

Overview of Recent Developments in Labor and Employment Law

DC Bar Community Economic Development Program

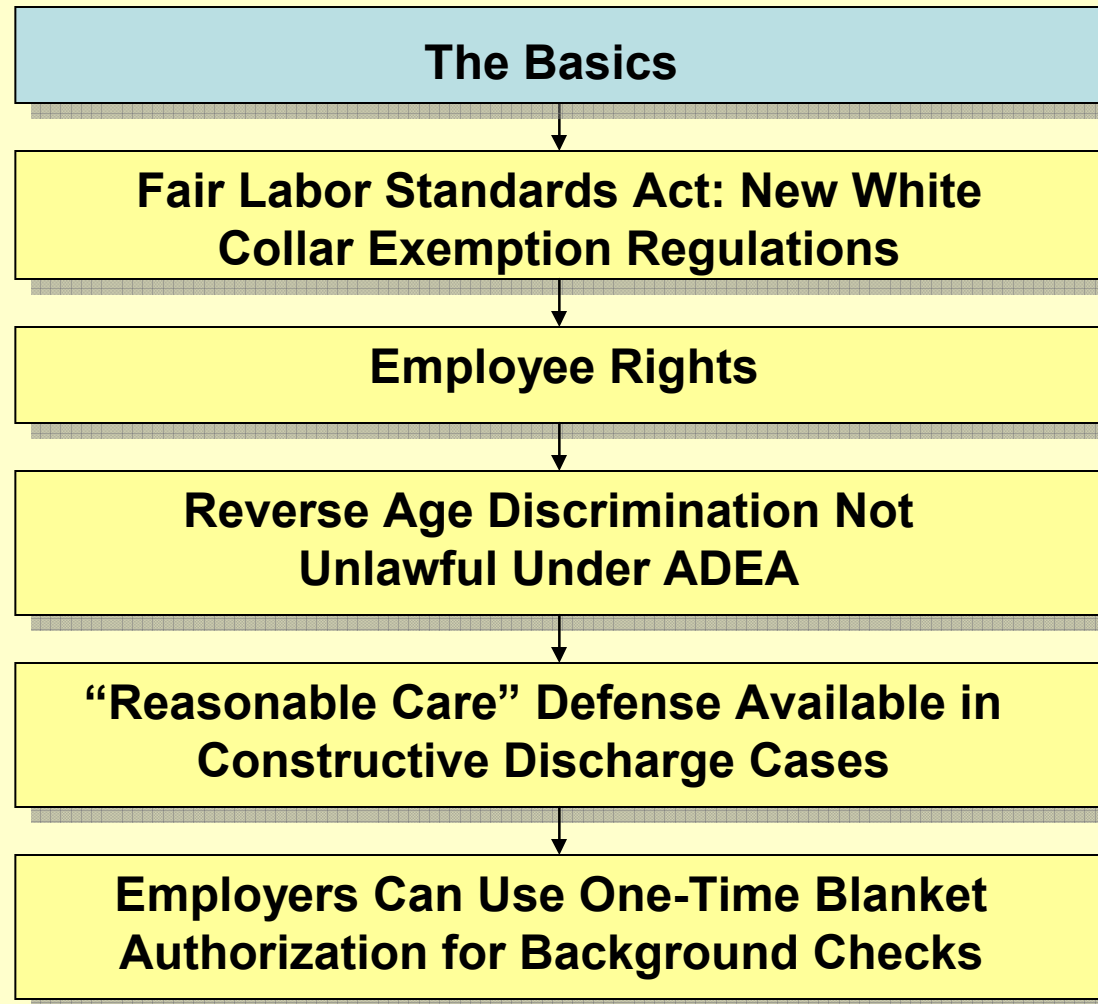
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Agenda



THE BASICS

- Hiring
- Employee Handbook
- Professional Work Environment
- Managing Leave
- FLSA
- Termination



THE BASICS

Hiring

- Employment application language
- I-9 process
- Background checks
- Prohibited inquiries
- Medical examinations

THE BASICS

Employee Handbook

- At-will disclaimer
- Acknowledgment
- “Must have” policies
- Legal compliance
- Don’t forget state law

THE BASICS

Professional Work Environment

- Mutual respect, free of harassment, discrimination, intimidation, retaliation, or violence
- Applies to employees, vendors, contractors
- Procedure for reporting violations
- Anti-retaliation

THE BASICS

Managing Leave: ADA and FMLA

- Coverage
- Basic protections
- Does exhaustion of FMLA leave terminate employee rights?
- Thorny issues: Unpaid leave, part-time work, reassignment

THE BASICS

FLSA

- Understand exempt vs. non-exempt
- Paying a salary doesn't make someone exempt
- All “managers” are not exempt
- Docking and other trouble areas

THE BASICS

Termination

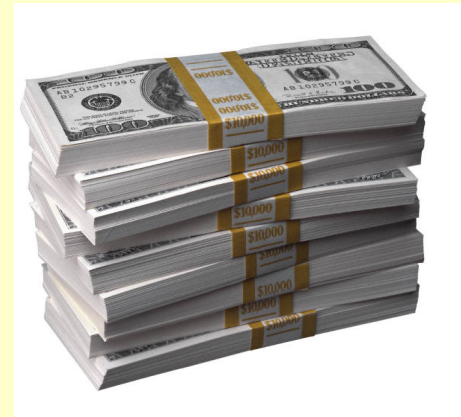
- Performance management is a process, not an event
- Despite at-will rule, juries like to see fairness in the process
- Documentation is a must
- Similarly-situated

Agenda



FAIR LABOR STANDARDS ACT: NEW WHITE COLLAR EXEMPTION REGULATIONS

- Compensation and “Salary Basis”
- “Exempt Duties” Tests
- Recommended Actions



FAIR LABOR STANDARDS ACT: NEW WHITE COLLAR EXEMPTION REGULATIONS

Compensation and “Salary Basis”

- Final Rule
 - Raises the “salary level” test for exempt employees
 - Expands exceptions to “no docking” rules
 - Liberalizes the safe-harbor provision

FAIR LABOR STANDARDS ACT: NEW WHITE COLLAR EXEMPTION REGULATIONS

“Exempt Duties” Tests

- Executive Exemption
- Administrative Exemption
- Learned Professional Exemption
- Creative Professional Exemption
- Computer Employee Exemption
- Outside Sales Exemption

FAIR LABOR STANDARDS ACT: NEW WHITE COLLAR EXEMPTION REGULATIONS

Recommended Actions

- Employers should ensure they are in compliance with the new regulations

Agenda



EMPLOYEE RIGHTS

- We're not unionized, so the National Labor Relations Act doesn't apply, right?
- **Wrong.**

EMPLOYEE RIGHTS

- Protected Concerted Activity
- “Weingarten Rights”

EMPLOYEE RIGHTS

Protected Concerted Activity

- Covers joint employee action – complaints, grievances, etc.
- Activity engaged in “with or on the authority of other employees” and not solely to benefit individual employee
- Mere griping not protected

EMPLOYEE RIGHTS

Weingarten Rights

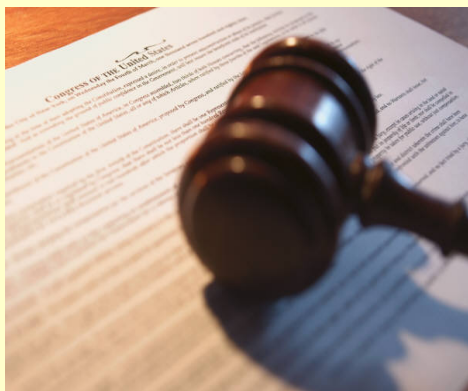
- Non-union employees do not have the right to have a representative present during an investigatory interview (**IBM Corp., 341 NLRB No. 148**)

Agenda



REVERSE AGE DISCRIMINATION NOT UNLAWFUL UNDER ADEA

General Dynamics Land Systems,
Inc. v. Cline, 124 S. Ct. 1236 (2004)



- Supreme Court rejected argument that ADEA authorizes claims of “reverse age discrimination”

REVERSE AGE DISCRIMINATION NOT UNLAWFUL UNDER ADEA

Age Discrimination in Employment Act of 1967

- ADEA was not intended to stop an employer from favoring an older employee over a younger one

REVERSE AGE DISCRIMINATION NOT UNLAWFUL UNDER ADEA

The Employer Community

- Under the federal ADEA, employees are now free to make employment decisions without fear of reverse age discrimination claims
- Validates employer's ability to design benefits for older employees

Agenda



THE “REASONABLE CARE” DEFENSE in SEXUAL HARASSMENT CASES

- Ellerth/Faragher (1998)
- Limits Employer Liability
- Affirmative Defense:
 - Employer used reasonable care to prevent harassment
 - Employee didn't use complaint procedure



WHAT IS “REASONABLE CARE” TO PREVENT AND CORRECT SEXUAL HARASSMENT?

- Policy
- Training
- Investigation
- Corrective Action

“REASONABLE CARE” DEFENSE AVAILABLE IN CONSTRUCTIVE DISCHARGE CASES

Supreme Court Extends Defense to Constructive Discharge Claims Where...

- Employer exercises reasonable care to prevent and correct any sexually harassing behavior
- The employee quits without taking advantage of corrective opportunities provided by the employer

“REASONABLE CARE” DEFENSE AVAILABLE IN CONSTRUCTIVE DISCHARGE CASES

Affirmative Defense

- Provides incentives for:
 - Employers to train managers and co-workers on conduct
 - Zero-tolerance policies in the workplace
 - Establishing user-friendly internal complaint procedures
 - Investigating employee complaints



Agenda



Fair Credit & Reporting Act

- What does the Fair Credit and Reporting Act have to do with hiring employees?



Fair Credit & Reporting Act

Impacts
employers who
want to obtain
from a
about an

information

consumer reporting agency

individual

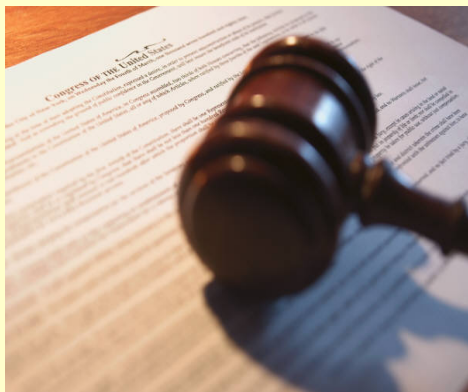
Notice, Authorization and Certification Requirements

Employers utilizing consumer reports for employment purposes must:

- Disclose in a **separate document** that a consumer report may be obtained
- Obtain **written authorization** from the individual **prior** to ordering the report
- Comply with notice requirements before/after adverse action

EMPLOYERS CAN REQUIRE CURRENT EMPLOYEES TO SIGN A ONE-TIME AUTHORIZATION UNDER THE FCRA

Kelchner v. Sycamore Manor Homes (M.D. Pa. 2004)



- Employers must be able to conduct meaningful workplace investigations; blanket FCRA authorizations promote this.

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