

Recent Developments Affecting the Employment Relationship: Hiring, Managing and Terminating Employees in 2025

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Focus of Our Session

- The basics of discrimination and retaliation
- We'll focus on nuances of common anti-discrimination and anti-retaliation laws
- We'll walk through the arc of the employment relationship, but the legal issues we'll discuss could arise at any point in the arc.
- Our methodology will be to present the issues through Case Studies.



Relevant Federal Statutes

- Title VII of the Civil Rights Act of 1964 (“Title VII”) – prohibits employment discrimination on the basis of race, color, religion, sex, and national origin
- Age Discrimination in Employment Act (“ADEA”) – prohibits employment discrimination on the basis of age (40+)
- Americans with Disabilities Act (“ADA”) – prohibits employment discrimination on the basis of disability
- Genetic Information Nondiscrimination Act (“GINA”) – prohibits discrimination based on genetic information
- Pregnancy Discrimination Act (“PDA”) – prohibits employment discrimination based on pregnancy, childbirth and related conditions

New York State Statutes

- New York State Human Rights Law (“NYHRL”) and New York City Human Rights Law (“NYCHRL”) - prohibits employment discrimination on the basis of any protected category
- Protected categories include, but are not limited to:
 - Age (18+)
 - Race, including traits historically associated with race
 - Religion/Creed
 - Color
 - National origin
 - Sex
 - Sexual orientation, gender identity or expression
 - Disability and pregnancy
 - Genetic predisposition to certain diseases or carrier status
 - Military and veteran status
 - Marital and familial status
 - Domestic violence victim status
 - Criminal conviction record

Discrimination & Retaliation Standards

- To establish a *prima facie* case of discrimination, the plaintiff must show:
 - 1) They are a member of a protected class;
 - 2) They were qualified to hold the position;
 - 3) They suffered an adverse employment action; and
 - 4) The adverse action occurred under circumstances giving rise to an inference of discrimination.

- To establish a *prima facie* case of retaliation, the plaintiff must show that:
 - 1) They engaged in “protected activity”;
 - 2) Their employer was aware that they participated in such activity;
 - 3) They suffered an adverse employment action based upon their protected activity; and
 - 4) There is a causal connection between the protected activity and the adverse action.

Protected Activity

- All federal and state statutes contain retaliation protections.
 - Any complaints of “protected category” harassment/discrimination
 - Any complaints of retaliation for having made a harassment/discrimination complaint
- Other examples of protected activities:
 - Complaint about workplace safety (OSHA)
 - Complaint about illegal conduct (Labor Law 740)
 - Union support or activity (NLRA)
 - Filing for workers compensation
 - Requesting a reasonable accommodation (ADA, not NYHRL)
 - Using job-protected leave (FMLA, NYPFL, NYPSL)

HIRING PRACTICES



Case Study #1: This or That Applicant?

Applicant A and Applicant B both do not meet the “minimum 3 years relevant experience” requirement. The Hiring Manager states that they want to bring in Applicant A for an interview anyway.

- **What if:** The Hiring Manager says that they think that Applicant A’s superior education makes up for the lack of experience.
- **What if:** Applicant A’s name suggests that they are not a racial/ethnic minority. Applicant B’s name suggests that they are a racial/ethnic minority.

Are there any concerns with interviewing A and not B?

Case Study #1: Let's change the facts

- The Hiring Manager interviews both Applicant A and B.
- The Hiring Manager informs you that, even though Applicant A would be a perfect fit for the position, he feels it is important to hire Applicant B for reasons of diversity.

Are there any concerns with this rationale for the hiring decision?

Discrimination in 2025

- Any unequal treatment of people as between people of different protected characteristics invites the “why” question and an allegation of discriminatory treatment
 - Doesn’t mean that there is a violation, but it means you need to be prepared to explain why the protected characteristic was not a factor
- January 21, 2025. “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”. The Executive Order directs federal agencies to “combat illegal private sector DEI preferences, mandates, policies, programs and activities”
 - EEOC Acting Commissioner issued statements that “rooting out unlawful DEI-motivated race and sex discrimination” will be an enforcement priority
 - Discrimination against minority persons remains a priority of many agencies and the courts

Case Study #2: “I’d like the job, but . . .”

An applicant, Harper, applies for an evening shift position. The Hiring Manager brings to Harper’s attention the hours of the shift. Harper states that he will need to be home by dark on Fridays and is unable to work on Saturdays for religious reasons.

Can the applicant be denied the position?

Religious Accommodation: the new legal standard

- The previous standard under Title VII for religious accommodation was that the employer did not need to bear more than a “de minimis” burden.
- *Groff v. DeJoy* (U.S. Supreme Court 2023). To establish “undue hardship” employer must show that “burden of granting an accommodation would result in substantial increased costs in relation to the conduct of its particular business.”
- Fact-intensive analysis:
 - Proof of the consideration of alternatives is key.
 - Need to demonstrate deliberation about operational alternatives.
 - “Substantial increased cost”

Criminal History and NYS Clean Slate Act

- The Clean Slate Act is in effect, as of November 2024, but it will take time for the courts to implement the sealing of criminal convictions eligible for sealing
- What will be eligible for sealing?
 - Misdemeanors: **3 years**
 - Driving While Ability Impaired by Alcohol (DWAI) traffic infraction: **3 years**
 - Felonies: **8 years**
 - Measured from release (or sentencing if no incarceration)
 - If still on probation, parole or post-release supervision, no sealing until complete
 - If convicted again within the waiting period, clock resets for all unsealed crimes
 - If convicted after sealing, previously sealed records are *not* unsealed
- Not all criminal convictions are eligible for sealing (including sex offenses within the meaning of the Sex Offender Registration Act)

Case Study #3: The Applicant with a Past

Reginald applies for a Customer Service Representative position. Reginald's background check reveals that he was convicted of misdemeanor assault five (5) years ago.

What if Reginald didn't disclose this on his application?

Now assume that the position is a Cashier position. Reginald's background check reveals that he was convicted of petit larceny five (5) years ago?

What if the Company hired another employee for a Cashier position with who also had a theft conviction?

Corrections Law Article 23-A

- Factors to consider when an applicant has a criminal conviction:
 - Public policy
 - Specific job duties and responsibilities
 - Bearing on applicant's fitness to perform duties
 - Seriousness of conviction history
 - Time elapsed
 - Age at time of offense
 - Evidence of rehabilitation
 - Interest of employer in protecting property, safety and welfare of individuals and the general public

*Note: There is a presumption of rehabilitation if candidate has certificate of relief from disabilities or certificate of good conduct

Case Study #4: The Things We Learn Online

- Bob, the HR Director for the XYZ Corp., interviews Steve, a candidate for an open position
- Steve's resume made him a borderline candidate and Steve did not perform well in the interview
- Nonetheless, after the interview, Bob Googles Steve's name and discovers Steve's public Facebook page
- The Facebook page reveals Steve is 55, gay, Jewish, and immigrated from Poland
- Bob also sees that Steve posts often his support for President Donald Trump

Case Study #4 Cont.

- The next candidate interviewed for the position, Sally, has a much stronger educational background and work experience
- She is under 40, U.S. born, heterosexual, and there is no indication of her political leanings
- Sally interviews very well and Bob decides to offer her the job
- Steve files a failure to hire claim alleging discrimination based on his age, national origin, sexual orientation and violation of his First Amendment rights

Where did we go wrong?

What could have been done differently?

Best Practices for Social Media in Hiring

- Develop a social media in hiring policy
- Address when search will occur – ideally later in the process
 - Pros – avoids tainting otherwise clear-cut decisions
 - Cons – focuses the applicant on the reason for the decision
- Identify information you will not look at or consider and what will be reported to those involved in hiring
- Have non-decision maker conduct search and report only relevant, nonprotected information to decision maker
- Instruct individual conducting search not to dig into “impermissible” information

Case Study #5: The Serial Litigant Applicant

- Immediately prior to giving a job offer to an applicant, human resources learns that the applicant sued three of his last four employers for discrimination/retaliation.

Must the offer still be given?

Retaliation

The acts that may be considered retaliatory are broad: any act that would tend to “dissuade a reasonable person from engaging in protected activity.

FAQ from the EEOC’s website:

Q: Can an employer refuse to hire me because I filed an EEOC job discrimination complaint against another company?

*A: **No.** When you file an EEOC job discrimination complaint or otherwise participate in an EEOC proceeding, you are protected against retaliation by any covered employer, even if the complaint involved a different company.*

Case Study #6: I've got a bad feeling about this

- The Company conducts a search for a Vice President of Marketing. The search team selects Tori based on her education, experience and performance during the interview. Prior to accepting the job offer:

- Tori asks for a 25% increase in salary

Can the offer be withdrawn?

- Tori says that she is aware that the Company pays its male Vice President of Sales more than it is offering her

Can the offer be withdrawn?

- Tori discloses that she will be having surgery around the time of her scheduled start date and will need to work 100% remotely for the first several months

Can the offer be withdrawn or delayed?

PERFORMANCE MANAGEMENT



Case Study #7: They said WHAT?!

- Angela, Carol and Steve were part of an underperforming team.
- The original decision was to fire all three. At the last moment, the decision was made to place Carol and Steve on PIPs. Angela was fired.
- After she was fired, Angela posted a negative review about working at the company on Glassdoor. She also reposted it on Facebook. The post:

If you like working at a company with clueless supervisors, terrible pay and even worse benefits, you'll love working at this company!

- Carol “liked” Angela’s Facebook comment. 👍
- Steve “liked” the comment and posted this reply:

You forgot to mention that they rip off their customers with junk products!!

***The CEO wants Carol and Steve fired because “after all, they are on PIPs!”
Concerns?***

Social Media & “Protected Activity”

The NLRB’s website on Social Media:

Using social media can be a form of protected concerted activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not "concerted activity": what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management. Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy.

EMPLOYMENT SEPARATION



Case Study #8: The Season for Giving

- Two supervisors, Jerome and Naomi, have decided that a laborer, Michael, is just not cutting it, and they need to separate his employment. But because it is the holiday season, they decide to wait until after New Year's to inform him.
- Jerome and Naomi schedule a meeting with Michael for 4:00 p.m. on January 2nd.
- But, before the meeting takes place, Michael informs Naomi that he needs to take FLMA leave.

Can the termination still take place?

What could they have done differently?

Discrimination/Retaliation for Protected Leave

- An employee cannot be discriminated against *because* they have taken (or intend to take) job-protected leave
 - FMLA, NYS Paid Family, NYS Sick Leave, etc.
- This is not a superior right to remain in employment.
 - FMLA Regulations: “An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period.” 29 CFR 825.216
- It’s a question of fact. It’s a question of proof.

Case Study #9: RIF or Retaliation?

It's been a slow year, and Tech Corp. has determined it needs to reduce some staff positions by 5%. One affected employee filed a charge with the EEOC 6 months ago which is still pending.

Must that employee be immune from the RIF?

Reducing Liability in Group Terminations

Avoiding liability in group terminations requires significant planning.

- The selection criteria to be used
- The process to be followed by individual decision-makers in determining selections
- Results of selection process
 - Adverse impact on protected groups (e.g., statistical analysis)
 - Evaluating selection results to ensure no bias or other improper motive influenced the results

Case Study #10: Little Lies, Big Consequences

- Melody has been employed for many years at the company.
- Her performance has been poor for some time.
- However, Melody is well-known and well-liked by everyone, and no supervisor has been willing to issue her discipline or a PIP.
- In an upcoming reorganization, Timothy includes Melody's position for elimination. He figures that it is kinder and gentler to separate with her this way.
- Melody files an EEOC/NYSDHR claim for age discrimination.

What is the potential consequence in the discrimination case?

The Problem of “Pretext”

- “Pretext” refers to a false, lawful reason provided by the employer that masks a true, unlawful motivation for an employment action
- All of the following have been found by courts to be some evidence of “pretext” for an unlawful motive:
 - Shifting reasons for the employer’s termination decision
 - Failing to follow an applicable policy prior to termination, including progressive discipline
 - Failing to investigate the employee’s concerns or allegations
 - Proceeding to immediately terminate an employee without investigation or fair opportunity for the employee to answer allegations

Questions?



Thank You

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