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INTRODUCTION

A quick run-through of employment law? Impossible. There is the ADA, the ADEA, COBRA, EPPA, ERISA, the FMLA, the FLSA, the NLRA, OSHA, Title VII, the Rehab Act, Section 1981, the NLRB, the EEOC, the DoJ and the DoL. And that is just on the federal level. Then there are the various state counterpart statutes and agencies, such as the OHRC. And, on top of all of that, there are the numerous common law doctrines regarding employment law. Starting with the employment at will doctrine, there are the various and often changing rules regarding who is an employee, what role an employee manual plays, whether there is a covenant of good faith and fair dealing implicated in the situation, what public policy is at issue, the applicability of the tort of intentional infliction of emotional distress, whistleblower rules, privacy rights, duties of loyalty, trade secrets, covenants not to compete, defamation law, and so forth.

This paper will give a broad overview of the coverage of several of the statutes. It will then briefly describe some of the various rule and regulations applicable to the employer-employee relationship.

THE FAMILY AND MEDICAL LEAVE ACT

INTRODUCTION

The Family and Medical Leave Act ("FMLA"), 29 U.S.C. §§ 2601 *et seq.*, is the most recent piece of federal legislation governing employer conduct and employee rights in the workplace.[1]

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[1] Annually requires a covered employer to allow an eligible employee up to twelve weeks unpaid leave (or paid leave, if the leave has accrued) to care for family members during illness, or upon the birth or adoption of a child

The stated purpose of the FMLA is the protection of the family by providing the opportunity to take leave to deal with parenting or other family obligations for both single parents and families where both parents work.

The FMLA requires a covered employer to allow an eligible employee up to twelve (12) weeks unpaid leave (or paid leave, if the leave has accrued) to care for family members during illness, or upon the birth or adoption of a child or the placement of a child for foster care, or in the event of the employee's own serious health condition.

WHO IS AN EMPLOYER UNDER THE FMLA?

? "Employer" means any person engaged in commerce or who affects commerce, who employs 50 of more employees for each working day during each of twenty (20) or more calendar work weeks in the current or preceding calendar year.

? "Employer" also means any Public Agency, including political subdivisions of a state, and agencies of the state or its political subdivisions.

? "Employer" includes any person acting directly or indirectly in the interest of the employer. It also includes any successor in interest of the employer.

? Certain individuals who work for a company are also considered employers under the FMLA and can be personally liable for violation of the FMLA.

WHAT EMPLOYEES ARE ENTITLED TO TAKE FMLA LEAVE?

? An eligible employee is an employee who has been employed for at least 12 months and who has worked at least 1,250 hours with that employer for the previous 12-month period.

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or the placement of a child for foster care, or in the event of the employee's own serious health condition. Covered employers must employ 50 or more employees within a 75-mile area around the work site. Eligible employees must have been employed for at least 12 months and have worked at least 1,250 hours with that employer for the previous 12 months.

? A public agency must employ 50 employees within a 75-mile area around the work site in order for an employee to be eligible for FMLA leave.

ON WHAT BASIS MAY AN EMPLOYEE REQUEST LEAVE?

? An employee may request leave:

(1) because of the birth of a child and to care for that child;

(2) because of the adoption of a child;

(3) because of the placement of a child for foster care;

(4) to care for a spouse, child or parent if that person has a serious health condition; or

(5) because the employee himself has a serious health condition that makes him unable to perform the functions of his employment.

? "Child" includes a biological, adopted, or foster child, a step-child, a legal ward, or a child of a person standing in loco parentis who is under 18, or if over 18, is physically or mentally incapable of self-care.

? "Parent" means the biological parent of the employee or someone who stood in loco parentis to that employee when that employee was a child.

WHAT CONSTITUTES A SERIOUS HEALTH CONDITION?

? A serious health condition means a physical or mental condition which involves inpatient care, hospice or residential medical care or "continuing treatment" by a health care provider.

? "Continuing treatment" by a health care provider means that the employee or the family member is required to be treated by a health care provider two or more times for the injury or illness.

? Voluntary or cosmetic treatments which do not require in-patient care do not constitute serious health conditions.

? Prenatal care is included as a serious health condition.

? Routine preventative physical exams are not serious health conditions.

? An employee is unable to perform the functions of the employer's position when a health care provider finds that the employee in unable to perform the work at all or if he is unable to perform any of the essential functions of the position within the meaning of the Americans With Disabilities Act. 42 U.S.C. §§ 12101 *et seq.*

WHAT FORM MAY THE EMPLOYEE'S LEAVE TAKE?

? Generally, an employee has no right to leave on an intermittent or reduced schedule unless the employer and the employee so agree. However, the employer must provide such leave if the employee provides certification that there is a medical need for it.

? Intermittent leave may be taken an hour at a time if proven to be medically necessary.

WHAT NOTICE IS REQUIRED TO BE GIVEN BY THE EMPLOYEE

The employee must provide the employer with not less than thirty (30) days notice before the date leave is to begin. If possible, employees must make plans for medical treatment in a way that will not unduly disrupt the operation of the employer.

? Obviously in some situations thirty (30) days notice will not be possible. In that case, the employee is required to give as much notice as reasonably possible.

CERTIFICATION

? An employer may require that an employee provide it with certification issued by the health care provider concerning the need for the leave.

? Certification is sufficient if it states the date on which the serious health condition began, the probable duration of the condition and appropriate medical information concerning the condition. See attached form.

? If the employee is taking leave to care for an eligible relative, the certification should include a statement by the health care provider that he is needed to care for the relative.

? The employee should also provide an estimated amount of time the employee believes is needed to care for the relative.

? Where an employee is taking leave for his or her own serious medical condition, the employer may require the employee's health care provider to provide a statement that the employee is unable to perform the essential functions of his job. If the employer requests such information, the employer should provide the health care provider with a job description detailing and listing the essential functions of the job position.

? Certification may also be required when an employee requests intermittent leave.

Where an employer has reasonable grounds to doubt the validity of the certification, the employer may require the employee to obtain a second opinion. The second opinion may not be obtained by a health care provider employed on a regular basis by the employer. Where the first certification and the second opinion conflict, the

employer may require the employee to obtain a third opinion. However, if the employer makes such request the employer must pay for the third health care providers' opinion.

MAINTENANCE OF HEALTH CARE BENEFITS

? When an employee takes leave under the FMLA, the employer must ensure that upon return, the employee will be returned to the same or an equivalent position with equivalent benefits and terms and conditions of employment.

? The employer must continue coverage under any group health plan for the duration of leave at such level and under such conditions as would have been provided to the employee had the employment continued throughout the duration of leave.

? The employee may also be required to continue making any co-payments for health insurance.

? An employer may require an employee to provide certification of his ability to return to work.

? An employer may require an employee to provide certification of his inability to return to work because of the continuation, recurrence or onset of a serious health condition.

The FMLA permits an employer to withdraw the employee from health care benefits after a thirty day (30) grace period, if the employee fails to continue to make his co-payments. This may not be advisable, for upon return to employment, the employee must be placed in the same position, including the same or equivalent employee benefits that he would have had absent the leave.

If the employee fails to return to work from leave, the employer may recover the premiums it paid on behalf of the employee out of the employee's final pay. The

employer may not do so however, if the employee's failure to return to work is a result of a continuation, recurrence or onset of a serious health condition or other circumstances beyond the control of the employee.

PROHIBITED ACTS

It is unlawful for an employer to interfere with, to restrain, or to deny the exercise of or attempt to exercise, any right provided by the FMLA.

It is unlawful for an employer in any manner to discriminate against or to discharge any individual who opposes a practice made illegal or unlawful by the FMLA.

It is unlawful for an employer to discriminate against or to discharge an employee who has filed a charge or instituted any proceeding relating to the FMLA or who has given or will give information in connection with any proceeding related to the FMLA or any person who has testified in any proceeding regarding any right under the title.

ENFORCEMENT

Any employer who violates the FMLA will be liable to the affected employee for the following damages:

1. Any lost wages, salary, employment benefits or other compensation that was denied to the employee;
2. If actual benefits have not been lost, the actual monetary losses sustained by the employee as a direct result of the violation, up to the sum equal to 12 weeks of wages or salary of the employee;
3. Interest;
4. Liquidated damages equal to the sums in paragraphs 1 and 2; and

5. Any equitable relief which the court deems appropriate, including employment reinstatement and promotion.

DEFENSES

An employer may try to prove that it acted in good faith and had reasonable grounds for believing that its act or omission was not a violation of this action. If that occurs, then the court can reduce the amount of liability and interest under paragraphs 1 and 2.

The statute of limitations for causes of action under the FMLA is two years. However, if an employer is deemed to have willfully violated the Act, then a three (3) year statute of limitations is applicable beginning from the date of the last event constituting a violation of the Act.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act ("ADA" or "Act") was enacted by Congress in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," in "such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101, *et seq*.[2]

The statute's broad and sweeping language, which took effect in July of 1992, was intended to protect disabled persons from intentional discrimination as well as from "thoughtlessness," "indifference," and "benign neglect." *See, Crowder v. Kitagawa*, 81

[2] Prohibits discrimination in the terms and conditions of employment against an otherwise qualified individual who has a disability, or is perceived as having a disability. 42 U.S.C. § 12112(a). This statute covers employers of at least 15 employees. Drawing upon the experience of Title VII, the ADA has a strict procedure for person's to follow before they can file a lawsuit. A claimant must file a complaint with the Equal Employment Opportunity Commission

F.3d 1480, 1483-1484 (9th Cir. 1996). Such broad language, however, has resulted in confusion for many people who have wondered what their duties and responsibilities are under the Act.

WHAT THE ADA COVERS

The ADA prohibits discrimination against individuals with disabilities by employers, public entities, and private entities operating places of public accommodation.

Employers are prohibited under Title I from discriminating against "qualified individuals with disabilities," including both applicants and current employees. In order to establish a prima facie case of disability discrimination in the area of employment under the ADA, a plaintiff must prove: "(1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of the disability." *White v. York Int'l Corp.*, 45 F.3d 357, 360-361 (10th Cir. 1995).

A person is considered to have a "disability" if he or she

(1) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) [has] a record of such impairment; or

(3) [is] . . . regarded as having such impairment.

42 U.S.C., § 12102(2). That person is then a "qualified individual with a disability" if he or she can perform the "essential functions of the job" with or without "reasonable

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or with an appropriate state counterpart. The Commission has the power to investigate. Until the Commission issues a "right to sue" letter, no claim may be filed. Once the letter is issued, a claimant must quickly file suit.

accommodation." *Id*. at § 12111(8). An employer will be seen as discriminating against an applicant or employee by doing such things as "denying employment opportunities," "not making reasonable accommodations," and "using qualification standards . . . that screen out or tend to screen out" disabled individuals. *Id*. at § 12112(b).

Similarly, the ADA, under Title II, prohibits the exclusion of "qualified individuals with disabilities" from "participation in or [the denial of] . . . the benefits of the services, programs, or activities of a public entity . . ." *Id*. at § 12132. A person is a "qualified individual with a disability" under this section if he or she "meets the essential eligibility requirements" of the services or programs provided by the public entity, with or without "reasonable accommodation." *Id*. at § 12131(2).

Employers and public entities need not make a reasonable accommodation to a qualified individual with a disability if the proposed accommodation would cause an "undue hardship." *Id*. at § 12112(b)(5)(A). "Undue hardship" means an action requiring significant difficulty or expense" when considered in light of various factors. *Id*. at § 12111(10)(A). The factors to be considered when determining whether an accommodation would impose an undue hardship on a covered entity include: the nature and cost of the accommodation; the overall financial resources of the covered entity; and the type of operation of the covered entity. *Id*. at § 12111(10)(B).

Title III of the ADA prohibits discrimination against individuals with disabilities "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation of any place of public accommodation . . ." *Id*. at § 12182(a). A private entity is considered a place of "public accommodation" if "the operations of such entit[y] affect commerce." *Id*. at § 12181(7). Places of public accommodations include hotels

and motels, restaurants and bars, theaters and stadiums, grocery and hardware stores, and museums and libraries. *Id*.

A place of public accommodation is required to make reasonable modifications in policies, practices, or procedures for the disabled individual, unless such modifications would "fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden." *Id.* at § 12182(b)(2)(A)(i).

SEXUAL HARASSMENT LITIGATION
WHAT CONSTITUTES "GOOD FAITH EFFORTS"?

In June 1999, the U.S. Supreme Court issued *Kolstad v. American Dental Assoc.,* 119 S.Ct. 2118, which holds that employers may not be liable for punitive damages because of the acts of their managerial employees if the employers make "good faith efforts" to comply with anti-discrimination law. The reason the court offered for this rule was that it would be a disincentive for employers to learn about and implement Title VII rules if they were penalized for doing so.

Instead, the Supreme Court ruled that: "... in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decision of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII." The Court did not, however, provide much detail regarding "good faith efforts," leaving the issue largely to the lower courts to flesh out. The Court did suggest: "In some cases, the existence of a written policy instituted in good faith has operated as a total bar to employer liability for punitive damages . . . ," citing *Harris v. L&L Wings*, 132 F.3d 978, 983-84 (4th Cir. 1997).

The Tenth Circuit has indicated that in order to protect itself from punitive damages under Title VII, an employer "must at least adopt anti discrimination policies and make a good faith effort to educate its employees about these policies and the statutory prohibitions." *Cadena v. Pacesetter Corporation*, (September 12, 2000, 10th Circuit).

EMPLOYERS THAT HAVE NOT MADE "GOOD FAITH EFFORTS"

In the following cases, courts have determined that the employers did not make good faith efforts and allowed and award of punitive damages to a plaintiff. In *EEOC v. Wal-Mart*, 187 F.3d 1241 (10th Cir. 1999), the only evidence admitted to support the good faith standard was a "generalized policy of equality and respect for the individual." In *Cadena*, there was conflicting testimony from managers for the company about whether any employees were ever advised about or trained concerning the employer's harassment policy. Furthermore, the employer did not present evidence that it *enforced* its sexual harassment policy. "Therefore, even if an employer-defendant adduces evidence showing it maintains on paper a strong non-discrimination policy and makes good faith efforts to educate its employees about that policy and Title VII, a plaintiff may still recover punitive damages is she demonstrates the employer adequately failed to address Title VII violations of which it was aware." *Cadena.*

Also see, *Burch v. La Petite Academy*, ___ F.3d ___ (10th Cir. June 19, 2000), where the employer did not demonstrate that it educated its employees about its nondiscrimination policies or that it adequately enforced these policies.

EMPLOYERS THAT HAVE MADE "GOOD FAITH EFFORTS"

In the following two cases, the courts determined that employers satisfied the *Kolstad* standard and barred the plaintiff from receiving punitive damages. In *Woodward v. Ameritech Mobile Communications, Inc.*, ___ F. Supp.2d ___ (S.D. Ind. March 20, 2000), plaintiff's punitive damages prayer was dismissed on summary judgment due to the application of the *Kolstad* standard. The employer established an anti-harassment policy that contained alternative complaint mechanisms, the policy was distributed to all employees, and all employees received training on the policy. "In light of this evidence," the court said, "a reasonable jury could not conclude that [the employer] failed to make a good faith effort to comply with the requirements of Title VII."

In *Bullman v. Penske Truck Leasing*, ___ F. Supp.2d ___ (S.D. Ind. June 23, 2000), the employer had a policy prohibiting discrimination and providing a complaint mechanism. The plaintiff complained about alleged harassment as the policy provided, and his complaints were met with a swift and timely investigation. The court stated that if it were forced to decide the punitive damages issue, "since [the employer] had an established harassment policy, which [plaintiff] eventually used to stop the alleged harassment, [plaintiff) has failed to meet his burden to hold [the employer] liable for punitive damages."

AGE DISCRIMINATION IN EMPLOYMENT ACT

Prohibits discrimination against an individual who is significantly older than another. 29 U.S.C. § 623. This statute covers employers of at least 20 employees. Persons receive protection upon attaining the age of 40.

CIVIL RIGHTS ACT OF 1866

Protects the rights of all citizens to make and enforce contracts to the same extent as is enjoyed by white citizens. This statute covers private employers, prohibiting them from engaging in racial discrimination in connection with their contracts. It was originally adopted shortly after the end of the Civil War, and was originally intended to help secure rights under the Thirteenth Amendment, which abolished slavery. Section 1981, as this statute is known, was substantially amended in 1991, giving it a significantly broader effect than it had before.

EMPLOYEE POLYGRAPH PROTECTION ACT

Generally restricts the ability of private employers from requiring or requesting employees to undergo lie detector examinations. This statute has broad coverage.

FAIR LABOR STANDARDS ACT

Better known as the minimum wage law, it also sets the standard workweek at 40 hours. "Non-exempt" employees must be paid overtime for any hours worked in a week above 40. The FLSA has an odd statute of limitations, in that the time bar generally does not bar entire claims but only portions of claims. The limitations period generally is two years, but can be extended under proper circumstances to 3 years

NATIONAL LABOR RELATIONS ACT

This statute protects the right to engage in collective bargaining. Generally, people think of this law in connection with labor unions. However, it can have a much broader impact than that, for it also protects against wrongful interference with the ability of employees to collectively present grievances to their employer. A recent case affirmed the NLRA concept that an employee who is going into a disciplinary hearing

has the right to have a representative present, even when the employer is a non union place of business.

REHABILITATION ACT OF 1973

This law is a precursor to the Americans with Disabilities Act. It prohibits discrimination against disabled individuals under any program or activity receiving Federal financial assistance. Significantly, the statute only prohibits discrimination that occurs *solely* by reason of the disability.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII prohibits discrimination with respect to the terms, conditions, or privileges of employment because of the individual's race, color, religion, sex, or national origin. Covered employers must have 15 employees. As a subset of discrimination, this law also outlaws harassment based on the individual's race, color, religion, sex, or national origin. Title VII's filing requirement was essentially adopted by the ADA, as well.

STATE LAW

EMPLOYMENT AT WILL

Generally, without modification by contract, the law provides that the relationship between employer and employee is "at will." That means that either party may freely leave the contractual relationship at any time for any reason. If the employment agreement is of indefinite duration, it is terminable at will. As a practical matter, this is a great advantage to the employer.

EMPLOYEE MANUALS

Employee manuals can serve a useful role. They communicate company policies in a clear manner. They can provide protection against certain types of claims,

such as those arising under Title VII. However, they can also bind the employer to the terms contained therein. For example, if an employer states in a manual that employees cannot be fired except for certain enumerated causes, the employee may be able to enforce that right as if the provision were part of a binding contract.

COVENANT OF GOOD FAITH AND FAIR DEALING

Traditionally, the law has implied a covenant of good faith and fair dealing in every contract. Such a term can be implied in employment contracts, as well. Generally, however, no cause of action will lie for a claim for a breach of such a provision except in the situation where an employer terminates an employee for what appears to be the purpose of withholding commissions that have either been earned or are about to be earned.

PUBLIC POLICY TORT

There are certain reasons of important public policy that an employee may not terminate an employee. For example, it would violate public policy to terminate an employee who refuses to violate the law. It also violates public policy, and state statute, to terminate an employee who: must perform jury duty; files a workers' compensation claim; is called to active duty in the armed forces; and the like.

WHISTLEBLOWERS

Those who blow the whistle on illegal activities of their employer may have protection under the law. However, generally they must do so publicly on matters that affect the public interest. In other words, an employee who blew the whistle internally on a fellow employee who allegedly embezzled money from the employer and was subsequently fired did not state a whistleblowing claim.

COVENANTS NOT TO COMPETE

Courts in Oklahoma view covenants not to compete with disfavor. A covenant which appears to keep former employees from practicing their lawful profession generally will not be enforceable. However, a covenant which is designed essentially to protect trade secrets, such as one that restricts the ability to solicit the former employer's clients, may be enforceable. Much will depend upon the length of time of the covenant as well as the area of coverage of the restriction. The Uniform Trade Secrets Act prohibits someone from misappropriating the trade secrets of another.

DEFAMATION

One of the latest hot causes of action used in the employment context is some sort of a claim for defamation. When an employer fires an employee, and in the process of the termination or of giving a reference publishes false and defamatory material, the employer may be liable under a libel or slander claim, a claim of "false light," or even claims of intentional infliction of emotional distress or "unreasonable publicity of the private life of another." Thus far, Oklahoma has gone along with the majority of states and has not recognized the tort of compelled self-publication.