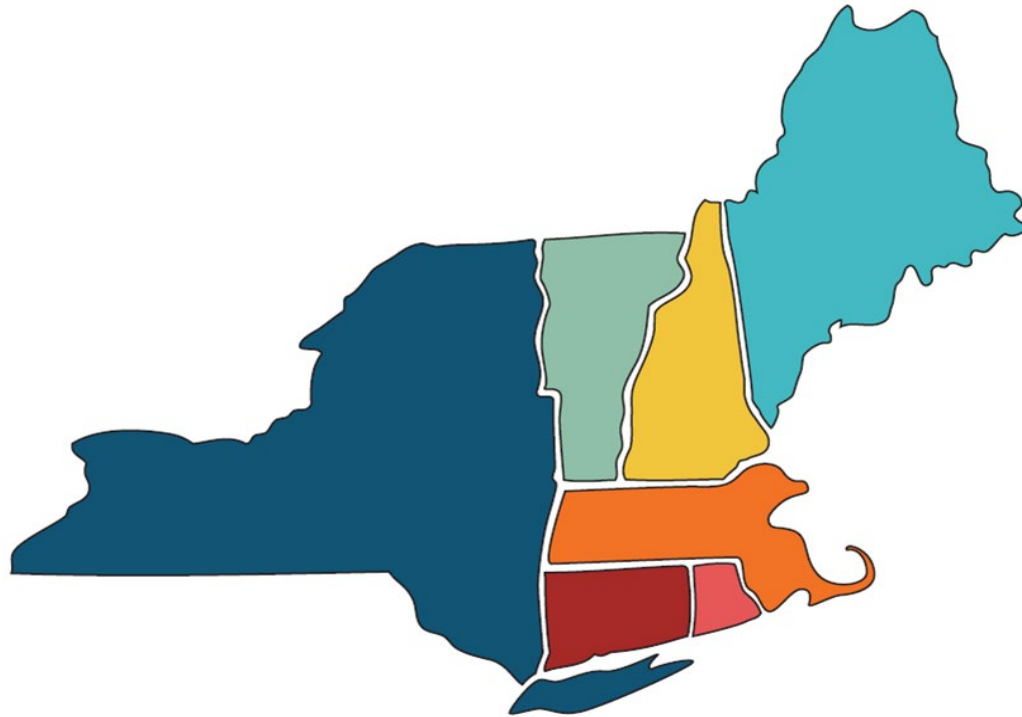
FMLA Basics

- Applies to covered employees of covered employers
 - › Employers with more than 50 employees
 - › Employees who have been employed for at least 12 months, have worked for 1250 hours in past year, and work within 75 miles of 50 employees
- May take up to 12 weeks of unpaid leave in rolling 12-month period
- For FMLA-covered reasons
- Must be returned to former job – or an equivalent one with the same pay and benefits

Important Details

- FMLA leave may be taken continuously, intermittently, or through a change in schedule.
 - But, intermittent leave is not required for healthy birth or adoption of child
- When medical need for intermittent leave is foreseeable, employee may be required to transfer temporarily into an alternative position with equivalent pay and benefits
- **FMLA is the floor, not the ceiling!**
- **FMLA leave and ADA leave do not count for attendance policy purposes**

9. State law also provides job-protected leave – but for different reasons.



Leave Laws: Important Reminders

Employees may be entitled to a lot of leave (especially in MA) and use of leave is increasing!

- This is ***not*** inconsistent with a strong work ethic

Planning is important!

- Consider cross-training, utility players, staffing company relationships

10. The National Labor Relations Act applies to non-union workplaces, too.



National Labor Relations Act Basics

- Employee (union and non-union) have the right to engage in “protected concerted activity”: the right to communicate with one another (even very disparagingly) about
 - › Wages;
 - › Hours; or
 - › Working conditions.
- To be “concerted,” conduct must be engaged in by:
 - › 2 or more employees;
 - › 1 employee authorized to act / speak on coworker’s behalf;
 - › 1 employee seeking to induce or prepare for group action; or
 - › 1 employee raising group concerns.

Part II

Next session:
September 28, 2023
2:00 – 4:00 p.m.



Presenters

Suzanne W. King

sking@pierceatwood.com

100 Summer Street
22nd Floor
Boston, MA 02110

One New Hampshire Avenue
Suite 350
Portsmouth, NH 03801

PH / 617.488.8159