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2015 Employment Law Seminar

Presented by GKH Employment Law attorneys
**Jeffrey J. Worley, Lindsay J. O'Neil and
M. Jason Asbell**

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Pennsylvania Professional Licenses



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Two General Categories of Licenses

Health-Related Boards

- Medicine
- Chiropractic
- Dentistry
- Nursing
- Nursing Home Administrators
- Occupational Therapy
- Pharmacy
- Optometry
- Osteopathic Medicine
- Massage Therapy
- Physical Therapy
- Podiatry
- Psychology
- Examiners in Speech-Language Pathology and Audiology
- Social Workers, Marriage and Family Therapists and Professional Counselors
- Veterinary Medicine

Business-Related Boards

- Accountancy
- Architects
- Auctioneers
- Barbers
- Real Estate Appraisers
- Cosmetologists
- Crane Operators
- Professional Engineers, Land Surveyors and Geologists
- Funeral Directors
- Landscape Architects
- Real Estate Commission
- Vehicle Manufacturers, Dealers and Salespersons
- Navigation Commission for the Delaware River and its Navigable Tributaries



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Common Grounds for Disciplinary Actions

- Unprofessional conduct:
 - Negligence
 - Abandonment of client
 - Under the influence of drugs/alcohol
 - Intimidation/harassment of patient
 - Failure to maintain adequate records
 - Breach of confidentiality
 - Sexual misconduct
- Fraudulent billing
- Criminal convictions
- Aiding practices that are in violation of the licensing laws
- Misrepresentations related to practice or applications
- Practitioner's mental health
- Failure to maintain insurance
- Delinquent child support

Common Sources of Complaints

- Patients/customers
- Relatives of patients/customers
- Coworkers
- Members of Public
- Professional Liability Insurers; 40 P.S. § 1303.746(a)
- Health care facilities reporting sentinel events; 35 P.S. § 448.806a(a) and (b)
- Impaired physician reports from hospitals, colleagues, etc.; 63 P.S. § 422.4(f); 63 P.S. § 271.16c(f); 63 P.S. § 130g(f)
- MCARE fund; 40 P.S. § 1303.711(a) and (c)
- Self-reporting
- Continuing education audits
- Referrals from other agencies such as the Pa. Dept. of Health, Dept. of Public Welfare, Pa. Attorney General, United States Attorneys' Offices
- Facilities/employers

Procedure for a Licensing Action

- Complaint is submitted
- Prosecution Division reviews potential charges
- Prosecution files charges with the relevant Board
- Defendant responds to charges
- Hearing
- Appeal

Sanctions Available

- Treatment or counseling
- Additional education or training
- Reprimand
- Licensing restriction, such as requiring supervision
- Monetary fine
- Suspension of license
- Revocation of license

EEOC Charges

- Total EEOC Charges for 2014: 88,778
- Total charges in PA: 4,045
 - 2013: 93,727; 2012: 99,412
 - Race: 35%
 - Sex: 29%
 - National Origin: 10%
 - Disability: 28%
 - Age: 23%
 - Color: 3%
 - Religion: 4%
 - Equal Pay Act: 1%
 - Retaliation: 42%

Pregnancy Discrimination Act

The PDA provides that pregnant women have the right to be treated the same as others who are “similar in their ability or inability to work” but “not so affected” by pregnancy.

Pregnancy Discrimination Act

- *Young v. UPS*
 - Pregnant employee with lifting restriction requests accommodation
 - UPS only provides accommodations to employees who have a workplace injury, a need for an accommodation pursuant to the ADA, or have lost DOT certification

Pregnancy Discrimination Act

- UPS argues that the policy does not discriminate because it does not consider pregnancy.
- Young argues that because UPS had provided other employees with an accommodation, it must likewise provide her with an accommodation.
- The Supreme Court disagrees with both positions!

Pregnancy Discrimination Act

- An employer must be able to articulate a legitimate non-discriminatory reason if it does not provide a pregnant employee with an accommodation and it provides an accommodation to others with a similar ability or inability to work.
- Cost is not a legitimate non-discriminatory reason
- Inconvenience is not a legitimate non-discriminatory reason

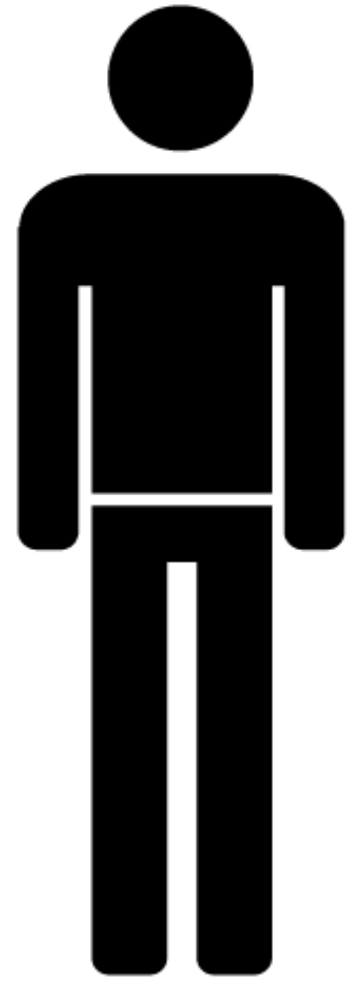
Pregnancy Discrimination Act

Legitimate non-discriminatory reasons may include:

- Job classification
- Employer needs
- Seniority

Pregnancy Discrimination Act

EEOC guidance specifies that many common complications related to pregnancy will be considered a disability under the Americans with Disabilities Act.



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EEOC Enforcement Gender Discrimination

- EEOC extends gender discrimination to transgendered individuals.
- “Title VII barred ‘not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.’”

EEOC

In *Macy v. Holder* the EEOC argued that unlawful gender stereotyping occurs:

“whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.”

Employment Non-Discrimination Act

- Federal law that would prohibit discrimination based upon sexual orientation and gender identity
- This Act has been pending for 20 years but has failed to pass Congress

Gay Marriage

- 37 states currently permit gay marriage
- *Obergefell v. Hodges* - currently pending before the Supreme Court

Whitewood v. Wolf

The District Court's decision in May 2014 held that Pennsylvania's statute prohibiting same-sex marriage was unconstitutional and violated the Due Process and Equal Protection clauses of the United States Constitution, thus legalizing gay marriage in Pennsylvania.

Discrimination

No federal or state protection for sexual orientation or gender identity in private employment

- Thus, while a same-sex couple may be lawfully married under PA law, an employee may be terminated for marrying a same-sex partner without recourse under federal or state law

FMLA

FMLA

FMLA extends to same-sex spouses

- to care for a same-sex spouse with a serious health condition;
- for military related leave and to care for a spouse who is injured during active military service

FMLA Leave for Child Care

The FMLA regulations define *in loco parentis* (in the place of a parent) as including those with day-to-day responsibilities to care for or financially support a child. Employees who have no biological or legal relationship with a child may, nonetheless, stand *in loco parentis* to the child and be entitled to FMLA leave.

FMLA Child Care cont.

- Married same-sex couples who have adopted a child will qualify for FMLA leave both to bond with the child and to care for the child's serious medical condition.
- Married (and in some instances unmarried) same-sex couples will have eligibility for FMLA leave to care for the non-adopted child of a same-sex partner if they meet the definition of *in loco parentis*.

Insurance

- Policies issued in PA will have to treat same-sex spouses the same as all other spouses;
- Children of same-sex employee spouse will be treated as step-children and eligible for coverage; and
- Health plan coverage for same-sex spouse is non-taxable.

Self-Funded Insurance

- Self-funded policies are governed by ERISA and not state insurance law.
- At this time businesses are not required to provide coverage to same-sex spouses-but businesses may offer coverage if they choose to do so.

EEOC v. Abercrombie – U.S. Supreme Court

- Abercrombie refused to hire a woman because she wore a hijab (traditional head covering), which didn't conform to Abercrombie's "Look Policy"
- Title VII religious discrimination claim made by the woman

EEOC v. Abercrombie continued

- Issue is whether an employer can be liable under Title VII for refusing to hire an applicant, or discharging an employee, based on a “religious observance and practice” only if employer has actual knowledge that religious accommodation is required, based on direct and explicit notice from the applicant or employee
- Argued in Feb. 2015 – decision forthcoming

3rd Circuit Cases on FMLA

Budhun v. Reading Hospital: FMLA & Health Certifications

- If employee provides a medical certification stating he or she can return to work from FMLA leave, employer cannot require employee to remain on FMLA leave

Lupyan v. Corinthia Colleges: FMLA and Mailed Notice

- When employer is required to give notice under FMLA, it must have “proof of delivery,” as mailbox rule is not the automatic presumption

Affordable Care Act Updates

- Play or pay in effect for 2015, see IRS 2014-37
- Jan. 1, 2015: employers with 100+ F-T employees must offer affordable care to 70% of their F-T employees to fulfill mandate
- By 2016, these employers (with 100+ employees) must offer affordable care to 95% of their F-T employees to fulfill mandate
- Jan. 1, 2016: employers with 50-99 F-T employees may face penalties if they don't provide affordable care to 95% of their F-T employees

Affordable Care Act and SHOP

- SHOP (Small Business Health Options Program) is a way to get lower costs on group plans and get a tax credit
- In 2015, employers with 50 or fewer FTEs can use
- In 2016, SHOP open for businesses with 51-100 FTEs
- Must sign up for SHOP through website to qualify for the tax credit

Fair Labor Standards Act

- “White Collar” Employee exemption
 - Currently minimum salary requirement: \$23,660
 - Projected increase in 2015 estimated to \$52,000
- Many exempt employees will lose exemption unless their salaries are increased
- Potential by-the-hour alternatives

Employees Are Hired To Succeed



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Employee Engagement

- An engaged employee applies discretionary effort to further the organization's interests
- Why? An engaged employee is vested in the organization's success; the employee's and the organization's values are similar; the employee recognizes individual success through the organization's success; the employee is rewarded
- How? Communication and action

Communication

- Connecting the employee and the organization
- The organization's mission and priorities
- Expectations: What is the job? What needs to be done? What are the rules?
- When expectations are met, exceeded or failed
- Employee expectations, ideas and input

Handbooks

Set forth basic rules and expectations

- Schedules
- Paid time off/sick leave and FMLA
- How to call off
- How to address and report problems
- Confidentiality
- Disciplinary process
- Employment at will

Job Descriptions

- Establishes the essential functions of the position
- What is the job to be done?
- What are the responsibilities?

Job Description

Requirements of the position

- Skills and experience
- Education, degree, certification

Intangible skills

- Self motivated
- Good communication skills
- Attention to detail

Employee Review

- Honest and accurate
- Measure against the job description
- Compare to previous goals and reviews as well as disciplinary actions or recent successes
- Establish new goals
 - Build off of prior success
 - Challenge problem areas

Documentation

- Disciplinary
- Rewards-acknowledgment
- Change of job description-requirements
- Modification due to accommodation
- Change of policy

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QUESTIONS & ANSWERS

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