Public Sector & Employment Law

Handling an Employee Investigation
Firefighter Cancer & Police Pyschological Claims
LGBTQ+ As a Protected Class
National Paid Leave Trends in the United States

MVP Law Seminars • 2021

www.mvplaw.com

MVP LAW MUNICIPAL LAW SEMINAR

TABLE OF CONTENTS

HANDLING AN EMPLOYEE INVESTIGATION

Employers regularly receive complaints of workplace misconduct by employees, including:

- Discrimination
- Harassment (sexual and otherwise)[1]
- Health and safety violations
- Workplace violence or threats
- Workplace drug and alcohol use
- Violations of employer rules
- Theft or fraud
- Other criminal activity

When are misconduct investigations necessary?

- When an employee complains about conduct of another employee
- When an employee files a grievance
- When an employee files a charge with the EEOC

Why are investigations necessary?

- Instances of discrimination, harassment, safety violations and accidents, and misconduct are required to be investigated by law.
- However, the safest approach is to investigate any reported or suspected claim, whether formally submitted or otherwise.

Why are misconduct investigations important?

They help determine:

- Whether the allegations of misconduct have merit
- Who was involved in the misconduct
- Disciplinary or other measures that should be taken to prevent recurrence and limit employer liability
- Preventative steps to avoid future similar incidents

The information revealed may later be used as evidence and testimony during the due process hearing, or subsequently at trial.

[1] Title VII requires an employer to investigate charges of workplace harassment. See *Wilson v. Tulsa Junior College*, 164 F.3d 534, 542-43 (10th Cir. 1998).

Besides fulfilling legal obligations, the investigation of complaints provides practical benefits as well.

- Affirmative defense to charge of harassment or hostile environment
- Limit liability for discrimination or quid pro quo sexual harassment
- Safe harbor defense for improper deductions from an employee's pay
- Limit claims relating to negligent retention
- Create a less litigious workforce
- Provides a good source of information about the complaint

Also:

- Improves employee morale
- Increases productivity (when coupled with appropriate disciplinary action)
- Reduces turnover rates
- Ends inappropriate conduct on a company-wide level

Who should conduct the investigation?

- An internal or external investigator?
  - Reasons for using an external investigator may include:
    - History between complainant and HR Manager
    - Complaint involves HR Manager
    - Complaint involves department head or elected official
    - Timing/Size of investigation
- If the decision is made to conduct the investigation internally, need to determine who will conduct the investigation
  - HR or employee relations personnel
  - In-house counsel
  - Other (like a risk management team if investigating an employee injury)
- The investigator must be experienced, well trained, impartial, open-minded, and possess insight, compassion, and perseverance
- Consider whether law enforcement should be involved
  - whether unlawful activity requires police involvement
  - legal obligations to report the conduct
  - impact of police involvement
  - media and public opinion

Planning the investigation – things to consider

- When should the investigation begin?
- Should the employee be suspended or transferred pending completion of the investigation?

- Should the complainant be offered paid leave or other accommodation pending completion of the investigation?
- Should supervisory or reporting relationship be modified pending completion of the investigation?
- How should evidence be handled?
- Who should be interviewed?
- What should be the sequence of the interviews?
- Which materials should be reviewed before interviews begin?

The investigation file should be complete, accurate, and thorough. It should include:

- A chronology of events
- List of people involved or contacted
- List of documents reviewed
- All communications with those involved
- Witness statements
- Documents that establish or refute the issue investigated
- Physical evidence
- Investigator's report
- Documentation of results or remedial action taken
- Summary of the allegation and responses
- Complete record showing the employer's prompt and appropriate action
- Do not include conclusions about credibility or the merits of the complaint
- File should only include objective, fact-finding information

After the investigation

- Assess the evidence gathered for completeness.
- Summarize the findings in a written report.
- Take action based upon factual findings, which are consistent with employer policies and procedures.

Weingarten Rights[2]

- Federal law gives private sector employees the right to join unions, have them negotiate with employers for wages and working conditions, and take group action concerning their employment, including the right to strike.
- As a private sector employer, you may not fire, discipline or lower the salaries of employees for joining a union or exercising their collective bargaining rights.

[2] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

- A union-represented employee who reasonably believes that an investigatory interview with his employer may lead to discipline has the rights to:
    - Ask for representation by a union agent
    - Ask for representation by a fellow employee
    - Forego representation and proceed with the interview without a union representative or co-worker present
- The statutory rights of employees to get assistance from a union representative are called Weingarten rights and exercising them is considered protected concerted activity under the NLRA. This right does not extend to non-union employees.
- The employer does not have to offer representation unless it is requested.

Potential Risks

- Privacy – unlawful searches
- Defamation – avoid making defamatory statements about any participant, including the accuser and accused, during the investigation that could expose the employer to liability. Avoid conclusory and unsupportable statements.
- Retaliation – avoid retaliatory conduct toward the employee who made the accusations or an employee who participates in the investigation.
- False imprisonment – employees should not be questioned against their will or confined to a room by their employer and prevented from leaving.
- Tort claims – poorly conducted investigations may result in other tort claims, such as intentional or negligent infliction of emotional distress and assault and battery.
- Prohibited practice complaints – Weingarten violations

Criminal Activity

- Many private sector employers are able to simply terminate an “at-will” employee who is charged with a crime without first investigating the alleged misconduct (especially if it happened off the clock)
    - Regardless, it is still good practice to gather relevant facts and establish a good-faith basis for discharge, in case the need arises to defend against a later charge of discrimination filed by the former employee.
    - The employment agreement or collective bargaining agreement may spell out the rights of the private-sector employee who faces discipline.

MISCONDUCT AND HARASSMENT INVESTIGATION PROTOCOL

Advisories and Admonitions

1. Explain purpose of interview (to gather facts; to obtain complete and accurate information; to seek the truth).

2. Explain that no conclusions have been reached yet, as the investigator wants all relevant facts before reaching a conclusion.

3. Truth: The investigator wants the truth. The witness must tell the truth, even if he or she thinks that it is information the investigator will find problematic.

4. Explain that there will be no retaliation for coming forward, participating in the investigation, or telling the truth.

5. Confidentiality: Ask witness to keep matters discussed confidential and to discuss the issues only with those that need to know (i.e. law enforcement). Do not discourage complainant or victim from seeking legal counsel. If appropriate, give the witness the name of a specific individual he or she can talk to about their concerns/questions.

6. Do not promise absolute confidentiality. Advise that the investigator will treat the matter as confidential, to the extent possible, but that information will need to be communicated to those who need to know. (Do not promise any statement is "off the record.") Both the content and the source of the information may need to be communicated to management, witnesses, the victim, and the accused in order to conduct the investigation, take appropriate action and to give the complainant and accused sufficient information to allow them to understand the results of the investigation.

7. Ask the complainant and alleged harasser if they have any reason to believe the investigator cannot be fair and impartial. If so, resolve the concern or refer the matter to administration.

8. At the end of the interview, explain that if new information becomes available or if the witness remembers addition information, he or she should let you know immediately.

9. Give each party a copy of the relevant company policy with acknowledgment language.

10 CONSIDERATIONS FOR CONDUCTING AN EMPLOYMENT MISCONDUCT INVESTIGATION

1. There is no such thing as an informal complaint of misconduct.

2. Listen intently to the Complainant and then ask the Complainant to provide a written statement. Absent extraordinary circumstances, the written statement should be provided immediately following the verbal statement.

3. When interviewing the Complainant (who can be the person who was directly affected by the misconduct or another who witnessed the conduct), identify who committed the misconduct; ask about the specific nature of the conduct, when the conduct occurred, where it occurred, what happened right before it occurred, what happened right after it occurred; determine who witnessed the conduct; inquire about the identity of other persons who may have knowledge about the Complainant's allegations and how they obtained such knowledge; and ask the Complainant about his/her knowledge of similar complaints against the accused. Ask the direct victim what he/she would like to see happen. Do not promise to do it but inquire.

4. Notify the appropriate parties (your direct supervisor, human resources, and other administrators).

5. Discuss the allegations with the accused and advise the accused that the company's policy prohibits retaliatory conduct against the person making the complaint or their witnesses. Explain that retaliation may include gathering or encouraging others to express disappointment in Complainant or to give the Complainant the "cold shoulder." Tell the students and/or employees that the allegation is serious. This is no joking matter.

6. Advise the Complainant and the accused of the policies prohibiting the specific type of misconduct alleged. The advisement should be both verbal and in writing. This may be achieved by simply providing both the Complainant and the accused with a copy of the relevant policies and what they mean.

7. Make the investigation a priority. Interview all potential witnesses individually and do not permit them to congregate prior to the interviews. Mass interviews or conditions allowing for consultation among witnesses prior to their interviews may suggest "group think" and may weaken the credibility of the witnesses and the investigation. Require witnesses to provide written statements. Tell witnesses to keep their comments and the nature of your inquiry confidential.

8. If at any point in your investigation, you have reason to believe that violence has been threatened, contact law enforcement immediately.

9. Limit the number of persons with whom information gathered during the investigation is shared. Distribute investigation-related information only on a need-to-know basis.

10. Make a decision AND follow up later to determine whether the decision was appropriate and/or effective.

MANAGER'S PREDISMISSAL CHECKLIST

(To Be Referenced Prior to Termination of Employee for Misconduct)

		YES	NO
1.	Do I have ALL the facts recorded accurately?	☐	☐
2.	Have I documented all facts and actions?	☐	☐
3.	Have I assembled the records?	☐	☐

Length of service_____.
Performance records. (Keep examples of unsatisfactory work product.)
Attendance record.
Performance review records, reflecting candid appraisals.
Discipline and warning records.
Special Action records.

4.	Is my decision based on facts, not inference, suspicion or emotion?	☐	☐
5.	Has the employee fully understood the job requirements and behavior standards?	☐	☐
6.	Have I given the employee specific information where he/she has fallen short in job performance or behavior standards?	☐	☐
7.	Has the employee received at least one written warning of possible dismissal?	☐	☐

(Where serious misconduct is involved, immediate suspension without warning may be justified. Examples: drinking or drunkenness on duty, dishonesty, theft, immoral or indecent conduct, fighting, insubordination, violation of secrecy of communication rules, sabotage.)

8.	Am I SURE the employee understood the warning?	☐	☐
9.	Has the employee had sufficient time and opportunity to correct the condition that led me to take this action?	☐	☐
10.	Has the employee had a full hearing?	☐	☐
11.	Have I considered the employee's point of view?	☐	☐
12.	Have personal difficulties or special, mitigating circumstances been considered?	☐	☐

		YES	NO
13.	Where the situation warrants, has consideration been given to transferring or demoting this employee?	☐	☐
14.	Am I sure that discharge will come as no surprise to the employee?	☐	☐
15.	Is dismissal in this case consistent with past practice?	☐	☐
16.	Would our company be able to justify treatment of this employee if he/she claims discrimination or unjust dismissal?	☐	☐
17.	Would a jury conclude that our treatment of this employee was fair?	☐	☐
18.	Has this decision been discussed with and approved by appropriate levels of higher management?	☐	☐
19.	Am I prepared to handle this dismissal tactfully and objectively?	☐	☐
20.	Have I scheduled the dismissal interview at a time that will eliminate or minimize the employee's personal contact with other employees before he/she leaves the premises?	☐	☐
21.	Have I made arrangements to notify the employee in private?	☐	☐
22.	Have I arranged for the final paycheck and am I prepared to explain the amount?	☐	☐
23.	Do I know what group life and health insurance the employee has and am I able to explain what will happen to it after dismissal?	☐	☐
24.	Is the HR Department prepared to conduct a careful exit interview?	☐	☐
25.	Have I decided what statements will be made to other employees concerning this person's discharge?	☐	☐

DOCUMENTING EMPLOYEE COUNSELING

One of the most common errors made by managers is the failure to document incidents of misconduct. When pressed for an explanation, managers cite "a lack of time" as the primary reason. What these managers fail to recognize is that the time saved on the front-end by not documenting an employee's poor performance, virtually guarantees a time investment five times greater on the back end. The enhanced time investment is usually spent in disciplinary and counseling sessions necessary to sustain management's recommendation to discipline the employee. The unfortunate part is that much of the wasted time likely could have been avoided with a very simple technique, the four-sentence-two-paragraph-letter "42P." And the beauty of it is that in most cases, one paragraph will be sufficient.

Employment lawsuits are often won or lost on documentation. Proper documentation helps clarify employment expectations and reduce surprises to the employee. It only takes four sentences:

Sentence 1: Include the date and briefly describe the activity and the circumstances.

Sentence 2: Summarize the position stated by management. ("We informed you …")

Sentence 3: Record the response made by the employee. ("You stated that …")

Sentence 4: Invite the employee to contact you if he/she disagrees with your summary of events or has questions. ("If I have misstated any aspect of our discussion, please contact me at ph: ( ) _____ or provide a written copy of your suggested corrections.)

You can always add more detail in a second paragraph, and in some cases you should do so. Use your best judgment. This form will cover the basics and get you started. Again, each situation must be judged on its own merits, so consider the contents of your letter carefully. If unsure, seek the advice of a colleague or legal counsel.

SAMPLE LETTER

Dear Employee:

This letter summarizes our meeting of January 1, 2018 in which we discussed your recent unauthorized absences from work. In the meeting, we informed you that you have had more than thirty unauthorized absences this year, which according to company policy warrants a three-day suspension without pay. You responded that you were aware of the policy, and would try not to have any future unauthorized absences. If I have misstated any aspect of our conversation, please contact me immediately with corrections.

Sincerely, Human Resources

Notes Pages

Notes Pages

Notes Pages

FIREFIGHTER CANCER AND POLICE PSYCHOLOGICAL CLAIMS

I. Firefighters: Occupational Disease

A. National

Generally, an occupational disease arises in and out of the course of employment. It is not a disease of ordinary life to which the general public is exposed outside of the employment. A claimant must establish a direct causal connection between the conditions under which work is performed and the occupational disease.

B. Missouri

Under Mo. Rev. Stat. § 287.067, an occupational disease is defined as an identifiable disease arising with or without human fault out of and in the course of employment. This differs from an ordinary disease of life in that it is not something the general public is exposed to outside of the employment. Additionally, occupational exposure must have been the prevailing factor in causing both the resulting medical condition and disability.

Firefighter Presumption

Per Mo. Rev. Stat. § 287.067.6, disease of the lungs or respiratory tract, hypotension, hypertension, or disease of the heart or cardiovascular system, including carcinoma, may be recognized as occupational diseases defined as a disability due to smoke, gases, carcinogens, or inadequate oxygen. This regulation applies to paid firefighters of a paid fire department and paid police officers of a police department certified under chapter 590 if a direct causal relationship is established. Additionally, this regulation applies to psychological stress of the above mentioned employees, so long as a causal connection is also established.

Cheney v. City of Gladstone refused to apply the above standard because claimant's disease did not fit squarely into the statutory definition. Instead, the court held that there only needs to be a probability that the working conditions caused the disease in question. In *Cheney*, claimant's decedent, a firefighter, was diagnosed with follicular non-Hodgkin's lymphoma (NHL). (*Cheney v. City of Gladstone*, 576 S.W. 308 (Mo. App. W.D. 2019)). The workers' compensation claim alleged that the lymphoma was an occupational disease caused by exposure to carcinogenic smoke and fumes.

The first question before the court was whether lymphoma was an occupational disease for firefighters. The court held that NHL was in fact an occupational disease because (1) there was an exposure to the disease which was greater than or different from that which affects the public generally, and (2) claimant established that there was a recognizable link between the disease and job by producing evidence of a *probability* that working conditions caused the occupational disease. An occupational

disease exists when a peculiar risk or hazard is inherent in the work conditions and a disease follows as a natural result.

The second issue before the court was whether the occupational exposure was the prevailing factor causing NHL. Here, the Court of Appeals deferred to the Commission's finding that the occupational exposure to carcinogenic smokes, fumes, and particulates as a firefighter was the prevailing factor in the development of his NHL. The court cited *Vickers v. Mo. Dep't of Pub. Safety* and noted that there need only be a *probability* that the working conditions caused the disease, and the working conditions do not have to be the sole cause of the disease. (*Vickers v. Mo. Dep't of Pub. Safety*, 283 S.W.3d 287, 292 (Mo. App. W.D. 2009).

Overview

To address whether a disease is an occupational disease, it first must be considered whether there was an exposure to the disease which was greater than or different from that which affects the public generally. Additionally, consider whether there was a recognizable link between the disease and some distinctive feature of the employee's job which is common to all jobs of that sort. The final inquiry questions whether the working conditions were the prevailing factor in the development of the occupational disease.

II. Mesothelioma

A. Missouri

According to Mo. Rev. Stat. § 287.200.4, mesothelioma benefits are owed at the rate of 300% of Missouri's AWW for 212 weeks, *if* the employer has elected to accept mesothelioma liability. If the employer did not elect to this coverage, then they are subject to civil liability and the exclusive remedy provision of the statute does not apply. Note, however, that the employer or its insurance will still be liable for medical bills and past temporary total disability (TTD) (if applicable) in addition to these benefits. Also note that the "triggering occurrence", or the event that commences liability, is the filing of a claim. Liability attaches for enhanced benefits at the time the claim is filed. *(See Accident Fund Insurance Co. v. Casey*, 2018 WL 2311331 (Mo. banc 2018)).

Under 287.200.1, PTD Benefits must still also be provided for compensable death claims involving mesothelioma. Benefits are owed at the rate of 300% of the state average weekly wage (AWW) for 212 weeks *if* the employer has elected to accept mesothelioma liability. If the employer has not elected to the coverage, they are subject to civil liability and the exclusive remedy provision of the statute does not apply. Also note that the employer or insurance company will still be liable for past medical bills and past TTD, if applicable, in addition to the benefits. Per Mo. Rev. Stat. § 287.240 Death Benefits, benefits include reasonable expenses of the burial of the deceased employee (not to exceed $5,000) and lifetime benefits for total dependents (spouse/children). These are calculated by using 2/3 of the employee's AWW during

the year immediately preceding the injury that resulted in death. While current case law is not yet clear on the matter, generally "the year immediately preceding the injury" is the last year that the employee was exposed to the hazard.

In *Hegger v. Valley Farm Dairy Co.*, the Missouri Supreme Court held that an employer that did not exist before January 1, 2014, when changes to the benefit remedy section were made, could not elect to accept mesothelioma liability. Note that if an employer does not elect to insure their enhanced mesothelioma liability, they do not fall within the exclusivity provision of the Missouri Workers' Compensation Act and can therefore be sued civilly.

B. Kansas

Under Kan. Stat. Ann. § 44-5a01, an occupational disease is one that arises out of and in the course of employment resulting from the nature of employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. The statute goes on to add that "nature of employment" should be construed to mean that there is a "particular and peculiar hazard" of contracting a disease that sets the employment apart from other occupations, creating a hazard of contracting the disease in general.

Krebaum v. City of Hutchinson was a Board decision concerning asthma. Claimant, a firefighter, alleged that he had contracted occupational asthma from repeated exposure to smoke. (*Krebaum v. City of Hutchinson*, No. 1,068,194, 2015 WL 4716626 (Kan. WCAB July 7, 2015)). William Barkman, M.D., who is certified in internal medicine and pulmonary disease, diagnosed claimant with work-related asthma, however the permanency of the disease would prove difficult to measure. The Administrative Law Judge awarded 9% functional impairment to the body as a whole and 46.5% work disability after finding that claimant suffered injury out of and in the course of his employment, which included occupational exposure to smoke and chemicals. This exposure was the prevailing factor in causing his injury, need for medical treatment, impairment, and disability.

III. Police Officers: Psychological Claims

A. Missouri

Mo. Rev. Stat. § 287.120 specifically addresses psychological claims. It states that mental injury resulting from work-related stress does not arise out of and in the course of employment, unless it is demonstrated that the stress is work-related and that it was extraordinary and unusual. The amount of work stress is measured by objective standards and actual events. Additionally, a mental injury is not considered to arise out of and in the course of employment if it resulted from disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action by the employer taken in good faith.

In *Braswell v. Missouri State Highway Patrol*, claimant, a Missouri Highway State Patrol trooper, witnessed other officers use a taser on a restrained individual. (*Braswell v. Missouri State Highway Patrol*, Injury No. 04-085262, 2007 WL 870098 (Mo. LIRC March 21, 2007)). However, when the trigger was squeezed, claimant mistook the taser for a service revolver. After the incident, claimant began experiencing emotional problems and received medical care for her mental condition. Using language from *E.W. v. Kansas City Missouri School Dist.*, the Commission concluded that § 287.120.8 does not apply in this instance because the case resulted from a traumatic event, which is distinguishable from the non-compensable non-traumatic mental/mental claim. (*E.W. v. Kansas City Missouri School Dist.*, 89 S.W.3d 527 (Mo. App. 2002)). The above statute only applies to claims of mental injury resulting from work-related stress. Taking this into account, the Commission reversed the ALJ's decision and held that the event was in fact compensable under 287.120.1.

In *Jones v. Washington University*, the Missouri Court of Appeals similarly held that § 287.120.8 was not applicable because the nurse's claim stemmed from a traumatic incident, one which included the physical contact or impact of a patient grabbing claimant's breast, rather than from work-related stress. (Jones v. Washington University, 199 S.W.3d 793, 796 (Mo. Ct. App 2006)).

Prior to the prevailing factor requirement, the Missouri Court of Appeals in *George v. City of Saint Louis* affirmed that a firefighter's PTSD was an occupational disease because it flowed as a natural consequence of his employment. (*George v. City of St. Louis*, 162 S.W.3d 26 (Mo. Ct. App. 2005)). The firefighter did not need to show that the job stresses were extraordinary and unusual as compared objectively with other firefighters of equal rank. The court in *George* held that claimant's performance of his customary duties as a firefighter was a substantial factor in causing his PTSD and exacerbating his depression.

B. Kansas

There is no statutory authority regarding psychological claims under Kansas law, thus we turn to Kansas Common Law. In *Gleason v. Samaritan Home*, the court established that in order to maintain a compensable claim for traumatic neurosis, the traumatic neurosis must have been brought on specifically by the injury. The Kansas Workers' Compensation Appeals Board issued a decision in *Heyen v. City of Wichita*. *(Heyen v. City of Wichita*, No. Docket No. 1,064,079, 2013 WL 2455722, at *2 (Kan. WCAB May 29, 2013)). In *Heyen*, claimant, a police officer, pursued a vehicle out of which a passenger fired at her from ten feet away. One of the bullets shattered claimant's passenger window. While claimant did not suffer physical injuries, she did begin to suffer from PTSD. The Board affirmed the denial of psychological treatment because claimant's PTSD was not linked to any physical injury. A Board member also noted that claimant's social worker did not provide an option stating that the PTSD is directly traceable to any physical injury and did not state that the accident was the prevailing factor causing claimant's PTSD.

In *Ritter v. Decatur Health Systems*, a CNA injured her lower back when she slipped and fell while showering a wheelchair-bound patient. Claimant began to suffer from back pain which prevented her from engaging in activities she previously enjoyed. She also was diagnosed with major depressive disorder and attempted suicide. The Board affirmed the ALJ's holding that claimant suffered a compensable psychological injury that was directly traceable to her work-related injury.

Notes Pages

Notes Pages

Notes Pages

LGBTQ+ AS A PROTECTED CLASS

Workplace discrimination is especially harmful to the LGBTQ+ community and presents a substantial barrier to career advancement. LGBTQ+ people face threats of discrimination and harassment that are so severe that many are forced to hide their true identity in the workplace. According to the General Social Survey conducted by the University of Chicago, eighteen percent of lesbian, gay, and bisexual (LGB) respondents and thirty percent of transgender respondents report being fired, denied a promotion, or not hired for a job because of their sexual orientation or gender identity, respectively. Most recently, during the COVID-19 pandemic in 2020, LGBTQ+ people were thirty-six percent more likely to have been laid off or had their hours reduced than the rest of the population. (*Pride at Work: Workplace Discrimination* 2021). Additionally, thirty-five percent of LGB respondents report having been harassed at work themselves and 58% of LGB respondents report having heard derogatory comments about sexual orientation at work.

Other notable employee protection acts include the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, the Americans with Disabilities Act of 1990, and the Genetic Information Nondiscrimination Act of 2008. Each of these acts offers discrimination protection against various classes of employees, changing the workplace forever.

I. Title VII Implications and Enforcement

The American workplace was changed forever when President Lyndon B. Johnson signed the Civil Rights Act of 1964 into law. Under the Civil Rights Act, Title VII was introduced to prohibit employment discrimination based on race, sex, color, and national origin. (*EEOC Title VII of the Civil Rights Act of 1964*). The Act applies to private employers with more than 15 employees, labor unions, and employment agencies. Title VII deems it unlawful to fail or refuse to hire or to otherwise discriminate against anyone because of the aforementioned protected categories. Additionally, the regulation prohibits the limitation, segregation, or classification of employees or applicants for employment that would deprive them of employment opportunities or adversely affect their employment based on the protected classes. These prohibitions force employers to re-evaluate their hiring criteria and instead focus on a potential employee's skills and credentials rather than one's identity.

Workplace discrimination consists of actions including, but is not limited to, making comments, jokes, or slurs regarding someone's race or sexual orientation, terminating an employee for refusing sexual advances, or classifying job applicants by race or skin color.

A. What Does Title VII Include?

Under Title VII, it is unlawful to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements and recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs
- Retirement plans, leave and benefits; or
- Other terms and conditions of employment

Discriminatory practices under Title VII may also include:

- Harassment on the basis of race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity) or religion;
- Refusal or failure to reasonably accommodate an individual's sincerely held religious observances or practices, unless doing so would impose an undue hardship on the operation of the employer's business;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain race, color, national origin, sex (including pregnancy, sexual orientation, and gender identity) or religion;
- Denial of employment opportunities to an individual because of marriage to, or association with an individual of a particular race, color, national origin, sex (including sexual orientation or gender identity) or religion; and
- Other employment decisions based on race, color, national origin, sex (including pregnancy, sexual orientation, or gender identity) or religion.

Both intentional discrimination and behavior resulting in a disparate impact upon the protected classes are prohibited under Title VII and are subject to disciplinary action. An exception to the rule prohibiting disparate treatment is when the lack of a protected characteristic is a bona fide occupational qualification for a specific job. An employer may defend itself from a discrimination claim by contending that there are specific qualifications needed for the job to be done.

B. Title VII Enforcement

Complaints under Title VII should be filed with the Equal Employment Opportunity Commission (EEOC). Title VII authorizes the Department of Justice (DOJ) to prosecute enforcement actions against state and local governments if they are referred to the DOJ by the EEOC. The Department of Justice may also initiate investigations and prosecute enforcement actions against state and local government employers when it has a reason to believe that there is a pattern or practice of discrimination.

C. Oncale

In *Oncale v. Sundowner Offshore Services, Inc.*, a worker on an eight-man oil crew claimed that he was sexually harassed by some of his male coworkers in front of the rest of his crew. The worker reported the harassment and threats to a supervisor, who allowed it to continue. Eventually the worker quit and wanted the record to show that he left his job due to sexual harassment and abuse. Both the district court and Fifth Circuit held that as a man, the worker was unable to bring a cause of action against his male coworkers under Title VII because they were of the same sex. In a unanimous Supreme Court decision written by Justice Antonin Scalia, the Court held that sex discrimination by members of the same sex is actionable under Title VII and that the regulation's prohibition on discrimination "because of sex" still stands even if the victim and perpetrator are of the same sex. The *Oncale* decision expanded the definition of "sex" under Title VII to include gender, widening the category of actionable offenses under the regulation.

i. Significance of the Oncale Decision

The *Oncale* decision is notable because it set the judicial precedent that Title VII also applies when harassment is between members of the same sex, even in the absence of sexual desire. In summary, *Oncale* expanded Title VII to all sexual harassment incidents. Per *Oncale*, discrimination based on sex is actionable as long as it puts the victim in an objectively hostile or abusive work environment, no matter the perpetrator's gender or their sexual preference.

D. Obergefell

Obergefell v. Hodges was a historic civil rights decision that guaranteed same-sex couples the right to marry. In a 5-4 decision passed down from the Supreme Court, the right to marry is a fundamental liberty under the Fourteenth Amendment's Due Process and Equal Protection Clauses. Marriage is fundamental because it is a part of individual autonomy, protects an intimate association between two people, benefits families by granting legal recognition to building a home and raising children, and is a keystone of social order. Same-sex marriages should reap those same benefits. *Obergefell* impacted state actors' liability, not only concerning marriage, but also for other rights, privileges, and immunities under federal law and the United States Constitution. This

case codified the idea that organizations cannot discriminate toward anyone on the basis of their marriage, including the sex of the person they are married to.

II. Title VII Expansion Under *Bostock*

The United States Supreme Court's landmark decision in *Bostock v. Clayton County,* Georgia gave Title VII another significant expansion. The *Bostock* case was decided on June 15, 2020, and its principal case regarded Gerald Bostock, a juvenile court employee who was fired from his job after expressing interest in a gay softball league at work. Previously, the Eleventh Circuit held that Title VII was not applicable to employment discrimination based on sexual orientation or transgender status. Some states and localities already had laws in place to protect LGBTQ+ workers, but not every state had those regulations in place. In a 6-3 decision written by Justice Neil Gorsuch, the Supreme Court held that an employer who fires an individual merely for being gay or transgender violates Title VII. Justice Samuel Alito was joined in his dissent by Justice Clarence Thomas and Justice Brett Kavanaugh. The Court held that sexual orientation was protected under the "sex" category of Title VII verbiage.

In his opinion, Justice Gorsuch offered the following example as to why sexual orientation and sex are intertwined. He posed a scenario where a fictitious employer has a policy that they will fire any employee who they find out is gay. At a company party, an employee shows up with their wife. There, the employee's sex is what hinges on them being fired or keeping their job. Justice Gorsuch further expanded saying that it is impossible for an employer to discriminate based on sexual orientation without first taking an employee's sex into account and that discrimination based on sexual orientation "inescapably intends to rely on sex in its decision-making." Gorsuch also notes that if changing the employee's sex would have garnered a differently response from an employer, it qualifies as discrimination on the basis of sex.

Justice Gorsuch interpreted the language of the Act as closely to its literal meaning as possible and regarded it as a mere question of statutory interpretation. The Court reasoned that since Title VII does not explicitly deny protection to the LGBTQ+ community, they are protected. Additionally, because it is impossible to discriminate based on sexual orientation or transgender status without taking one's sex into account, it follows that the aforementioned is a form of sex discrimination under Title VII.

A. What the Bostock Decision Means for Employers

Post-*Bostock*, employers are forced to take a long, hard, introspective look at their employment practices and their workplace culture. Some employers have gender-specified dress codes that should be revised to include gender neutral language unless these dress codes are specifically necessary. The *Bostock* decision also means practicing intentionality with words spoken in the workplace. While amicable relationships between employees are to be expected and help to boost company

morale, making derogatory comments about someone's identity, even in a seemingly lighthearted manner, is problematic.

III. Religious Objections as a Defense to Title VII

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC was an underlying case decided simultaneously with *Bostock*. In this case, Aimee Stephens worked for R.G. and G.R. Harris Funeral Homes as a funeral director. She initially presented herself as a man when she was hired, but after five years of employment told her employer she wanted to live and work as a woman. Ms. Stephens was then fired. Her former employer argued a religious exemption and claimed that if the government forced him to employ Ms. Stephens, it would result in a burden on his exercise of religion, violating the Religious Freedom Restoration Act of 1993. As in Gerald Bostock's matter, the Supreme Court held that an employer has violated Title VII when it intentionally fires an employee based, at least partially, on sex.

Title VII outlines specific exemptions from the employment discrimination guidelines, such as religious organizations and religious educational institutes. Additionally, a ministerial exception bars Title VII claims by employees serving in clergy roles.

A. Religious Organization Exception

Under the religious organization exception, this type of organization is allowed to give employment preference to members of their own religion. It should be noted, however, that this exemption only applies to an institution whose purpose and character are primarily religious. This exemption also only allows these organization to prefer to hire employees who share their religion and does not give them permission to discriminate based on race, color, national origin, sex, age, or disability. Even if a religious organization were to claim that it is part of their religion not to hire people of other races, they would be barred from doing so under Title VII.

B. Ministerial Exception

Under this exception, clergy members cannot bring claims under federal employment discrimination laws, including Title VII. This regulation comes from the First Amendment principle that governmental regulation of the church, including hiring clergy members, is excessive government entanglement with religion. Akin to the requirements for the religious organization exception, the employee must perform an essentially religious function to be covered under the ministerial exception.

IV. Employment Discrimination Remedies

When discrimination is present, the goal of the law is to put the victim in the same position as they would have been had the discrimination not occurred. The type of relief received is dependent on the discriminatory behavior and the effect the behavior had

on the victim. The victim of discrimination may also be able to recover back pay, front pay, attorney's fees, expert witness fees, and court costs. The noncompliant employer will be required to cease discriminatory practices and to take action to prevent future discrimination.

Compensatory and punitive damages may be available, the amounts of which depend on the size of the employer.

- For employers with 15-100 employees, damages are capped at $50,000
- For employers with 101-200 employees, damages are capped at $100,000
- For employers with 201-500 employees, damages are capped at $200,000
- For employers with over 500 employees, damages are capped at $300,000

V. Title IX and the Education System

In recent news, several school districts have come under fire for various Title IX issues involving LGBTQ+ youth. Title IX of the Education Amendments Act of 1972 applies to schools, local and state educational agencies, and other institutions that receive federal financial assistance from the U.S. Department of Education. The regulation states that the aforementioned organizations must operate its education program or activity in manner free from discrimination based on sex, including sexual orientation or gender identity. (*U.S. Department of Education Title IX and Sex Discrimination* 2021).

A. Bostock and Title IX

On June 16, 2021, the Department of Education issued a Notice of Interpretation applying *Bostock*'s principles and reasoning to Title IX. Although the Court in *Bostock* said that it was not deciding if the ruling applied to Title IX, the Department of Education said in the Notice that Title VII and Title IX were textually similar, likening Title VII's "because of sex" to Title IX's "on the basis of sex". Because neither regulation expressly excludes sexual orientation or gender identity and both are designed to protect against discrimination, *Bostock*'s holding applies to Title IX. The document also notes that following the *Bostock* decision, two appellate courts have also decided to apply the *Bostock* principles to Title IX, supporting their holdings that Title IX protects transgender students from discrimination on the basis of gender identity. After consideration of Title IX's verbiage, Supreme Court caselaw, and developing jurisprudence, the Civil Rights Division determined that the best reading of Title IX's prohibition against discrimination on the basis of sex is that it includes discrimination based on gender identity and sexual orientation.

B. Title IX Enforcement

The Office for Civil Rights (OCR) is an office within the U.S. Department of Education and has the legal authority to enforce Title IX among other regulations. Schools are

required to respond promptly and effectively to sexual discrimination. If an institution is found to have violated Title IX, it is given an opportunity to remedy the violation on its own accord. If an institution refuses to remedy the violation, then OCR may initiate administrative procedures to cut off federal funding to the school or refer the case to the U.S. Department of Justice to pursue the case in federal court. Typically, an educational institution will commit to voluntary compliance over which the OCR monitors implementation.

C. Faragher-Ellerth Defense

The *Faragher-Ellerth* defense is primarily used as an affirmative defense to claims of workplace harassment under Title VII. The defense stems from the Supreme Court decisions in *Faragher v. Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. In order to avoid liability using this defense, the employer must be able to demonstrate that the employer used reasonable care to prevent and promptly correct sexually harassing behavior and that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer to avoid the harm.

VI. Final Thoughts

When it comes to competitive business, the competition at the highest levels of the workforce is for talent. It is crucial for businesses to implement effective policies and training programs for employees to mitigate the risk of employment discrimination claims and to foster an inclusive work environment to better retain employees. Additionally, by enacting clear protocol for reporting discrimination claims, the process of correcting inappropriate behavior is streamlined and employers are better able to avoid liability for prohibited behavior. It is also imperative to enlist consultation to ensure that these protocols and policies are legally sound. Legal review of company policies on harassment is also important to ensure that a business is taking the best course of action to protect itself from Title VII liability.

Notes Pages

Notes Pages

Notes Pages

PAID SICK LEAVE TRENDS IN THE UNITED STATES

Paid leave can take many forms: sick leave, vacation, holidays, maternity/paternity/parental, bereavement, compensatory time, and general paid time off (PTO). Currently in the United States, there is no federal requirement that employers provide any paid leave. However, more states and cities are starting to create their own requirements for paid leave that apply to employers within their jurisdictions. On the federal level, legislation has been proposed and there have been varying levels of support, but little movement is imminent. This presentation will focus on two types of paid leave that are commonly-supported: sick and parental.

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA), passed in 1993, provides up to 12 weeks of unpaid, job protected leave during a 12-month period. It can be taken for the following reasons:

- Birth and care of newborn child of employee;
- Placement with the employee of a child for adoption or foster care;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition
- To take medical leave when the employee is unable to work because of a serious health condition

While this provides a benefit to employees who need extended absences from work for these reasons by allowing them to retain their job and position upon return, the unpaid aspect of FMLA leaves many employees wanting more. Even at the time of its passing, there was controversy over whether the leave should be paid or not.

The FMLA was not a new concept in 1993 – a prior bill, the Family Employment Security Act, had been proposed but not formally introduced in 1984. Similar bills were introduced in the 1980s, and FMLA was passed in Congress in 1992 but vetoed by the President. Debate on these bills, and FMLA, focused on issues such as length of leave, minimum employer size for applicability, and how much the benefit would cost employers. The same themes permeate proposed paid leave legislation today.

A 2016 survey found broad support for making at least some types of FMLA leave paid. 85% of workers opined that employees should receive paid leave to deal with their own health condition and 67% supported paid leave to help an employee's family member with a serious health condition. There was a split in support for paid maternity/paternity leave: 82% of respondents supported paid maternity leave compared to 69% who supported paid paternity leave.

With the COVID-19 pandemic, the federal government temporarily transitioned some FMLA leave to paid leave. The Families First Coronavirus Response Act provided up to

12 weeks of paid FMLA leave, but only for employees who were caring for a child whose school or child care had closed due to COVID-19.

Most recently, a Democratic proposal, the FAMILY Act, would provide 12 weeks of paid leave for:

- Birth or placement of a child;
- To care for an employee's spouse/domestic partner, child, or parent who has a serious health condition, or
- The employee's serious health condition

Benefits would amount to approximately 2/3 of the employee's wages, with a minimum of $580/month and a maximum of $4,000/month. This benefit would be provided by the government, and funded by a .2% payroll tax. It would also create the Office of Paid Family and Medical Leave to administer the paid leave. It would also apply to any employer, differentiating it from the FMLA, which applies to employers with over 50 employees.

Paid Sick Leave

A 2019 Pew Research Center Study found that 76% of civilian employees had access to some sort of paid sick leave as an employment benefit in 2019. That means 24% of employees lack access paid leave, which equates to roughly 33.6 million workers. This number represents an increase from 67% in 2010. When Pew broke the respondents down by average wage level, there was a stark difference between high and low earners: 92% of workers in the top quarter of earnings (which was hourly wages over $32.21) have access to some form of paid leave while only 51% of workers in the lowest quarter ($13.80 or less) do. The gap is wider for the lowest 10% of wage earners ($10.80 per hour or less), where 31% of workers have access to some form of paid leave.

The public-private distinction also carries a differential in paid sick leave: 91% of public sector employees (state and local governments) receive some paid sick leave, compared to 73% of workers in the private sector. Employer size is also relevant: 91% of employers with over 500 employees offer paid sick leave, compared to 64% of employers with less than 50 employees.

In March 2020, the Bureau of Labor statistics estimated that the average cost of providing paid leave to employees would be $0.45 per hour worked. While costs of paid leave may be easier to quantify, benefits are not. However, it has been suggested that paid sick leave would result in increased productivity, fewer workplace injuries and decreased employee turnover. It has also been thought that by allowing for paid leave, employees can take a full day and thus have time to see their regular doctor instead of going to hospitals and urgent care centers, which would reduce stress on the healthcare system.

At the state level, several states have enacted legislation that requires paid sick leave. The most common requirement is that employees accrue one hour of leave for every thirty

hours worked. Arizona, California, Maryland, Massachusetts, New Jersey, and Oregon use this rate. Other states use different accrual rates: Michigan and Rhode Island accrue one hour of leave per thirty-five hours worked; Connecticut and Washington accrue one hour leave per forty hours worked; and Nevada and Vermont accrue one hour leave per fifty-two hours worked. The District of Columbia provides for a variable accrual rate based on the size of the employer, ranging from one hour leave per thirty hours worked to one our leave per eighty-seven hours worked. Many of these states also either impose a statutory cap of paid sick leave an employee can have or allow employees to impose a cap at a certain minimum amount. The most common cap is forty hours of paid sick leave.

Many larger cities have also enacted paid sick leave policies that apply to employers within their boundaries. This includes New York City, San Francisco, Chicago, Philadelphia, Seattle, Portland, Newark, and San Diego.

San Francisco's ordinance was passed in 2006 as a ballot measure. Thus, rather than being a legislative enactment by the city's governing body, it won majority support from voters themselves. It covers all workers within city limits, and leave accrues at one hour of paid leave per 30 hours worked. For employers with 1-9 employees, employees can accrue up to 40 hours of paid sick leave; for employers with ten or more employees, employees can accrue up to 72 hours of paid sick leave.

Chicago's paid sick leave ordinance took effect more recently, in July 2017. An amendment in July 2020 makes it applicable to all employees in the city, even if their employer does not have a brick-and-mortar location in the city. Leave is accrued at one hour paid sick leave per 40 hours worked, and employers can limit the total amount of leave accrued to 40 hours in a 12-month period. Employees can carry over between 20 and 40 hours of unused leave, depending on whether their employer is covered by the FMLA or not. Employees can use the leave for their own illness or that of a family member, to care for a child whose school or place of care has been closed, to stay home pursuant to a public health order, or for any FMLA-eligible purpose. There is also an anti-retaliation provision: employees who are discriminated against or retaliated against for using or trying to use paid sick leave can sue civilly and can recover damages equal to triple the amount of full sick leave lost or denied plus costs and attorney's fees.

Parental Leave

Among member nations to the Organization for Economic Cooperation and Development (an organization of 38 leading economies in developed nations), only the United States has no requirement for paid parental leave. However, there is a growing move towards joining the other 37 countries. In the 2020 National Defense Authorization Act, the Federal Employee Paid Leave Act allows for up to 12 weeks of paid parental leave for foster care placement, adoption, or birth of a child. The issue has some bipartisan support – two prior Republican proposals would have allowed for paid paternity leave, but both bills paid for the leave from the parents' future social security benefits. Essentially, then, the proposed legislation allowed for parents to borrow against their future social security benefits for the paid parental leave.

Support for paid parental leave is broad, although there is a split in support for paid maternity/paternity leave: 82% of respondents supported paid maternity leave compared to 69% who supported paid paternity leave. Support for maternity leave focuses on the effect that having a child has on women in the labor force. A study in 2019 found that nearly 30% of women leave the labor force when they have a child, but in two states with paid maternity leave (California and New Jersey), labor market participation for mothers increased by 5%. The study also found that on the whole, mothers are 14% less likely to participate in the labor force than other women. This study, then, does suggest that the availability of paid maternity leave is an important tool towards keeping mothers in the labor force and reducing barriers to entry (or barriers to remaining) in the labor force.

Currently, six states and the District of Columbia have paid family leave laws, and another three states have passed laws that will become effective soon. These states are all on the coastlines. Many of them wrap parental leave into an overarching paid family leave act rather than having standalone legislation. Washington, Massachusetts, Connecticut, and Oregon offer the most parental leave – 12 weeks.

Notes Pages

Notes Pages

KANSAS CITY, KS
10 E. Cambridge Circle Dr.
Suite 300
Kansas City, KS 66103
ph. 913.371.3838

ST. LOUIS, MO
505 N. 7th St.
Suite 2100
St. Louis, MO 63101
ph. 314.621.1133

SPRINGFIELD, MO
1546 E. Bradford Pkwy
Suite 100
Springfield, MO 65810
ph. 417.865.0007

DES MOINES, IA
4400 Westown Pkwy
Suite 490
West Des Moines, IA 50266
ph. 515.823.0800

SPRINGFIELD, IL
3201 W. White Oaks Dr.
Suite 200
Springfield, IL 62704
ph. 217.606.0900

OMAHA, NE
10665 Bedford Ave.
Suite 101
Omaha, NE 68134
ph. 402.408.1340

TULSA, OK
2021 S. Lewis
Suite 225
Tulsa, OK 74104
ph. 918.771.4465

KANSAS CITY, MO
2700 Bi-State Dr.
Suite 400
Kansas City, MO 64105
ph. 816.912.4446

Kansas • Missouri • Illinois • Iowa • Oklahoma • Nebraska • Arkansas

www.mvplaw.com