

**Triaging Common Employment Law Problems:
Spotting Issues, Giving Advice, And Knowing When To Call for Help**

Learning objective: Participants in this session will learn to trouble shoot common employment law scenarios, including an ability to spot issues and to determine what additional information and support may be needed.

Scenario 1: A business client's CEO calls and says: "I want to terminate an employee and thought I should check with a lawyer first."

A. First step: Ask questions. Be curious and follow up.

- a. Background
 - i. How long has the employee worked for the employer?
 - ii. What are the employee's duties?
- b. What has led to the employer's desire to terminate the employee?
 - i. What is the evidence about what has happened?
- c. Is there an employment contract or collective bargaining agreement that requires "cause" or particular procedures before termination can occur?
- d. What do the employee handbook and other employer policies say about the employee's conduct, at will employment, and (progressive) discipline?
- e. Has the employee had any formal performance reviews? What were the results of these reviews?
- f. Has the employee been disciplined before the current events?
- g. Has any discipline been documented?
- h. Have employees with similar performance issues been disciplined (looking for whether the subject employee is being treated differently/more harshly than others and, if so, why)?
- i. Is the supervisor who is terminating the employee the same person who hired the employee?
- j. Is the employee in a protected class?
- k. Has the employee raised recent concerns about suspected legal violations or safety issues or declined to do something requested of them for safety or legal reasons?

Scenario 1 Facts Learned in Interview: By asking these questions, you learn that the employee at issue is a 41 year old Asian female who has worked for the employer for two years. Her job duties are to stock items in a warehouse and to pick items from the warehouse shelves to fill customer orders. She was hired by the same supervisor who manages her today. It took her awhile to come up to speed on the job, but after she got up to speed she did well for about a year. She did have one write up in her first year of employment for yelling and swearing at another employee about who was working in which area of the warehouse. She had a one year formal review and received satisfactory marks. She received a cost of living increase.

In the last six months, she has had a number of performance problems, including yelling at other employees and being late to work without giving notice or a reason. Yesterday, she yelled and swore at her manager when he asked her to hurry to complete a time-sensitive customer order after she was late to work again and without notice.

The employee is not in a union. She received an offer letter that said her employment is at will. The employee handbook says that employment is at will and disclaims that the handbook creates a contract. It says that only the company president can change the at will employment relationship and that must be done in a written agreement.

A handbook policy requires employees to communicate and act professionally. It prohibits yelling, swearing, and threatening talk and behavior. The attendance policy in the handbook requires employees to arrive on time for a scheduled shift and to work the entire shift. Employees must give at least three weeks' notice to a supervisor before a planned absence and must notify the supervisor three hours before the shift if the employee will be late or absent for an unexpected reason (like illness). If it is not reasonably possible to give three hours' notice, the employee must notify the supervisor as soon as reasonably possible. The employee signed an acknowledgement that she had read and would follow the employer's policies in the handbook.

The handbook provides for progressive discipline (verbal coaching, write up, suspension, termination) but gives the employer discretion to administer any discipline that the employer deems necessary for the particular circumstances, including immediate termination.

Over the last few months, the supervisor has talked with the employee about being on time, giving notice when she will be late, and treating co-workers respectfully. No further write ups have been done since the write up last year.

Last year, the employer terminated two employees (at different times) for being late without notice but only after they had each received a couple of write ups and a "last chance agreement".

B. Documents to Request from Employer

- a. Any contract governing the employee's employment
- b. Employee handbook/relevant policies
- c. Employee's personnel file
- d. Any other documentation about the issue leading to the termination (may include: time clock or compensation records, emails/texts/communications with or about the employee)

Scenario 1 Document Review: After reviewing the documents, you find that the employer correctly described the policies and records. You also notice that a handbook policy prohibits disrespect and insubordination to supervisors.

C. Analysis: Common Potential Claims and How They Are Analyzed

- a. **Wrongful termination:** Generally, employment is at will in the U.S., so an employer or employee may terminate the employment relationship at any time and for any or no reason. States recognize various exceptions including:
 1. Public policy – a termination that violates the state’s public policy. Examples include termination of an employee for refusing to do something that is illegal; termination of an employee for applying for workers’ compensation benefits; terminating an employee for reporting a fellow employee to law enforcement for suspected criminal activity and for cooperating in the investigation.
 2. Implied contract – something the employer says orally, in an employment contract, or in the handbook creates an enforceable expectation that employment can only be terminated for just cause or that specific steps must be taken before termination can occur. For example, an employee handbook says that employment is at will, but it also says that discipline will be progressive. The handbook does not disclaim being a contract. Progressive discipline must be followed.
 3. Covenant of good faith – implies a covenant of good faith in the employment relationship so that employment cannot be terminated without just cause.

Scenario 1 analysis: For purposes of this hypothetical employer and employee are in a jurisdiction that recognizes wrongful termination in violation of public policy if an employer terminates an employee for refusing to do something that would be illegal for the employee to do. It also recognizes wrongful termination in violation of an implied contract. It does not require just cause for termination through an implied covenant of good faith. In this scenario, the employee has not been asked to do anything illegal, and the employer has not created anything other than an at will employment relationship. The employer has reserved to itself the right to jump to immediate termination if the circumstances warrant termination in the employer’s judgment. But, if the employer terminates now, the employee may argue that the employer did not really believe that immediate termination was necessary, because in the case of other employees who had tardy/no notice issues, the employer did not move to immediate termination.

b. Discrimination

i. Examples

1. Title VII

“It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex [including pregnancy, sexual orientation, and gender identity], or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.”

42 U.S.C. 2000e-2(a)

2. Age Discrimination in Employment Act (ADEA)

“It shall be unlawful for an employer- (1) to . . . discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . .” 29 U.S.C. § 623

3. State and local human rights statutes and ordinances

Scenario 1 analysis: If there is no direct evidence of any discrimination (e.g., a decision maker saying, “you’re too old to work in the warehouse), then a court would consider a discrimination claim in three steps.

Step 1: Is the employee part of a protected class, did she suffer termination, and is there evidence of causal relationship?

This employee is in at least two protected classes based on her age (over 40 under the ADEA) and Asian. If the employer terminates the employee, that criteria will be satisfied. Causation would consider any evidence of bias by the employer against Asian and older employees, the timing relationship between the termination and any such evidence, and whether the employees who picked up the employee’s duties after her termination are non-Asian and younger.

Step 2: Can the employer articulate a legitimate, non-discriminatory reason for the termination?

The employer here would show evidence of its legitimate issues with the employee's attendance, unprofessional conduct, and insubordination.

Step 3: Is there evidence that the employer's stated reason is pretext for discrimination?

The employee would present evidence that the employer was not really terminating the employee for being late without notice and for disrespect to the supervisor and other co-workers, because the employer did not move directly to termination when other employees had similar performance problems.

- c. **Issue spotting in other scenarios:** While this scenario does not raise the concern, other potential claims by employees include **defamation** (employer said something factual, negative, and false about the employee); **promissory estoppel** (the employer induced employee to move or take some other significant action to take a job offered in reliance on a false representation about the job); **National Labor Relations Act, Section 7** and equivalent state laws (employee discussed terms and conditions of employment with other employees); **retaliation** (terminating an employee because the employee engaged in legally protected conduct like reporting a suspected legal violation or safety issue. E.g., Title VII - Employers may not discharge or discriminate against employees for "oppos[ing] any practice made an unlawful *employment* practice by this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added); ADEA - Employers may not discriminate against or discharge a person "because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter." 29 U.S.C. § 623(d); OSHA and federal and state whistleblower laws).
- e. If the organization is a religious organization, what impact does that have?
- Title VII exemption: "This subchapter shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a).
 - Constitutional ministerial exemption. The Establishment Clause and Free Exercise Clause bar claims by or on behalf of ministers against their employers for employment discrimination. See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).
 - Equivalent state laws
 - Defenses to defamation claims

Scenario 1 analysis: This employer is not a religious organization.

Scenario 2: The CEO of a business client calls and says: “I have an employee who says she is ill/injured and can’t come to work for an indefinite time.”

A. First step: Ask questions. Be curious and follow up.

- a. How long has the employee worked for the employer?
 - i. Did an injury happen at work?
- b. What are the employee’s job duties?
- c. What do you know about the illness/injury?
- d. How many employees do you have?
- e. How many employees do you have within 75 miles of this location?

Scenario 2 interview: The business has 100 employees in Everytown, South State. The employee has worked for the business for a year and a half in a clerical role – making copies, delivering documents and mail, organizing files. The employee called his supervisor this morning and said that he can’t come to work for an indefinite time, because he has diabetes that has flared up.

B. Documents to Request from Employer

- a. Any policies regarding leaves the employer provides, including paid time off, sick leave, notice of absence, and other leave policies
- b. The employer’s Family Medical Leave Act (“FMLA”) policy
- c. First report of injury
- d. Any notes from health care providers
- e. Any communications describing the issue
- f. Any historical medical records about this medical issue

C. What information can the employer request from the employee and his/her health care providers?

Under the Americans with Disabilities Act (“ADA”), a covered employer “shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A).

You may ask about the employee’s ability to perform the essential functions of the employee’s job.

D. Is the employee entitled to paid or unpaid leave under the FMLA, ADA, other applicable laws and/or employer policy? Consider:

- a. Does the employer’s paid time off or sick leave policy cover this?

- b. FMLA – employees are entitled to up to 12 weeks of unpaid leave in a year for a serious health condition that makes the employee unable to do the essential functions of his job if the employee has worked for the employer for 12 months, has worked at least 1,250 hours over the last year, and the employer has 50 or more employees within 75 miles of where the employee works.
- c. ADA – unpaid leave may be required as a reasonable accommodation.
- d. State and local laws/ordinances, e.g., paid sick leave mandated by law or sick and safe time ordinances requiring the accrual and payment of sick leave

E. Are there accommodations that would allow the employee to do his or her job?

- a. Find out more information from the employee or a health care provider about what limitations on the essential functions of his job the employee has as a result of the flare up.
- b. Discuss with the employee things that might help: schedule changes, intermittent leave, less time on the employee's feet, extra breaks for snacks and insulin readings?
- c. Would the accommodations the employee requests be burdensome?
 - i. How expensive would they be?
 - ii. How would they impact employees, customers, and others?
- d. The employer does not have to give the employee the accommodation requested and does not have to remove essential functions of the job. But employers must make reasonable accommodations that do not cause an undue burden to the employer if such accommodations will permit the employee to do the job.

Questions: Please email me at sebushnell@arthurchapman.com