

# **EMPLOYMENT LAW ISSUES YOU CAN SPOT FROM YOUR DESK**

RECOGNIZING EXPOSURE

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# TETRIS

Score:

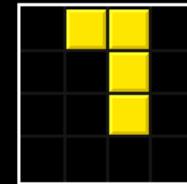
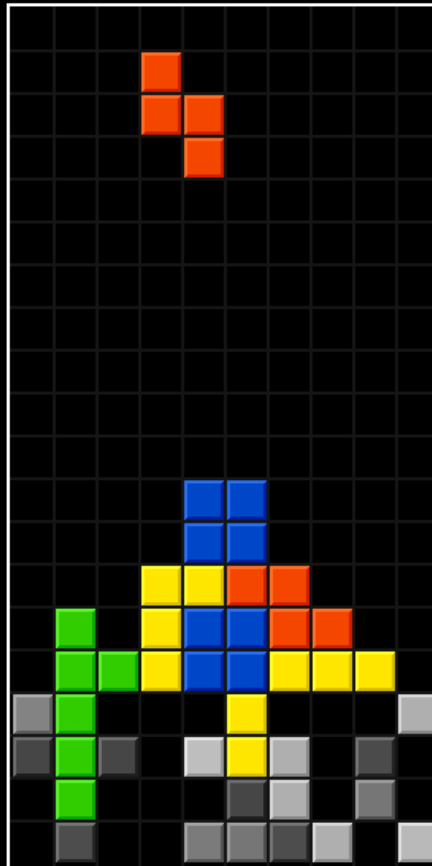
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# TOPICS

- I. Employment Law Compliance Strategy
- II. Employee Handbooks and Policies
- III. Professional Negligence
- IV. Employee Injuries, Illnesses & Disabilities
- V. Form I-9
- VI. Workplace Marijuana

# PART I: STRATEGY

Before we get into the substantive topics, we should spend a moment talking about why selecting an employment law strategy is a Big Deal™

# PART II: EMPLOYEE HANDBOOKS

- It describes your usual course of action.
- The limitations of the doctrine of “at-will” employment.
  - Jury decides which facts to believe
  - Discrimination and Retaliation
- Employers usually win discrimination lawsuits but often lose retaliation cases.

## **PART II: HANDBOOKS VS. CONTRACTS**

- A contract is a promise for the breach of which the law gives a remedy or in some way recognizes as a duty.
- An employee handbook is a description of the Company's expectations of employees and its policies and procedures for managing issues related to employment.

# PART II: AVOIDING HB CONTRACTS

- Disclaimer: “This employee handbook does not give rise to contractual obligations.”
- Language is important.
  - The Company “may”
  - Employees “shall”
- Don’t put “agreements” into your handbook.

# PART II: THE NLRB & THE NLRA

- Employees shall have the right to engage in concerted activities for the purpose of mutual aid or protection.
- It shall be an unfair labor practice (“ULP”) for an employer to interfere with, restrain, or coerce employees in the exercise of [their right to concerted protected activity].
- Penalties



# PART II: THE NLRB & HANDBOOKS

- “Overbroad policy language”
- Policies of Particular Interest
  - At-will employment statements
  - Employee use of social media
  - Policies on maintaining the confidentiality of company investigations

# PART II: NLRB & AT-WILL EMPLOYMENT

- “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.”
- Administrative law judge (ALJ) reasoning
  - An employee could be confused about his or her federal right to unionize and negotiate away from employment at will.
- Remedy: union organization education

## PART II: AT-WILL LANGUAGE

- Employment At Will Policy Language:  
<http://www.nlr.gov/news-outreach/news-story/advice-memos-find-will-clauses-two-employee-handbooks-are-lawful>

# PART II: NLRB & SOCIAL MEDIA

- Social Media Policy:  
<http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd>
- “In this case, we concluded that the Employer’s entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer’s social media policy that was initially alleged to be unlawful.”  
(emphasis added)

# PART II: NLRB & CONFIDENTIALITY IN COMPANY INVESTIGATIONS

## ○ *Banner Health*

- A general concern about protecting company investigations is not enough to overcome employees' interest in concerted protected speech activities.

## ○ Factors to consider:

- Witness protection
- Danger of evidence being destroyed
- Testimony in danger of being fabricated

# PART II: NLRB & CONFIDENTIALITY IN COMPANY INVESTIGATIONS II

- For additional guidance on confidentiality policy construction, see the NLRB's memorandum here:
  - <http://mynlrb.nlr.gov/link/document.aspx/09031d458113d0cf>

# A NOTE ABOUT SEXUAL HARASSMENT

- Vicarious liability for supervisor harassment since 1998
  - *Burlington Industries v. Ellerth*
  - *Faragher v. City of Boca Raton*
- Old EEOC Definition of “Supervisor”
  - Take or recommend tangible employee actions; direct daily work activities
- *Vance v. Ball State Univ.* (2013) definition:
  - Must have authority to take tangible employment action.

# PART II: PAYROLL DEDUCTIONS

- Okla. Admin. Code 380:30-1-7
- Payroll Deduction Agreements
  - Voluntary
  - Written
  - Ineffective until signed (no prior deductions!)



## PART II: RESTITUTIONARY DEDUCTIONS

- To compensate the employer for breakage or loss of merchandise, inventory shortage, or cash shortage caused by the employee; where the employee was the sole party responsible for the cash or items damaged or lost, at the time the damage or loss occurred.

# PART II: PAYROLL DEDUCTIONS & SALARIED EMPLOYEES

- Generally speaking, only “exempt” employees may be paid on a salary basis.
  - Salary pay is a base amount of pay that does not fluctuate between pay periods.
- Someone always wants to make deductions for:
  - A partial day for a non-FMLA reason
  - Broken equipment (short drawer, etc.)

## PART II: SAVINGS STATUTE

- There's a “safe harbor” rule for salary deductions!
- Written Safe Harbor Policy :
  - Prohibits improper deductions
  - Includes a complaint mechanism
  - Prompt repayment
  - Good faith commitment to comply after making an improper deduction

## PART II: FLSA RETALIATION

- "it shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint . . . ."

# PART III: PROFESSIONAL NEGLIGENCE



## Mike Ashworth

- ✓ Trial Lawyer
- ✓ Creative Problem Solver
- ✓ Teacher
- ✓ Community Servant

## **PART III: PROFESSIONAL NEGLIGENCE**

- Mike's not a Power Point guy.
- Despite this infirmity, he will give it a try
- Who picked out these colors anyway?
- Light bulbs.....

# NEGLIGENCE DEFINED

- A duty is owed
- A duty is breached
- As a result of the breach, the Claimant has been damaged
- Damages can be special, or general
- If the breach is intentional, willful or wanton, punitive damages may be at issue

# PROFESSIONAL NEGLIGENCE

- 12 O.S. Section 19 (Tort Reform)
- ANY action for professional negligence
- Petition must be accompanied by an affidavit that a “qualified expert” has been consulted
- A written report must be prepared opining professional negligence
- Report must state claim is meritorious



# WHAT IS PROFESSIONAL NEGLIGENCE?

- The statute does not define what it is
- Report must discuss acts or omissions of the Defendant
- Breach will be determined by the governing and applicable standard of care or accepted practices (GAAP)
- Expert testimony will be required

# PENN SQUARE BANK- 1982

- Small, regional bank in OKC specializing in high-risk energy loans
- Sold shares in the loans to other banks
- PS charged a fee to divide funds among investor banks according to their “share” or participation
- Over \$2 billion worth of investments originated

# PROFESSIONAL NEGLIGENCE?

- By the 1970's, Feds knew PS was in trouble and was overextended
- Arthur Young & Company (now Ernst & Young) issued a qualified opinion
- PS fired them and hired Peat, Marwick
- Peat, Marwick issued an unqualified opinion (clean bill of health)
- Three (3) months later, PS fails

# THE PLOT THICKENS

- Directors at PS getting sweetheart loans and not asking questions
- Peat, Marwick (now KPMG) had some partners receiving loans
- Peat, Marwick invested in a project sponsored by a major PS borrower
- \$207 million paid to insured account holders
- Over \$163 million in losses to non-insured account holders

# **(SEMGROUP) V. PRICE WATERHOUSE**

- CJ 2010-04042, Tulsa County
- Set for jury trial August 11, 2014
- Case alleges malpractice & punitive damages
- Expected to last 3-4 weeks
- SemGroup one of nation's largest bankruptcies...filed in July 2008
- Plaintiff is the Bankruptcy Trustee approved by the Court

# BACKGROUND

- PwC one of the largest accounting firms in the world
- SemGroup formed locally in 2000
- Mid-stream oil company, purchased from producers, stored it, then sold to refiners
- From 2000-2008 SemGroup grew rapidly
- PwC reported financial statements free of significant errors and gave clean audits

# THE CLAIMS

- PwC was an outside auditor employed by SemGroup
- In July 2008, SemGroup collapsed after receiving an unqualified opinion in March 2008
- When SemGroup filed for bankruptcy, PwC withdrew the March 2008 opinion saying it was no longer reliable

# THE DEFENSES

- SemGroup prepared the financial statements which PwC audited
- These statements showed SemGroup had massive liabilities from its derivatives trading ('05= 203 mil....., '07= 1.8 bil
- PwC audits did not opine SemGroup was in good financial condition
- Trustee blaming PwC for mistakes SemGroup made



# THE BUTLER DID IT....

- Per Judge Posner...(Fehribach v. Ernst & Young)
- The auditor's responsibility is to make sure the numbers are accurate
- You do not need an auditor to tell you the market is collapsing
- Auditors are not supposed to have business insight
- Auditors are “counters”

# PART IV: EMPLOYEE INJURIES, ILLNESSES & DISABILITIES

- Two Statutes
  - GINA
  - ADA
- GINA essentials
  - Don't ask for genetic information (GI)
  - Don't consider GI in employment matters.

# PART IV: GINA

- What's genetic information?
- *EEOC v. Fabricut, Inc.*
  - The facts (according to EEOC)
- Result
- Knox requested family medical history
- Good policies up front are cheaper than legal education obtained by lawsuit.

# PART IV: GINA SAFE HARBOR

- The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. `Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.
  - 29 C.F.R. 1635.8(b)(1)(i)(B)

# PART IV: AMERICANS WITH DISABILITIES ACT

- Who is within the scope of the Act?
- Who's "qualified?"
  - Possesses legitimate knowledge, skills, education or other requirements for position
  - Capacity to perform essential functions (with or without accommodation)

# PART IV: “DISABILITY” UNDER THE ADA

- A “disability” is a physical or mental impairment that substantially limits one or more major life activity.
- OR:
  - ...a person with a record of such impairment...
  - ...OR a person regarded as having such impairment.

# PART IV: ADA ACCOMMODATIONS

- An accommodation must be “reasonable.”
  - Which means it must not be an “undue burden.”
  - Which means it can’t be too hard on the business...
- Courts will consider a variety of factors, but it will basically weigh the burden of the accommodation against the resources of the company.

# PART IV: HOW TO ACCOMMODATE?

- Assuming you have a qualified individual with a disability, enter into the “interactive process.”
  - Capacity to perform essential functions
  - Hurdles Faced
  - Types of accommodations
- Job Accommodation Network ([askjan.org](http://askjan.org))



# PART IV: WHEN TO ENTER THE INTERACTIVE PROCESS?

- The wrong way:
  - Do nothing until the employee fills out an accommodation request form with HR.
  - Do nothing until the employee uses the word “accommodation.”
- *Brady v. Walmart* (2nd Circuit)
  - Burden on Employer
- *EEOC v. Ambercrombie & Fitch* (10th Cir.)
  - Burden on Employee

# PART IV: LEAVE AS AN ACCOMMODATION

- Usually requested after exhausting FMLA leave.
  - Unlike FMLA leave, the ensuing ADA leave is not job-protected.
  - But, even without statutory job protection, termination while on ADA leave may look like disability discrimination or retaliation.
- FMLA provides for 12 weeks of leave. ADA provides ... ??
  - *Murphy v. Samson Resources Co.* (10th Cir.)

# PART V: FORM I-9

- What is Form I-9?
- Decouple I-9 from employee file
- Retention Policy
  - 3 years from date of hire; or,
  - 1 year from date of termination;
  - whichever is longer.
- <http://www.uscis.gov/i-9>
  - M-274 Handbook for employers

# PART V: I-9 AUDITING

- The challenge: this stuff is boring.
- The problem: errors are expensive
  - *Ketchikan Drywall v. ICE (9<sup>th</sup> Cir.)*
- Get it right as soon as you can.
  - Double check the initial document.
  - Routinely audit forms on file.

# PART V: FAMOUS QUOTATION FROM ICE



ICE is set to increase the number of companies it will audit and systematically impose fines on violators. Violations could also lead to criminal charges. You are going to see audits regularly and on a larger scale. You will see the resuscitation of...civil fines.

-John Morton

Director of ICE (2009)

# PART VI: MARIJUANA @WORK

- Pot legalization is expanding broadly.
- What can you do about impaired employees on the job?
  - The laws differ substantially by state. Subject to those laws, employers can:
    - Have and enforce zero-tolerance policies
    - Conduct reasonable suspicion and random drug testing
    - Prohibit possession, use, and impairment while on the clock.

# PART VI: MORE MARIJUANA RIGHTS

- More rights employers retain:
  - Registered users may be disciplined for positive drug tests that puts the employer in violation of federal law or jeopardizes federal contracts or funding.
  - Your health insurance is not required to pay for pot.
  - You can prohibit non-employees from using legally prescribed pot on the premises.

# PART VI: POT PROBLEMS

- Federal contractors: Current policies are OK
- Everyone else with operations in pot-friendly states:
  - Ensure substance abuse policies comply with state protections.
  - Check with counsel about “lawful activity” or “lawful product” statutes covering off-duty pot smoking
    - 40 O.S. § 500: no discrimination against off-duty tobacco use.
  - Avoid disciplining registered medical users solely for failing a drug test



# DONE!

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