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Employment Law Basics for the Small Ophthalmology Practice

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I. Introduction

This article is designed to provide administrators of small ophthalmic group practices (those with fewer than 50 employees) with a comprehensive review of relevant employment law issues through examination of common employee manual policies and procedures. Upon conclusion of reading this article, administrators will possess tools to effectively manage employment law issues in a small ophthalmic group practice.

It is difficult for any ophthalmic practice, but especially smaller practices or solo practitioners, to keep up with the routines of daily practice and to stay current with the health care landscape. With physicians and their administrators focusing on health care reform, declining reimbursement, increasing expenses, and new and ever-changing self-referral, privacy and other health-care regulations, it is not surprising to find that many practices are giving a rather low priority to an area of their practice that is impacted by as many changing rules and laws as health care – that is, employment law.

As with health care issues, it is very important for practices to keep abreast of the issues and current laws affecting their employees and their employee relations. While changes in employment laws may have more of an indirect impact on a practice's daily operations than changes in health care laws, employment laws are just as pervasive, since a physician practice is an "employer" as well as a health care business.

Understanding employment law issues, and ensuring compliance therewith, will not only help a practice establish and nurture strong, loyal, and long-term relationships with its employees, but will also help a practice reduce its exposure to civil litigation, fines, and penalties. Many potential employment law issues can be avoided by the adoption of clear and concrete employment policies and procedures.

This course is intended to identify and discuss employment laws and legal issues that group practices need to consider when drafting or revising their employee policies and procedures, and when making personnel-related decisions. Although this discussion is limited to federal legislation, there are also statutes and regulations on the state and local levels relating to employment that must be considered.

II. Specific Legislation and Areas of Law

A. Fair Labor Standards Act ("FLSA")

One of the most commonly misunderstood areas of employment law, both in the health care industry and elsewhere, is compliance with the requirements of the FLSA. The FLSA was enacted by Congress in 1938 to help protect the health and efficiency of workers and prevent unfair methods of competition. It is the source of a large number of regulations and exemptions relating to payment of wages and work hours. More specifically, it defined the 40 hour

workweek, provided for the federal minimum wage, established requirements and exemptions for overtime and placed restrictions on child labor. The law applies to any employer whose annual gross revenue is $500,000 or greater, or who is engaged in the production of goods for commerce. This would make it appear that application of the FLSA is limited; however, the courts have determined that entities that regularly send or receive letters through the U.S. mail to and from other states are engaged in interstate commerce. In addition, most states have enacted wage and hour laws that, by and large, mirror the FLSA. Therefore, most employers fall under the definition of "employer" under the FLSA and must comply with its provisions.

1. Minimum Wage

One such provision of the FLSA is the establishment of a minimum wage for workers. As of July 24, 2009, the minimum wage is $7.25 per hour. It is important, though, to keep in mind that many states have passed their own minimum wage laws, which may conflict with the amount of minimum wage the Federal Government requires to be paid to employees. If this is the case, the higher of the two minimum wage amounts is the amount the employee is entitled to receive. Currently, twenty-nine states (including California, New York, Florida, and Nevada), plus the District of Columbia, set minimum wage rates higher than the Federal minimum wage. Fourteen states (including Pennsylvania, Texas, New Hampshire and Virginia) have state minimum wage rates the same as the Federal Rate. Eight states (including Georgia, Tennessee, South Carolina, and Louisiana) have either no state minimum wage law or rates lower than the Federal minimum wage rate. In such a case, the Federal minimum wage rate applies. A good resource for finding your state's minimum wage law is found on the Department of Labor's website.

2. Overtime

The overtime requirements of the FLSA are another part of the law that majorly affects employers. There are a number of issues to consider when analyzing overtime and whether it is owed under the FLSA.

a) Who is an Employee?

The first issue to consider when determining whether an employer must pay overtime is whether a worker is considered an employee or an independent contractor. Independent contractors are not covered under the FLSA and therefore are not required to be paid overtime. Employers must be careful when labeling workers as independent contractors because misclassification of a worker as an independent contractor when he or she is actually an employee can have many ramifications, including payment of back taxes, interest, and penalties. The determination of whether a person is an employee or an independent contractor is based upon the work the person does and not the title the person is given. It is also judged based upon the FLSA's "economic reality" test, where an employee is one who, as a matter of economic reality, follows the usual path of an employee and is dependent on the business which he or she serves. The Department of Labor weighs the following six factors to determine whether a worker is an employee or an independent contractor:

- The extent to which the services rendered are an integral part of the principal's business;

- The permanency of the relationship;
- The amount of the alleged contractor's investment in facilities and equipment;
- The nature and degree of control by the principal;
- The alleged contractor's opportunities for profit and loss;
- The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;
- The degree of independent business organization and operation.

Recent guidance from the Department of Labor explains that the economic realities test is intended to ensure a broad interpretation of the definition of employ ("to suffer or permit to work"), thereby increasing the number of workers who fall within its scope. If a worker is determined to be an employee under the above test, then the employer must comply with the overtime and minimum wage provisions of the FLSA.

b) **When Must Overtime be Paid to an Employee?**

Once it is determined that a worker is an employee for purposes of the FLSA, the next issue is which employees are eligible for overtime. The general requirement to pay overtime to an employee applies to all employees not otherwise exempt from the overtime requirements. Therefore, it is important to determine which employees are exempt. These exemptions allow an employer to pay an employee a "fixed" salary regardless of the number of hours worked. With the desire to control payment of costly overtime, employers must not only know the exemptions set out in the FLSA, but also must correctly apply them to certain employees in order to avoid costly penalties for misapplication of the exemptions. For example, an employee who is inappropriately treated as exempt could be eligible for back pay damages for up to two years. If the violation is found to be willful, the back pay could be extended to three years. Willful violations may also be assessed double damages and attorneys' fees. Therefore, if there is any question as to whether any of the following exemptions under the FLSA applies to a particular position, the advice of an attorney should be obtained. The following employees are the most commonly exempt from the overtime rules in an ophthalmology practice:

(1) Executive Employee - applies to employees:

(a) Who are paid a salary of at least $455 per week;

(b) Whose primary duty is managing an enterprise or customarily recognized department or subdivision of an enterprise;

(c) Who customarily and regularly supervises two or more employees; and

(d) Who has the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

(2) Administrative Employee – applies to employees:

(a) Who are paid a salary of at least $455 per week;

(b) Whose primary duty is:

(i) Performing office or non-manual work directly related to management policies or general business operations of the employer or its customers; and

(ii) Includes work customarily and regularly requiring the exercise of discretion and independent judgment.

(3) Professional Employee - applies to an employee:

(a) Who is paid a salary of at least $455 per week, or, if compensated on an hourly basis, at a rate of at least $27.63 an hour; and

(b) Whose primary duty is performing work that:

(i) Requires knowledge of an advanced type, meaning work intellectual in nature and requires the consistent exercise of discretion and judgment and which must be:

(a) In a field of science or learning; and

(b) Customarily acquired by a prolonged course of specialized intellectual instruction.

(4) The Computer-Related Operations - applies to:

(a) An employee paid a salary of at least $455 per week, or, if compensated on an hourly basis, at a rate of at least $27.63 an hour; and

(b) The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

(c) The employee's primary duty must consist of:

(i) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(ii) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(iii) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(iv) combination of the aforementioned duties, the performance of which requires the same level of skills.

(5) Highly Compensated Individuals - Highly compensated employees performing office or non-manual work and paid a total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

It is important for practices to understand that it is the work that the employee does - not the title of the position – that determines whether a worker qualifies as exempt from the overtime requirements. This can lead to some surprising results. For instance, LPNs and other similar positions, such as ophthalmic technicians, do not qualify for the professional exemption because they do not have the required educational background. On the other hand, RNs who are performing professional nursing duties are exempt as long as they are salaried and receive at least $455 per week. If an RN is paid on an hourly basis, however, they lose the exemption and should receive overtime pay. In addition, to be considered a salaried employee, the employer must pay the employee for at least one full day even if they only work for part of the day and then leave. Deductions for absences of less than one day can make it so that the employee is considered non-salaried, thereby entitling them to overtime compensation.

On March 13, 2014, President Obama signed a memorandum instructing the Secretary of Labor to update and modernize the overtime exemption regulations, specifically related to the executive, administrative, and professional exemptions. In response, on July 26, 2015, the U.S. Department of Labor published a Notice of Proposed Rulemaking ("NPRM") in the Federal Register. Comments from interested parties were due by September 4, 2015. Pursuant to the NPRM, the Department of Labor has proposed the following changes to the exemptions from overtime pay for "white collar" employees:

1. Raise the standard salary level to the 40th percentile of weekly earnings for full-time salaried workers ($921 per week, or $47,892 annually), as published by the Bureau of Labor Statistics;
2. Increase total annual compensation for highly compensated employees ("HCE") to the annualized value of the 90th percentile of weekly earning for full-time salaried workers ($122,148 annually); and

3. Establish a mechanism for automatically increasing the salary and compensation levels going forward (i.e., CPI-U or fixed percentile of wage earnings).

In addition to these proposals, the NPRM also requests comments on modifying the manner in which annual compensation is calculated (i.e., Should nondiscretionary bonuses be taken into account?) and whether specific occupational examples should be provided to meet the "duties test" for overtime exemption.

According to the Department of Labor the "proposal to set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers represents the most appropriate line of demarcation between exempt and nonexempt employees. This salary level minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test." [1] If enacted as proposed, the new law would raise the salary threshold for exempt employees from $455 a week ($23,660 a year) to about $970 a week ($50,440 a year) in 2016. [2]

Given these proposals, employers must consider how changes in the law will affect their practices. Specifically, the final rule may require employers to choose between either: (1) increasing employee salaries to maintain their exempt status, or (2) begin paying those employees overtime benefits for time worked over forty (40) hours per week. Employers need to take into account how such decisions will affect the financial status of their practice to determine whether other business changes will be necessary in order to ensure both compliance with the law and a successful medical practice.

c) **How is Overtime Calculated**

Once an employer determines that an employee is not exempt, an employer must pay all non-exempt employees at a rate of at least time and one-half their regular rates of pay for any hours worked over 40 hours in a given week. However, overtime pay is not required by the FLSA to be paid for work on Saturdays, Sundays, holidays, or regular days of rest. Whether an employer wishes to pay a higher rate for work done on those days is a determination that is left up to employers. That said, how employees are paid for such work days will affect the determination of the employee's "regular rate of pay" for purposes of calculating overtime wages. Increased pay for time worked on Saturdays, Sundays or holidays is not considered premium overtime pay for the purposes of determining an employee's "regular rate of pay."

In order to calculate overtime, an employer must divide the total pay for employment in any workweek, which includes the employee's hourly rate plus the value of any other compensation such as non-discretionary bonuses and shift differentials, by the total number of hours actually worked by the employee. For example, if an employee works forty-five (45) hours over the course of a work week (seven (7) consecutive twenty-four (24) hour days), and the employee is paid ten dollars ($10.00) an hour for forty (40) hours worked from Monday through Friday and twelve dollars ($12.00) an hour for five (5) hours worked on Saturday, the employee's "regular rate of pay" for that work week is $10.22 ($460.00 pay/ 45 hours worked). As a result, the employer will have to pay the employee one and one-half time $10.22 for the five (5) overtime hours worked.

[1] http://www.dol.gov/whd/overtime/NPRM2015/factsheet.htm
[2] Id.

d) **Compensable Time**

Now that you have determined which workers are employees and which of those employees are not exempt from the overtime hours, the next issue to examine is which hours worked are compensable and therefore count toward the calculation of whether an employee has amassed enough time in a week to be compensated for overtime. According to the FLSA, the definition of "employ" means "to suffer or permit to work," which basically mean that if an employee is required or allowed to perform work, that employee must be paid for that time spent working. Therefore, for example, even if an employee is scheduled to work only from 9 to 5, but the employee stays until 5:30 to complete a task, that extra half hour must be paid because the employer is benefitting from the time spent by that employee. The best way to control the hours worked by employees is to have policies in place which address these situations and control the hours worked by employees. For example, a policy that would address the above example might state something along the lines that employees must receive approval for any overtime worked and that an employee who does not receive such approval will still be paid for such time, but will be disciplined for failure to seek approval. It is important to note that, even if employees do not obtain the required authorization, the employer is required to pay the employee for such time worked if he/she was aware of it. The following topics are common areas where questions arise as to whether certain time spent by employees count as hours worked:

(1) Vacation, Sick, and Holiday Time

Time paid to employees for vacation, sick, or holiday time is not counted for purposes of calculating overtime for employees. Such time, while paid, is not spent working, and is a benefit provided to employees by their employer.

(2) Lectures, Meetings, and Training Programs

Whether employee time is compensable and counted as working time for attendance at lectures, meetings, or training programs is dependent on whether the time taken for attendance is:

- Outside normal business hours;
- Voluntary;
- Not job related; and
- No other work is concurrently performed

Such time is compensable unless all four criteria are met. If the attendance at the lecture, meeting, or training program does not meet any one of the above requirements, then that time is considered compensable.

(3) Travel Time

Whether travel time is compensable depends on what type of travel is involved for the employee. The types of travel to consider are: (1) travel from home to work/work to home; (2)

travel from home to work/work to home then to another location; (3) travel as part of the employee's principal activities; and (4) travel away from home overnight.

Home to Work/Work to Home – This type of travel to and from work on a regular workday is not considered work time.

Home to Work/Work to Home to Another Location – If an employee is asked to work for one day in a different practice location that is not their typical worksite, the time spent traveling to and from that other location is compensable; however, the time of employee's regular commute may be deducted from such time. For example, if it regularly takes an employee 30 minutes to commute to their regular location for work, and the employee is asked to work in a different location one day that would take them 45 minutes to get to from their home, the compensable time for travel would be 15 minutes.

Travel as Part of Work – Travel that is a part of the employee's regular duties, such as travel to different work sites during the day, is counted as hours worked and taken into account for overtime calculation purposes.

Travel Away from Home – If an employee is asked to travel away from home overnight, the travel time that is during the employee's regular work day would be compensable, this includes travel on days not normally worked but during what would be regular working hours. For instance, if an employee's regular hours are 9 to 5, Monday through Friday, and the employee is travelling on a Saturday or Sunday between the hours of 9 to 5, that time would be compensable, unless the travel involves time spent as a passenger on an airplane, train, boat, bus or automobile.

(4) On-call Time

Another area where the FLSA impacts practices relates to on-call time. In some cases, employers could be required to include on-call time for purposes of calculating overtime pay. In other cases, employers might have to pay minimum wage to employees for their on-call services. The extent to which the activities of non-exempt staff are restricted for the benefit of the employer when they are on-call directly affects how employees must be compensated for that time. Some of the factors to be considered are:

- Is there a requirement for the employee to remain on the employer's premises?
- Are there geographic restrictions placed on an employee's movements?
- How frequent are employees called to work during an on-call period?
- Is there a time limit for responding to calls?
- Are the employees free to engage in personal activities while on-call?

The more limitations placed on an employee during his/her "on-call coverage," the more likely the time during which the employee is on-call will be deemed compensable.

(5) Waiting Time

Another consideration to think about is whether the employee is "engaged to wait" or is "waiting to be engaged." If the employee is engaged to wait, his/her time is compensable and can be calculated toward hours worked for purposes of overtime. An example of an employee who is engaged to wait is the person answering calls for the practice's answering service or at the front desk. That employee must be there to answer the phone and therefore must be paid

for waiting for calls to come in. On the other hand, if an employee is waiting to be engaged, that time is not compensable depending on how you would answer the above listed "on-call" questions. A good example of waiting to be engaged would be if an LPN is on call on certain days in case the practice gets especially busy or in case someone calls out sick. That time spent waiting for a call, which may never come, is not compensable, particularly if that LPN is free to be at home, run errands, and engage in other personal activities while on-call.

(6) Rest and Meal Periods

Rest periods, if they are for a short period of time, usually 20 minutes or less, are counted as hours worked and are compensated. If a break is longer or considered a bona fide meal period, usually 30 minutes or more, that time is not considered as hours worked, unless the employee is not completely relieved of his duties for that time period. If an employer requires that an employee take his lunch break at his desk and be available if a phone rings or someone comes in, then such time is compensable.

Whether an employer is required to offer breaks is typically governed by the state; however, there is one break requirement that the Federal government does require under the FLSA and that is for nursing mothers. The FLSA now, following the passing of the Patient Protection and Affordable Care Act (P.L. 111-148), 29 U.S.C. § 207(r)(1) ("PPACA"), requires employers to provide a nursing mother with unpaid "reasonable break time" to "express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." In addition to providing break time, employers must also provide a place, other than a bathroom, for the employee to express breast milk "shielded from view and free from intrusion from coworkers and the public." There is, however, an exception to this requirement for employers with less than 50 employees if this requirement would impose an "undue hardship" on the employer.

(7) Preparatory and Clean-Up Activities

In order for time spent preparing or cleaning up to be considered compensable, the main thing to consider is whether that work is integral to the job and whether that time is spent predominantly for the employer. For example, if part of an employee's job is to clean up the exam rooms and prepare them for the next day, then such time is compensable. If an employee is staying late to clean up or organize her desk area, that time most likely would not be compensable since it is likely done for the employee's benefit.

As you can see, there are many different scenarios that can raise questions as to compensability. Determining which hours spent at work or at home may count as hours worked under the FLSA, is many times a fact specific analysis that may not fit neatly into any one category described above. If you are having difficulty determining whether certain hours are hours worked for these purposes, the Department of Labor offers an FLSA Hours Worked Advisory, which is a helpful resource to guide employers. You should also consult with an attorney to make sure that you are in compliance with the FLSA and all state wage requirements.

3. Recordkeeping

In order to keep track of whether your practice is complying with the above requirements of the FLSA, it is important, and required by the FLSA, for employers to keep good records of certain information pertaining to employees. The FLSA requires that every employer that is covered by the Act keep accurate records for all non-exempt employees containing:

a) Employee's full name and social security number;

b) Address, including zip code;

c) Birth date, if younger than 19;

d) Sex and occupation;

e) Time and day of week when employee's workweek begins;

f) Hours worked each day;

g) Basis on which employee's wages are paid;

h) Regular hourly pay rate;

i) Total daily or weekly straight-time earnings;

j) Total overtime earnings for the workweek;

k) All additions to or deductions from the employee's wages;

l) Total wages paid each pay period;

m) Date of payment and the pay period covered by the payment.

These records must be maintained by the employer for at least three years for payroll records, sales and purchase records and at least two years for wage computation records.

4. Enforcement

Enforcement of the FLSA is carried out by the Department of Labor's Wage and Hour Division. In order to recover unpaid wages or overtime pay, an employee may bring a claim to the Wage and Hour Division, which will investigate the claim and an employer can be forced to comply with FLSA through: (i) supervision of payment of back wages to the employee by the Wage and Hour Division; (ii) the Secretary of Labor who may bring a suit to collect unpaid minimum wage and overtime to pay to employees or obtain an injunction restraining an employer from violating the law; or (iii) the employee or employees may bring a private suit for back pay either individually or on behalf of similarly situated employees as part of a class action. Defending a private suit, especially a class action suit, can be quite costly to employers; however, recent Supreme Court case law has provided some procedural limitations on individual employees proceeding as a class. In order to avoid costly litigation, it is important for employers to respond and attempt to resolve FLSA issues raised by employees in a timely manner and continually review their policies to make sure they are in compliance with the law.

If an employer is found to have violated the FLSA, it may be liable for amounts due to the employee or employees as underpayments, an equal amount in liquidated damages and attorneys' fees and costs. If a violation is willful or flagrant, an employer can even be found criminally liable, although rare, and fined up to $10,000, and, potentially imprisoned for up to six months. Employees have a two year statute of limitations in which to bring a private civil action (three years if the violated is deemed willful).

B. Employment Discrimination

1. Title VII of the Civil Rights Act of 1964

Title VII of The Civil Rights Act, as well as the laws of all states, prohibits discriminatory behavior by employers. That is, it is illegal for an employer of at least fifteen employees to treat an employee or applicant differently from other employees or applicants because of his or her race, color, sex, national origin, and religion. This includes all phases of the employment relationship, such as help wanted ads, interviews, pre-employment testing, hiring, job assignments, shift assignments, promotions, compensation, benefits, job training, lay-offs or termination. The law is enforced by the Equal Employment Opportunity Commission (EEOC).

In addition, these laws also prohibit harassment or employer practices that seem neutral, but have a disproportionate impact on people because of their race, color, sex, national origin, and religion. Additionally, disability based harassment was recently added to the list of claims that the courts will recognize under the Civil Rights Act.

Another protection Title VII of the Civil Rights Act affords employees and job applicants is protection from retaliation for opposing any practice that Title VII prohibits or making a charge, testifying, assisting, or participating in a Title VII proceeding or investigation.

2. Pregnancy Discrimination Act

The Pregnancy Discrimination Act prohibits employers from discriminating against employees on the basis of pregnancy, childbirth or medical conditions related to pregnancy or childbirth. This Act applies to all aspects of employment decisions, including, hiring, firing, pay determinations, job assignments, promotions, layoffs, benefits and any other term of employment. This Act has two sections: (1) making pregnancy discrimination a form of discrimination based on sex and (2) requiring that female workers who become pregnant be treated the same as other workers who can handle the same kind of job. With regard to this latter section, the EEOC interpreted this section to require employers to treat these pregnant workers in the same manner that the employer treats any other temporarily disabled employee.

On March 25, 2015, the Supreme Court in Young v. United Parcel Service clarified the requirements under the second provision of the Pregnancy Discrimination Act and, in doing so, refused to follow the guidelines set forth by the EEOC. Pursuant to the Supreme Court, in order to successfully prove a claim of pregnancy discrimination, the employee must offer proof that: (1) she is in the protected group (able to get pregnant); (2) she asked for an accommodation when she could not fulfill her duties; (3) the employer refused or failed to provide the accommodation; and (4) the employer provided accommodations for others that were similarly unable to do their work on a temporary basis. In response, the employer can show that his/her policy had a neutral business rationale and was not based on a bias against pregnant workers.

To overcome this justification, the employee must then provide evidence that the employer's alleged business justification was only a pretext for bias and the policy puts a significant burden on female workers that is not justified by employer's stated basis.

3. Sexual Harassment

Sexual harassment is any unwelcome sexual advance or conduct on the job that creates an intimidating, hostile, or offensive working environment. The Civil Rights Act, as well as many state laws, makes it unlawful for an employer to refuse to hire, discharge, or otherwise discriminate against a person on the basis of sex with respect to terms and conditions of employment. All employers have a responsibility to maintain a workplace that is free of sexual harassment.

There are two specific forms of sexual harassment, quid pro quo and hostile work environment. Quid pro quo harassment occurs when an employee's submission to or rejection of unwelcome sexual advances or conduct is used as the basis for an employment decision affecting that employee. The second form, hostile work environment, consists of conduct that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The Supreme Court has found that some factors that might make conduct "severe" and "pervasive" are:

- Frequency of the discriminatory conduct;
- Severity of the discriminatory conduct;
- Whether the conduct is physically threatening or humiliating, as opposed to a mere offensive utterance;
- Whether the conduct unreasonably interferes with the employee's work performance; or,
- Effect on employee's psychological well-being.

Conduct that has been found to create a hostile work environment includes:

- Sexual advances;
- Gender-based baiting, ridicule, banter, or hazing;
- Use of crude or vulgar language in the workplace;
- Sexually oriented discussions;
- The presence of lewd, offensive or pornographic material in the workplace; or
- Any intimidation or hostility that is gender-based.

Conduct of this type that is unwelcome and affects the terms and conditions of employment makes the employer liable if the hostile work environment is created by a supervisor or the employer knew or should have known about the conduct and failed to take prompt and appropriate corrective action.

Sexual harassment can occur male to female, where the male holds the superior position, or female to male, where the female holds the superior position, and can even occur on a same sex basis.

Employers who are found liable for sexual harassment could be required to pay back pay, compensatory damages, punitive damages, and attorneys' fees.

In order to minimize the risk of sexual harassment in the workplace, employers should consider development and communication of a clear written policy against sexual harassment that includes, but is not limited to, a procedure to file complaints and assurances that there will not be retaliation for any reporting. All employees, especially managerial and supervisory, should be given training in connection with the policy. Employers must also take every complaint of sexual harassment seriously and conduct thorough and confidential investigations. When, and if it is determined through an investigation that, sexual harassment has occurred, employers must take prompt and appropriate corrective action.

4. Discrimination Based on Sexual Orientation and Gender Identity

Although there is no national law that specifically prohibits discrimination based on sexual orientation and gender identity, the EEOC has held that discrimination against a gay, lesbian, bisexual or transgender person is discrimination based on sex under Title VII of the Civil Rights Act of 1964. In addition, twenty-two states have laws in place that prohibit discrimination based on sexual orientation, nineteen of which also prohibit discrimination based on gender identity. Finally, on July 23, 2015, a bill in favor of the Equality Act was introduced to Congress. If this bill is passed, discrimination based on sexual orientation and gender identity will be prohibited in matters related to employment, housing, public accommodations, education and jury service.

5. Americans With Disabilities Act (“ADA”)

Congress enacted the ADA to remove the barriers to employment, transportation, public accommodations, public services, and telecommunications that exist for people with disabilities. The ADA provides civil rights protections to individuals with disabilities quite similar to the civil rights protections provided to individuals on the basis of race, color, sex, national origin, age and religion. In the context of employment, the ADA applies to employers with at least fifteen employees and impacts the application process, pre-employment medical examinations, hiring, firing, advancement, compensation, benefits and training, as well as many other aspects of employment. There is also a separate section of the ADA that prohibits coercing, threatening or retaliating against the disabled or those attempting to aid people with disabilities in asserting their rights under the ADA.

The ADA protections are available to qualified individuals with disabilities. This includes applicants for employment as well as existing employees who are or become disabled. A qualified individual is an employee or a prospective employee who meets legitimate skill, experience, education or other requirements of an employment position that he or she holds or seeks, and who can perform the "essential functions" of the position with or without reasonable accommodation.

The ADA defines “disability” as:

- Having a physical or mental impairment that substantially limits one or more major life activities;
- Having a record of such an impairment; or
- Being regarded as having such an impairment.

In 2008, Congress found that the definition of disability, as contemplated under the ADA, initially was being narrowly interpreted by the courts and so Congress amended the ADA to broaden the scope of protection available to individuals with physical or mental disabilities, as

well as those who have a record of a disability or are regarded as having a disability. On September 25, 2008, President Bush signed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"). These changes to the ADA were made effective January 1, 2009. While the original definition of “disability” still stands following the ADAAA, certain definitions within the definition have been modified by the ADAAA to overturn certain Supreme Court decisions and broaden the scope of the ADA.

The first part of the definition of “disability” originally only applied to impairments like epilepsy, paralysis, AIDS, substantial hearing and vision impairment, mental retardation, or learning disabilities that affected major life activities such as, walking, performing manual tasks, and working, but it did not cover any minor non-chronic condition of short duration. The ADAAA, however, expanded this definition and created a non-exhaustive list of major life activities that includes interacting with others, communicating, concentrating, breathing, eating, sleeping, lifting, thinking, etc. In addition, the ADAAA also further expands the definition of “major life activities” to include the operation of a major bodily function (e.g., "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions"). An impairment that is episodic or in remission is also considered a disability as well under the ADAAA, so long as the impairment would substantially limit a major life activity when it is active. The ADA and ADAAA specifically exclude the current use of illegal drugs as a disability, but a previous user of illegal drugs who is currently in recovery, as well as an active alcoholic, are considered disabled individuals under the acts.

In addition to expanding the definition of “major life activity”, the ADAAA also directed the EEOC to revise its regulations relating to the definition of “substantially limits” to broaden its scope. Prior to the Amendments, the definition of “substantially limits” was defined by EEOC regulations to mean:

- Unable to perform a major life activity that the average person in the general population can perform; or
- Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which an average person in the general population can perform the same major life activity.

In evaluating what constitutes “substantial limits,” the EEOC regulations state that a number of factors should be considered including:

- Nature and severity of impairment;
- Duration or expected duration of the impairment; and
- Permanent or long-term impact or expected impact of impairment.

The EEOC issued its final rule implementing regulations under the ADAAA on March 25, 2011. Instead of specifically defining “substantially limits,” as directed under the ADAAA, the EEOC chose to implement nine “rules of construction” to be used in determining whether a disability “substantially limits one or more major life activities.” These nine rules are:

1. The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. “Substantially limits” is not meant to be a demanding standard.

2. An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

3. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

4. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

5. The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

6. The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

7. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

8. An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

9. The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage does not apply to the definition of "disability" under the "actual disability" prong or the "record of" prong of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

The second part of the definition of "disability," "having a record of" an impairment, relates to individuals who have a history of a disabling illness such as cancer or mental illness, but who have recovered from the illness or are currently in remission.

The last part of the definition, concerning individuals "regarded as having" an impairment, pertains to individuals who may be subject to discrimination based upon a

perception that the person has a limitation, for example, denying employment to an individual with a severe facial disfigurement who is otherwise qualified because of concerns over a negative reaction from customers or co-workers. Under the ADAAA, the definition of “regarded as” has changed so that employees or prospective employees who are “regarded as” disabled are no longer required to show that the employer actually perceived the individual to be substantially limited in a major life activity. Rather, the employee or prospective employee need only show he or she has been subjected to an act prohibited by the ADA because of an impairment that is not transitory or minor, not that the employer actually perceived the employee to have that impairment. The ADAAA, however, does not entitle individuals who are “regarded as” disabled to a reasonable accommodation.

There are a number of things that employers should avoid in the interview and hiring process to minimize the risk of potential ADA claims. For instance, it is not acceptable for an employer to ask disability-related questions or to require a medical examination before making a job offer. However, a job offer may be made contingent upon satisfactory completion of a medical examination, but only if the same examination is required of all employees in the same job category. Further, if an individual is denied employment as a result of a disability being discovered by the medical examination, the reason for not hiring the individual must be consistent with business necessity and the job description. In some instances, federal law such as affirmative action or disabled veterans may require collecting information about an individual's disability. In these instances and for these purposes only, employers may provide an applicant with the opportunity to disclose a disability, but a response to this question on the application must be optional. It is perfectly legitimate, however, to ask an applicant if they can perform specific job related tasks. The ADA does not classify tests for the use of illegal drugs as a medical examination and are not subject to these restrictions.

The ADA also requires employers to provide "reasonable accommodations" to enable a person with a disability to accomplish a job function in a manner that is different from the way an employee who is not disabled may accomplish the same function. A reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Some examples of reasonable accommodations would be modification of existing facilities to make them physically accessible, restructuring a job, modifying work schedules, acquiring or modifying equipment, and/or transferring a current employee to a vacant position for which he or she is qualified if they are unable to do their original job due to a disability. However, employers are not required to create special positions, lower quality or quantity standards or provide personal use items such as glasses or hearing aids. Reasonable accommodations must also be provided to the illegal drug user in recovery or the alcoholic; however, employers may prohibit the use of illegal drugs and alcohol on their premises and may impose discipline, including termination, for violation of that policy.

Employers are only required to make a reasonable accommodation for known disabilities of qualified applicants or employees. If a disabled individual does not request an accommodation, it is not necessary to provide one, except when a known disability prevents the individual to know or communicate their need for an accommodation that is obvious to the employer. Further, reasonable accommodations are only required if it is not an action requiring significant difficulty or expense and does not cause an undue hardship. The factors that are considered when evaluating the significance include the nature and cost of the accommodation in relation to the size, resources, nature and structure of the employer's operation.

Claims for violations of the ADA and the ADAAA must be filed through the EEOC or a designated State human rights agency. Similar to the FMLA, penalties that may be imposed for violations include re-employment, reinstatement, promotion, back pay, front pay, restoration of benefits, reasonable accommodation, attorneys' fees, expert witness fees and court costs. In addition, if an employer is found guilty of intentional discrimination or fails to make a good faith effort to provide reasonable accommodation, compensatory and punitive damages may also be assessed.

6. Age Discrimination in Employment Act ("ADEA")

The Age Discrimination in Employment Act of 1967 (ADEA), much like the other Acts, prohibits discrimination on the basis of age for applicants and employees 40 years of age or older in hiring, promotion, discharge, compensation, or terms, conditions or privileges of employment. Like Title VII of the Civil Rights Act and the ADA, the ADEA is enforced by the EEOC.

A major difference between the ADEA and the other Acts, other than that it protects against age discrimination, is that the ADEA applies to employers with at least 20 employees. Otherwise, it offers many of the same protections including protection from retaliation as well.

III. Conclusion

As you can see from this article, there are many laws and regulations that employers must consider when making any employment decision. Employers must comply with the wage, hour and discrimination provisions that apply to them. To do so, policies and procedures should be carefully drafted to ensure such compliance. These policies and procedures should be provided to all employees and enforced in a fair and equal manner. If your practice encounters a compliance issue with regard to any of the laws and regulations discussed in this course, you should take time to research the Department of Labor's guidance regarding the issue, as well as, your respective state's laws and regulations on the topic. In addition, it may be worth contacting an employment attorney to ensure that all of the necessary steps are taken to avoid any violation of the applicable state and federal laws.