

Avoiding Labor Disputes: Legal Update

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WHAT WE'LL COVER

- Immigration / Work Status
- Discrimination and Harassment
- Retaliation
- FMLA/ ADA/ PDA
- New E-discovery Rules
- Recent Supreme Court Decisions
- Best Practices

IMMIGRATION / WORK STATUS

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2006 LEGISLATION

- C.R.S. § 8-17.5-101 & 102: Ensures illegal aliens do not perform work on a public contract for services.
 - Requires participation in Basic Pilot Program
- C.R.S. § 8-2-122: Requires employers to fill out and maintain affirmation of legal work status form and to maintain copies of I-9 documents.

VERIFICATIONS / SAFE HARBORS

- I-9 Forms
 - Employers must maintain documentation.
- Basic Pilot Program: Dept. of Homeland Security
 - Keep printout.
- Social Security Number Verification
 - Do not take adverse action based on report.

ZAMORA

- Can company's good faith attempts to comply with immigration laws lead to a Title VII discrimination claim?
- The answer is: *Maybe.*

Zamora v. Elite Logistics, 478 F.3d 1160 (10th Cir. 2007).

SSA NO-MATCH LETTERS

- Failure to act may lead to finding of constructive knowledge.
- Within 14 days, check records for employer error, ask employee to confirm or resolve with SSA, correct if necessary, and document!
- Within 60 days, re-verify by completing I-9 again, and if still not resolved, terminate.

71 F.R. 34281; 8 CFR 274a

DISCRIMINATION AND HARASSMENT

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WHO IS PROTECTED?

FEDERAL LAW

(Title VI, ADEA, ADA, IRCA, USERRA)

*Race, Color, National Origin, Religion,
Sex, Gender, Pregnancy, 40 or older,
Citizenship, Work Status, Military,
Veteran Status*

FAMILY RESPONSIBILITIES OR “SEX PLUS”

- Title VII, Equal Pay Act, ADA, FMLA, PDA
- Stereotypes about caregivers.
- Avoid questions about child care.
- Disparate performance standards.
- Assumptions about taking work assignments, travel, networking.
- Changes following pregnancy or maternity leave.

COLORADO LAW ADDS CATEGORIES

- Marriage to a Co-Worker (not supervisor)
- Off-duty, off-premises legal activities*
- Reserve and guard members (paid leave)
- Victims of domestic violence*
- Sexual orientation*

LAWFUL OFF-DUTY ACTIVITY

- Exception for actual or apparent conflict of interest.
- Applies only to termination.
- New for 2007: makes award of attorneys' fees and costs available only to employees.
- Result should be increased claims.

C.R.S. § 24-34-402.5

VICTIMS OF DOMESTIC VIOLENCE

- 3 days leave per year.
- Must give reasonable notice unless imminent danger.
- Prohibits discrimination.
- Need policy.

C.R.S. 24-34-402.7 (2002)

NEW CATEGORIES

New in Colorado for 2007

SB 07 – 025, C.R.S. §§ 24-34-401, 402

– Sexual Orientation

A person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof.

– Religion

TRANSGENDER ISSUES

- Restroom Accommodation
- Locker Room Accommodation
- Name Changes
- Uniforms/Dress Codes
- Employee Education/Training

DRESS CODES

“Nothing in this section shall preclude an employer from requiring compliance with a reasonable dress code as long as the dress code is applied consistently.”

C.R.S. § 24-34-402(5)

- Earlier version would have required “reasonably consistent gender presentation” at work.

DEFENDING CLAIMS

- (1) Did the employer have **policies**?
- (2) Did the employer have **knowledge** of the conduct?
- (3) Did the employer **investigate**?
- (4) Did the employer **remedy** the situation?

POLICIES

- Prohibit discrimination or harassment based on *any* protected category in violation of law or policy.
- Identify specific examples of prohibited conduct.
- Penalty for violation is discipline up to and including discharge.
- Provide a separate complaint procedure for discrimination/harassment complaints.
- Assure no retaliation.

REPORT COMPLAINTS

- Train Managers/Supervisors to report all complaints of discrimination, harassment or retaliation.
- Even If:
 - *Employee requests confidentiality.*
 - *Employee asks you not to.*
 - *The complaint lacks merit or you question employee's motives.*
- Document the action.

CONDUCT A GOOD INVESTIGATION

- Take every complaint seriously.
- Need thorough, unbiased investigator.
- Speak to essential witnesses.
- Determine prior complaints involving same person.
- Be careful about confidentiality.
- Be prompt.

REMEDY THE SITUATION

- Take responsibility for making sure the conduct stops.
- Notify the complainant that something has been done or explain why not.

RETALIATION

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INCREASED RISK

- Increased number of claims:
 - 29.8% of all charges filed with EEOC in 2006.
- Difficult to defend.

ELEMENTS

- (1) Protected conduct.
- (2) Adverse action.
- (3) Causal connection between the protected conduct and the adverse action.

PROTECTED CONDUCT

- Complaint or participation in an investigation/lawsuit, or sought to enforce rights.
- Can be vague.
- Made in good faith (need not be valid claim) but must be reasonable.
- Examples: charge with EEOC; internal complaint; testimony; participation in investigation or refusal to cooperate.

ADVERSE ACTION

- Not limited to retaliatory acts that affect terms and conditions of employment.
- Any action that materially injures or harms an employee and could dissuade a reasonable worker from making or supporting a charge of discrimination.
- Context matters.
- Can include harm caused outside workplace.

BURLINGTON NORTHERN

- Only woman in forklift position made a harassment complaint.
- Later reassigned to a track laborer position & placed on suspension, without pay (although later reinstated with full back pay).
- Court held actions were retaliatory, even though no tangible, adverse employment action.

Burlington Northern & Santa Fe Rwy. Co. v. White, 126 S. Ct. 2405 (2006)

CAUSAL CONNECTION

- More likely if protected activity occurs immediately or shortly before adverse action.
- No other reasonable explanation for the adverse action.
- Lack of knowledge about employee's protected activity by decision-maker negates causal connection (but look out for cat's paw argument).

BEATING RETALIATION

- Prove a legitimate, non-retaliatory reason for adverse action.
- Document all poor performance and misconduct as it occurs.
- Apply performance standards and policies consistently and regularly.

FMLA / ADA / PDA

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FMLA / ADA / PDA

- Family/Medical Leave Act
- Americans with Disabilities Act (ADA)
- Pregnancy Discrimination Act (PDA)

FAMILY/MEDICAL LEAVE

- 3 Reasons:
 - (1) Serious medical condition (self)
 - (2) Serious medical condition (immediate family member)
 - (3) Birth or adoption of a child.

SERIOUS HEALTH CONDITION

- Inpatient care, including a period of incapacity, & any subsequent treatment related to.
- Period of incapacity of 3 or more consecutive days & subsequent treatment (2 or more times or continuing regimen)
- Period of incapacity due to pregnancy or prenatal care.

SERIOUS HEALTH CONDITION

- Period of incapacity for chronic condition.
- Permanent or long-term period of incapacity (Alzheimer's, stroke, terminal cancer).
- To receive multiple treatments (dialysis, chemotherapy, radiation)
- *NOT* short-term conditions (colds, flu, ear aches, headaches, regular dental problems)

ELIGIBILITY

- 50 or more employees at a worksite for 20 workweeks in the year.
- Employed by employer for 12 months (although not continuous).
- And worked for 1250 hours in preceding 12-month period.

BENEFITS

- 12 weeks of unpaid leave (can be intermittent) in one year (rolling or calendar).
- Job reinstatement: must return to same or similar position.
- Continuation of benefits.

MEDICAL CERTIFICATION

- Employee must give notice of leave as soon as practicable.
- Employers can require a certification from a medical provider, as long as notice is given within one or two days after employee gives notice.
- Require at least 15 days to submit.
- Notice must advise of failure to provide certification.
- Employer can still designate leave as FMLA, if gives written notice.

INTERMITTENT LEAVE

- Must be eligible only once.
- If employee calls in “sick,” treat absence as non-FMLA.
- Require a status report.
- Give provider a job description.
- Require employee to use paid time off.
- Schedule treatments to avoid undue disruption, if possible.

IDENTIFYING ABUSE

- Require complete certification (but no harassment)
- If question initial certification, get HIPAA-compliant release.
- Require recertification no more than every 30 days, but if certif. for intermittent or longer period, every year.
- Can request second opinion; if conflict, request third opinion.

ADA - REQUEST FOR AN ACCOMMODATION?

- Asking for a modification that could help him or her do the job?
- Because of a medical condition?
i.e. Special piece of equipment; leave of absence (longer than FMLA); job restructuring; modified schedule.

INDIVIDUAL WITH A DISABILITY

- (1) Potential medical condition that *could* impact ability to do the job.
- (2) Employer treats the employee as if he were disabled, even if he was not.
(Requires interactive process)
- (3) Record of a prior disability, such as OJI.

QUALIFIED?

Can the employee perform the essential functions with or without a reasonable accommodation?

- Job descriptions.
- What does employee actually do?

INTERACTIVE PROCESS

- If the employee is a qualified individual with a disability, the employer *must* participate in a good-faith dialog with the employee about what adjustments will allow the employee to do the job.
- Have a procedure for who responds to requests.

REASONABLE ACCOMMODATIONS

- Does not require creation of a new job.
- Does not allow excessive absenteeism.
- Does not require indefinite leave.
- Do not modify essential job functions.

HOW CAN I HELP?

- Do NOT ask about medical issues or personal problems.
- Help the employee do his/her job.
- Avoid “trigger” words like accommodation and disability.
- Do NOT disclose accommodations to coworkers, unless employee does.

MEDICAL INQUIRIES

- No pre-offer medical examinations.
- Post-offer examinations are okay as long as required for all similarly situated.
- Any medical exam must be job-related and consistent with business necessity.
- When request for accommodation is made, employer can request medical documentation and speak to the provider.

PREGNANCY

- Policies and procedures must be applied to pregnant employees in same manner as applied to other employees with similar needs and restrictions.

FOCUS ON JOB PERFORMANCE

- Managers should not handle FMLA/ADA requests.
- Employees have no greater protection against discipline for reasons unrelated to FMLA/ADA.
- Continue to enforce job performance problems and violations of policy.

E-DISCOVERY RULES

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FEDERAL RULES

- Investigate information management systems.
- When company has reasonable notice of potential litigation, it must preserve documents: litigation hold.
- Destruction/retention policies are safe harbors.

(December 2006)

EMAILS

- Must produce in original form (no more hard copies).
- Emails may or may not be public records. *RMN v. Arapahoe County Commissioners*, 121 P.3d 190 (Colo. 2005) (emails must be for use in performance of public functions or involve receipt & expenditure of public funds).
- Email is forever; it can prove you had notice.

RECENT SUPREME COURT DECISIONS

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GARCETTI v. CEBALLOS

- Claimed retaliation for writing memo in violation of 1st and 14th Amendments
- When public employees make statements in official duties, not speaking as citizens for 1st Amendment and not insulated from discipline by employer.

Garcetti v. Ceballos, 126 S.Ct. 1951 (2006)

LEDBETTER

- Title VII equal pay discrimination.
- Statute of limitations begins to run when discriminatory decision is made, not when employee first realizes that the bias occurred.

Ledbetter v. Goodyear Tire & Rubber, 127 S.Ct. 2162 (2007)

BEST PRACTICES



PERFORMANCE AND DISCIPLINE

- Clarify and document expectations.
- Employees deserve honest feedback.
- Discipline where necessary.
- Document performance issues, especially reoccurring ones.
- Give employee a chance to correct.
- Carefully study written personnel history before terminating an employee.

DOCUMENTATION

- If it is not written, it did not happen.
- Signed/dated.
- Legible.
- Accurate, specific, supported by facts, documents and witnesses.
- Expect what you write to be read by others.

DOCUMENTATION OUTLINE

- Detail expectations not met.
- Use specific examples, not labels or generalities.
- List prior counseling.
- Identify expectations going forward.
- Clarify consequences.

PROBLEM DOCUMENTATION

- Intentionally “papering” the file, particularly after the fact.
- Trumping up charges.
- Switching the reason for the decision mid-stream.
- Overzealous.
- Too focused on one incident.

PERCEIVED UNFAIRNESS

- Develop policies that can be followed.
- Be consistent in enforcing policies.
- Develop a procedure for making and responding to complaints.
- Give employee an opportunity to respond and listen.
- Be humane: no yelling, criticizing, publicizing, belittling.