



# Employment Law 101 for Non-Lawyers

Presented by  
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- We will email you the recording and slides within 24 hours.
  - Please participate in our polls.
  - Please use the Q&A box for questions.
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# Agenda

- At-Will Employment
- Unlawful Harassment
- Section 7 of the NLRA
- Wage and Hour

# At-Will Employment

A close-up, slightly blurred image of an antique clock face. The numbers 11, 12, 1, 5, 10, and 60 are visible. The text 'Antiquite de PARIS' is partially visible. The clock is set against a light grey background.

## No Guarantee of Longevity

- Employment is for an unspecified period of time
- Nothing will earn the employee tenure or guaranteed employment
- Employee makes no promises to stay for a set period of time
- Avoid using the term “probationary period”

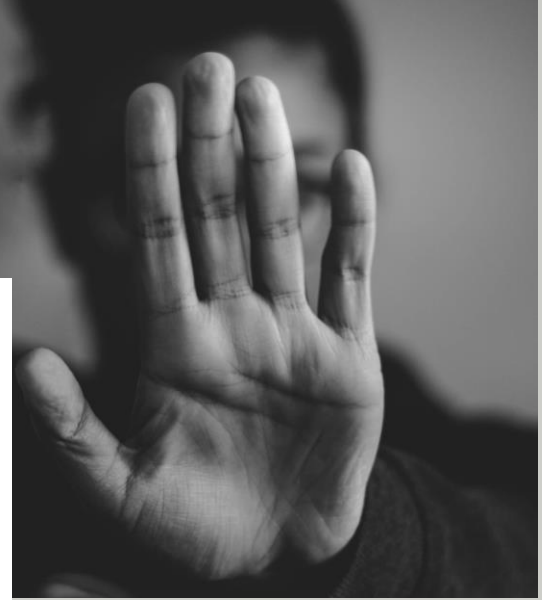


## No Guarantee of Notice

- At any time, an employer can terminate, or an employee can quit, without giving notice
- *Requesting* notice is fine, but *requiring* it might create a contract obligating you give notice too
- If an employee gives notice but you don't want them to work through the notice period, consider paying them anyway so the UI department doesn't see it as a termination

## No Guarantee of Good Cause

- Good reason, bad reason, no reason at all, so long as it's not an *illegal* reason
- Illegal reasons: based on an employee's inclusion in a protected class, use of a protected right or leave, or contrary to public policy



## But Don't Get Carried Away

- Weak reasoning and documentation will make it easier for an employee to claim the termination was for illegal reasons
- Not a suitable back-up plan when you *are* terminating for bad reasons
- If an attorney gets involved, it will cost you money even if they don't win





# Unlawful Harassment

# Not Everything is Harassment

Unwelcome

+ Based on Protected Class

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= Harassment

**Protected classes:** Race, color, religion, national origin, sex (including sexual orientation and gender identity), pregnancy, age, disability, genetic information, military or veteran status, citizenship or immigration status



## And Not All Harassment is Unlawful

Harassment becomes unlawful where:

1. Enduring the offensive conduct becomes a condition of continued employment, or
2. The conduct is severe *or* pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.



## The Hostile Workplace

- Not created by crabby bosses
- Not created by personality differences
- Not created by supervisors playing favorites

But beware the impact of *internalized bias*.

# Employer Liability for Harassment

If there is tangible employment action (discrimination in terms or conditions of employment), the employer is always liable.

If there is no tangible action (usually called a hostile workplace), employers have a defense *if*:

1. The employer exercised reasonable care to prevent and promptly correct any harassing behavior, *and*
2. The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise

# Poll Question

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Which two areas of HR do you feel most confident about?

# Poll Question

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Which two areas of HR do you feel least confident about?

# Section 7 of the National Labor Relations Act





## The NLRA: Not Just for Unions

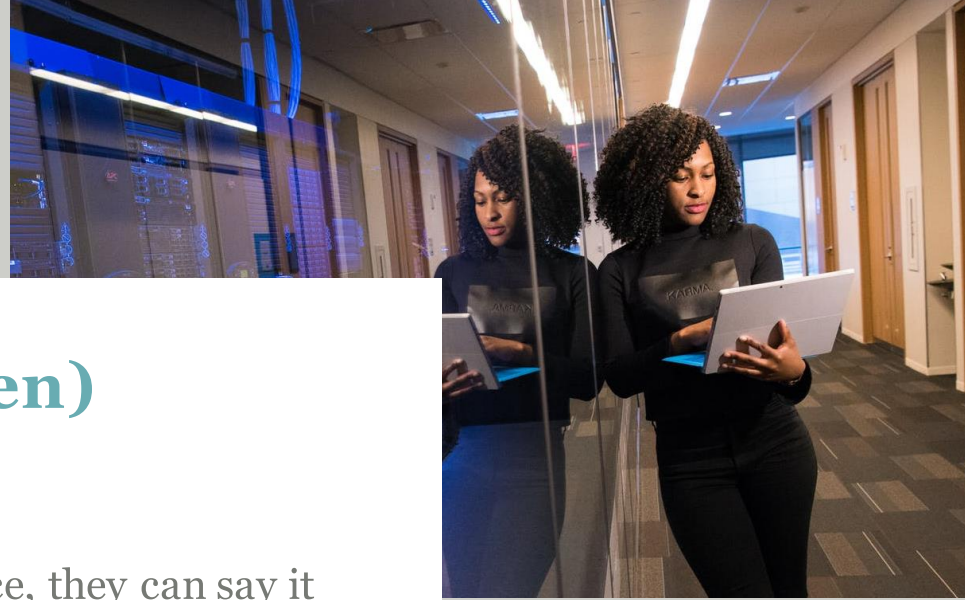
- Section 7 of the NLRA grants all employees the right to organize and engage in concerted activity for the purpose of mutual aid or protection
- Section 8 makes it an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights
- The biggest error non-union employers make is prohibiting salary discussions

# Examples of Protected Concerted Activity

- Employees discussing their wages, in any setting
- Employees complaining about safety concerns, including COVID-19 protocols and policies
- Employees organizing in opposition to a vaccine mandate
- Individual employee complaints regarding wages or employment conditions, if they are sharing general workforce discontent
- Employees discussing improving working conditions with other employees
- Circulating a petition asking for better hours
- Employees joining with coworkers to talk directly to the employer, a government agency, or the media about problems in the workplace

## Social Media is (often) Protected

- If they can say it in the workplace, they can say it on their Facebook page
- But it still needs to be *concerted* and it still needs to be *truthful* (in the mind of a reasonable employee)
- Language and activities can lose protection if they are so disloyal as to cause damage to the company's reputation or income





## Handbook Policies Cannot Squash Section 7 Rights

If a rule appears neutral, look at the nature and extent of the potential impact on NLRA rights, and the legitimate justifications associated with the rule

# Wage and Hour



## Fair Labor Standards Act

- Passed in 1938
- Regulates minimum wage, overtime, recordkeeping, child labor
- Emulated by many state laws, creating multiple opportunities for wage and hour claims

# FLSA Minimum Wage and Overtime

Minimum wage and overtime is for all employees who are non-exempt.

**Q1: Am I even covered by the FLSA?**

**Q2: Do I have an employee?**

**Q3: Can the employee be exempt?**



## Am I Covered by the FLSA?

**Almost certainly.** Ask yourself:

- Does my organization gross more than \$500,000 per year in business or sales?
- If not, do my employees engage in interstate commerce?





## Do I Have an Employee?

**Probably.** But you might also have:

- An independent contractor
- Someone who qualifies to be an unpaid intern
- A volunteer

## Is the Employee Exempt?

Only if one of the enumerated exemptions listed in the FLSA applies

- White Collar Employees
- Commissioned Sales Employees
- Agricultural Employees
- A long list of interesting job titles



# Non-Exempt Employee Traps

- Track time, including state-mandated breaks, carefully
- Don't deduct for breaks under 20 minutes
- Pay for all time worked, including unauthorized time and "iPhone time"
- Ensure overtime is paid at 1.5x their *regular rate of pay*
- Be wary of payroll deductions for your benefit

# It Started With Misclassification . . .

Employee was paid a flat rate of **\$800/week** to cook for an entertainment group on tour for **10 weeks**. She worked approximately **17 hours/day**.

## Damages:

Minimum wage back wages: \$210

Minimum wage federal penalty: \$210

Minimum wage state penalty: \$1,740

Overtime back wages: \$8,591

Overtime federal penalty: \$8,591

Overtime state penalty: \$1,740

Late payment state penalty: \$1,740

Attorneys Fees: \$5,000

Filing Fees: \$500

**Total: \$28,000+**

*(actual award was over \$80k)*



# Q & A