

HOT TOPICS IN EMPLOYMENT LAW



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Hot Topics in Employment Law

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Getting Started

Course Overview

Insurance professionals and risk managers must be aware of exposures arising for employment law claims. Employment-related claims can be very costly, driven by the high attorney's fees involved in these claims. Many of the laws have mandatory attorney's fees that will be awarded to the attorney representing the employee against your company or against your client, even if only one of the many claims they have asserted is proven, and even if only one portion or one claim of the amount sought is awarded. Even when there are no mandatory fees, attorney's fees can be high, even when no damages are awarded to a claimant.

There are a number of laws that impact employment law, but Title VII is the cornerstone. Title VII was passed in the 1960s when demands for equal treatment was high. Title VII protects against discrimination, harassment, or retaliation based on certain protected categories. Title VII makes it illegal for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual, with respect to compensation, terms, conditions, or privileges of employment because of an individual's race, color, religion, sex, or national origin.

This course will review the Acts in detail focusing on discrimination based on sex, gender, religion, racial, and national origin, along with insurance implications for the various exposures.

About the Presenter: Christine Sensenig, Esq.

Christine Sensenig, a partner with the firm of Hultman, Sensenig & Joshi, graduated from the University of Florida Levin College of Law. She has been in practice for over 18 years and has conducted many seminars on compliance with the myriad of laws affecting employers. She conducts Form I-9 audits, advises about workers' compensation matters, including return to work and the interaction between workers' compensation and the Americans with Disabilities Act, the Family Medical Leave Act, and now the Genetic Information Non-Discrimination Act. She assists with the preparation of handbooks and then training both staff and management to reduce potential exposure when claims of harassment, discrimination and retaliation arise. She investigates claims of harassment, discrimination and retaliation from the making of the claim through the EEOC/FCHR process, and then through litigation in the state and federal courts.

Ms. Sensenig is active in the Sarasota community. She served as Treasurer for three years and President for two years of the Sarasota County Gator Club, the local University of Florida Alumni Association. She's helped raise tens of thousands of dollars in funds to aid local students who are attending the University of Florida. Christine has served on the Board of the Sarasota Chapter of the Florida Association of Women Lawyers and received the President's Service Award for service above and beyond expectations. She currently serves on the Board of the Federally Qualified Health Center in Sarasota/North Port and the Women's Resource Center. She is a member of the Sarasota County Bar, Florida Bar, and American Bar Associations, and is also a member of the Labor & Employment Section of each of those organizations. Christine was recognized by her peers as a "Florida Legal Elite" lawyer in Florida Trend Magazine in 2009, 2010, 2011, 2012, 2013 and 2014.

Introduction

Hi, my name is Christine Sensenig. I'm an employment attorney with over 20 years of experience in human resources and employment law issues. We're going to discuss how to become aware of employment law issues, consider exposures, address traditional covers limitations, and bring value to your organization. Because after all, we're all in the business of risk management.

Chapter 1

Title VII

Title VII

As an insurance professional and risk manager, one of the things you really need to be aware of is there's legal exposure for employment law claims, which can be extremely high as to the attorney's fees that are involved in these claims. Many of the laws we're going to be talking about have mandatory attorney's fees that will be awarded to the attorney representing the employee against your company or against your client, even if only one of the many claims they've asserted is proven, and even if only one portion or one claim of the amount sought is awarded.

Attorney's fees are pretty much guaranteed. So let's start with the grandfather of all civil rights laws, Title VII. Title VII was passed in the 1960s. We all know there was a lot of turmoil, there was a lot of protesting, and a lot of marching going on in the 1960s. And people were demanding to be treated equally, and in a way that is similar to people who were different than them.

So we look at what Title VII actually protects. And Title VII requires that due to a protected category, you cannot have discrimination, harassment, or retaliation based on that protective category, particularly in the employment law context. So Title VII makes it illegal for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of an individual's race, color, religion, sex, or national origin.

So we pretty much reduced that to the big four. Sex, also gender, religion, race, and national origin. The other thing that Title VII prohibits is you cannot limit, segregate, or classify employees or applicants for employees in any way which would deprive or tend to deprive that individual of employment opportunities, or otherwise adversely affect their status as an employee because of the individual's race, religion, gender, or national origin. So let's talk about each one of those separately.

Chapter 2

Sexual Harassment

Introduction to Red/Yellow/Green Scenarios

I'm going to walk you through a scenario. And I want you to consider the scenario in terms of a traffic light and the colors red, yellow, and green. When you consider the facts that are presented, think about whether red, you'd stop. You'd say this is not behavior anyone should be engaging in. This appears to be harassing, discriminatory, retaliatory behavior.

Then in terms of yellow, yellow is possibly, well, I might need more information. Or, well, it could be OK, depending on context. Or, well, it could be OK based on that particular company's culture. And last but not least, green, which is where you say, no problem here. Full speed ahead. I don't see any concerns. Not going to stop the behavior.

So now that you've gotten the idea of how to think about the scenarios. Let's start with a scenario for you to consider.

Sexual Harassment

Let's consider a scenario under Title VII focused on sex harassment. John, an underwriting technician, persists in asking Joan, another underwriting technician in his department, out to dinner, even though she turns him down each and every time he requests a date. Would you consider this a red situation, a yellow situation, or green situation?

If you selected red, you're probably relying on that notion of no means no and it does. No certainly means no. So in this case, we know without a shadow of a doubt that John has asked Joan out several times and she has turned him down several times. What we don't know is necessarily how often he's done it, how frequently he's done it, necessarily is it once a month, once a week, every day, and these are things that may cause people to not believe this is a red situation, but a lot of times this would be a red situation.

Now, if you chose yellow, you probably wanted more information. You probably wanted to know, how often was John really asking Joan out? Did he do it daily? Did he do it weekly? Did he do it monthly? A lot of people also want to know, well, how did Joan necessarily say, I don't want to go out with you? Did she give a fairly lame excuse and say, my mother's coming into town. Next week my friends and I are going to a movie. We already made those plans. The week after, the proverbial, I need to wash my hair. Now, no always means no, but a lot of times, people try to be gentle in how they deal with someone who's interested in them, who they're not interested in, and so she may not have been clear in her intent to not be interested in John in a romantic way. Again, does this mean he gets to harass her? Absolutely not, but there are times when people need to be direct with a colleague and there's times when people don't get a gentle hint. So in this particular case, if Joan feels that John is really making her uncomfortable, she should report it to human resources and she should ask for their assistance if she doesn't feel comfortable saying to John directly, I'm just not into you.

If you selected green, you're probably looking at this in the broader social context and saying, well, if you don't meet your spouse in college, you're going to meet them at work, but in this case, you have to know whether John is necessarily being very persistent in asking Joan out and whether John is necessarily harassing her, perhaps stalking her, making her feel very uncomfortable.

But most people look at this and say, we're grownups. Deal with it. Be able to look at John and say, I'm not interested, thank you very much, so that he can move on, but again, not required. So in the world of harassment discrimination in the world of sex harassment policies, what you need to make sure to do is understand that if Joan is feeling uncomfortable, Joan should be able to either tell John I'm not interested or if she can't do that, go to HR.

Let me provide you with a little more information about John and Joan. What if John invites Joan to a great dinner at Del Frisco's Double Eagle Steakhouse, a very nice place with a very high price tag and Joan decides she's going to go out with John, as he seems like a nice guy, a little dull, but nice and during dinner she realizes he's really not her type and she'd rather keep him in the friend zone.

They have a nice dinner, they part amicably, and John asks her out again after the Del Frisco's dinner. Joan turns him down and John start sending Joan flowers to the office for the next few weeks and Joan does not speak with John and she avoids him whenever she sees him coming. How do you view John sending Joan the flowers, even after having been turned down? Do you believe this is a red situation, a yellow situation, or a green situation?

If you picked red, most likely you're still of the belief or you've come to the belief that no means no and that Joan has made her desire to not see John as a romantic partner pretty clear, because after John starts sending flowers, usually the response when you are receptive to that would be, why, thank you and let's go out again. Instead, John doesn't seem to be getting the hint.

So this is the type of situation where Joan would either say to John, really not interested in you, thank you very much, and if he doesn't get the hint, she can go on to HR or she doesn't have to approach John at all, because Title VII doesn't require that, nor does the case law that governs Title VII require someone to confront the person. Joan can go to HR and seek their assistance and say, it's just making me uncomfortable.

Now if you picked yellow in this case, you may be looking at whether Joan has been clear in her intentions to John, but when all is said and done, that doesn't really matter, because what matters in the world of harassment is Joan's perception of John's activity . If she perceives this as him harassing her and wanting a romantic relationship and wanting to continue engaging with her when she doesn't want to engage with him, then that's the type of situation that HR will likely get involved, but a lot of people pick yellow, because they still want Joan to be able to confront John directly, but again, there's no requirement that says Joan has to do that and again, she can seek HRs assistance.

If you picked green in this situation, you are probably of the mindset that these are two grown adults, they need to work it out. Not necessarily true in the world of Title VII. In this case, John is pursuing Joan, because he is interested in a romantic relationship with her. So gender, sex come into play. So in this kind of case where Joan is not reciprocating John's affection, it's not necessarily appropriate for him to continue seeking a relationship when she has sent him no clear message that she's interested.

Now, if Joan reports John's conduct to HR, what can risk management do to assist? Well in this case, risk management can get involved to make sure that there are no other issues that are going on of which they're not aware. Perhaps the situation between Joan and John has impacted the rest of the unit and risk management may need to deal with some morale training, some team building, and things like that, because John's conduct is not necessarily severe or pervasive.

It's not the type of conduct that's necessarily going to get him terminated. So that means Joan and John are probably going to have to continue working together in some way, in some fashion. As we all know, underwriters are not the easiest people to come by. So since they're both underwriting technicians and they're both going to probably be continuing to work together, even after a report to HR, what is it that you can do to assist?

Again, take into account how you may be able to informally chat with people and say, how's it going? Do you feel things are good? How do you feel the morale of the team is? The other thing you can do is participate in any training. There may be a need to engage in company-wide harassment, discrimination, and retaliation training and there may be a need to meet with John periodically, so that you assist HR in saying, well John, you understand the rules. You understand Joan doesn't feel comfortable. How are you doing? Do you have any questions or concerns? How is the relationship going with the rest of the team?

These are things you can do to make sure that not only morale is kept at an appropriate level, but that compliance is at the forefront of your company culture and by assisting with HR, you can absolutely help to make sure that the company's policies and procedures are being followed and that team morale and a sense of camaraderie can remain intact, despite this bump in the road.

Chapter 3

Sex and Religion Harassment

Sex and Religion Harassment

Gonna provide you with another scenario under Title VII. This one involves sex harassment and a few other issues. So let's start with our friend Terry, who's a maintenance supervisor at a factory. He has several calendars featuring scantily clad women on his cubicle wall, with some dating back to 2014, which can all easily be seen whenever you're in Terry's office.

Is this a red situation, a yellow situation, or a green situation? If you selected red, I'm sure you thought you didn't want to be subjected to cleavage let alone other things that you will necessarily see in such calendars, whenever you go into Terry's office. And the fact that he's got some dating back to 2014 probably makes you a little uncomfortable as well. Why has it been posted since 2014? Why hasn't someone addressed it?

Well, maybe they haven't addressed it because they're uncomfortable. Maybe they haven't addressed it because they're afraid of what Terry may do or say. And maybe they haven't addressed it because they didn't realize that they could or should. But this is the type of situation that someone could easily be offended by being confronted with numerous photos of scantily clad women in calendars that are right in front of you and purposely so.

So, if you picked yellow, you're probably wondering, well, if this is a maintenance supervisor, is this perhaps a cultural thing? Is this something that everybody in maintenance is fine with? Is this something that the company doesn't have an issue with because they're not naked, they're in bikinis. They're in t-shirts, they're in short shorts. So that's something you can have when you go to certain restaurants.

So a lot of people look at that and say, well get a sense of humor. Or it's not really that big of a deal. But remember, let's go back to Title VII and the perception of what the perceived victim feels is the only perception that matters.

The intent of the person, such as Terry, doesn't matter. It's what the person who is being exposed to it, who feels offended or feels harassed, their perception matters.

So if you picked green, you're probably thinking, what's the corporate culture? This isn't a problem. The women aren't naked. They're in clothing, they're in bikinis. You don't see an issue.

Now again, whether you see the issue doesn't matter. It's whatever someone who's in Terry's office is necessarily feeling. And if they feel harassed, or if they feel it's inappropriate to be looking at calendars and seeing a whole lot of skin, then that person has the right to say, this concerns me. I'm not comfortable. So this is probably not a green situation.

So let's think about Terry again. Would you feel differently if instead of waitresses in bikinis, Terry has a picture of his stunning wife Melissa in a white bikini, wearing a lei in front of a waterfall in Hawaii from his honeymoon last year? Is this a red situation, a yellow situation, or a green situation.

If you picked red, you probably did so based on the fact that showing that much cleavage and that much skin doesn't matter if it's Terry's wife. It doesn't matter if it's someone he doesn't know in a calendar. The answer is you think it's not appropriate to necessarily have pictures like that on display at work.

And you could be right. It, again, depends on the perception of the person who is looking at all that skin and all that cleavage and whether they feel comfortable or not. Not whether Terry feels comfortable. And not whether Terry had a fabulous honeymoon and his wife looks great in the bikini. The perception of the person who's looking at the picture of Melissa in the bikini matters. If you picked yellow, you probably were wavering on whether it made a difference as to a stranger in a bikini versus Terry's wife in a bikini. And you're wavering on, well, it's a family picture. Why should that offend anybody?

Well, Melissa is still in a bikini. There's a lot of skin being shown. And there's a lot of people who don't feel that's necessarily appropriate for the workplace. So even though it's a lovely picture of his wife-- she's in a waterfall, it makes him happy to look at that photo and reminisce about his honeymoon-- you could still be in a situation where someone feels uncomfortable looking at Melissa in that bikini.

If you chose green, you are probably relying on the fact that you view a family photograph very differently than you do photos of strangers. And you also believe that it's probably not nearly as large as some of the calendar photos that you may be confronted with. And you don't have any problem with Terry having a photograph of his wife Melissa from their honeymoon on his desk, because you, too, have family photos on your desk.

But do you have family photos of you in a Speedo and your wife in a bikini on your desk? Those are the sort of things that, again, you need to consider, on whether it's OK to be showing skin and cleavage. And does it really matter that it's a relative as compared to a stranger?

Chapter 4

Religion and National Origin/Race Harassment

Religion and National Origin/Race Harassment

Remember our maintenance supervisor, Terry? I'm going to switch the facts around a little bit for you. What if instead of pictures of bikini-clad women in posters and calendars, or of his wife Melissa, Terry has several large framed posters of the following-- John 3:16-- For God so loved the world that he gave his only begotten son that whosoever believeth in him should not perish but have an everlasting life. His next framed poster says, Jesus loves you. And his third framed poster says, I can do all things through Christ who strengthens me.

Is this a red situation, a yellow situation, or a green situation? If you picked red, you were listening to the protected categories under Title VII, which include religion. Terry's religion may not be the religion of someone who is visiting his office. And they're being confronted with large posters telling them that Jesus loved them and that they can do all things through Christ, when that person may be Buddhist or have an entirely different religion. It could be very uncomfortable for the person sitting in Terry's office. They may feel judged by Terry if they don't share the same beliefs.

A lot of people confuse the fact that you can have your beliefs, you can have your opinions, but sharing them at the workplace is not protected activity. You lose your First Amendment rights when you walk in your employer's door. The First Amendment applies to the public square. So, in this case if you picked red, you were definitely thinking about the perspective of the person who walks into Terry's office, is confronted with these religious posters, may not agree, and may feel uncomfortable. This would be a report to HR moment because it's very unlikely that Terry is going to voluntarily remove those posters.

If you picked yellow, you were probably trying to decide. Well, if he can have pictures of his wife in a bikini, why can't he have pictures saying I believe in God, I believe in Christ, I believe that Christ strengthens me? Is that necessarily a problem? Well, if you worked for the YMCA, it wouldn't be. They are the Young Men's Christian Association after all. But if you think about the fact that most organizations are secular in nature and they don't have a religious basis, the fact that you're walking into a maintenance supervisor's office and having to be confronted with religious posters could be a moment where the person feels uncomfortable and they may not be able to express, well, maybe I don't want to meet in Terry's office because I have to look at those posters. A lot of people again, think, well he has the right to believe in his religion. We live in the United States of America. He absolutely does. But to proselytize at work is not a right he's guaranteed under the Constitution.

If you picked green, you're probably thinking I live in the United States. I can have freedom of religion. Isn't that one of the things guaranteed to me? And then you heard in Title VII, I don't have to deal with religious discrimination. And I think I'm being discriminated against if I'm told I can't have these posters.

Let's go back to the notion of what it is to be in a workplace and what it is to be in a professional workplace where Title VII necessarily applies. And that is people have the right to work in an environment free of discrimination and harassment. So if you happen to be Buddhist and you happen to walk into Terry's office and sit down and the first thing you see is, I believe that God and Christ strengthen me, and you get the impression that if you don't believe that Terry's going to treat you differently, that's going to impact your work relationship. It's also going to make the Buddhist necessarily feel uncomfortable. So this is the kind of situation that HR is most likely going to get involved.

So let's take that situation a step further. Hasan Kain, a Muslim coworker of Terry's, tells HR that he has been in Terry's office and it does make him uncomfortable to have small team meetings in Terry's office, as the Christian posters make him feel unwelcome and less valued, as he does not believe Jesus loves him nor does he believe Christ will help him do all things or strengthen him. He has a different set of beliefs and values. He has respect for Terry and how he necessarily leads as maintenance supervisor. But these posters make him feel uncomfortable.

HR speaks with Terry who reluctantly takes down his framed pieces. Shortly thereafter, Hasan starts finding Bible verses tucked under his wiper blades. And he's no longer invited to the group lunch the team has every Friday. Is this a red, yellow, or green moment regarding the Bible verses and regarding the group lunch?

So if you picked red and you said this is a stop, this should not be happening moment, you're probably right. Because Terry being in charge of the group has to keep in mind that Hasan is still part of the group. So why is Hasan not being invited to the group lunch the team has every Friday? What changed? Well, the only thing we know of that changed is our spoke with Terry and told him to take down his posters. So the fact that Hasan seems to be frozen out after that happened would be an adverse employment action. And you're right. This is a stop moment. This should not be happening.

If you picked yellow, you probably wanted to know a little bit more information, such as who's actually putting the Bible verses under Hasan's wiper blades. Is it Terry? Is it somebody else in the group? Is it somebody else who just happens to be doing that for everybody at the company? But that notion of the group lunch that the team has every Friday and Hasan being no longer invited that's a problem.

Now you may want to know more, and that's why you picked yellow. You may want to know, well, is this a formal lunch? Is this the group always has lunch. Or is this an informal, hey, we're going to go to this place for lunch. Why don't you join us?

If you picked green, you probably are of the mindset that, hey, I don't have to invite anybody to lunch who I don't want to. And you probably said, well, whoever's tucking Bible verses under his window wiper blades, no big deal. It is a big deal. Because Hasan has made it clear that he is not a Christian. He believes in Islam. And he has a different value system, as well as a different belief.

At no time have we mentioned that Hasan is not a good employee, that he doesn't get along with his coworkers. So the fact that he made a complaint about the religious posters and then is being subjected to Bible verses under his wiper blades and being disinvited to the group lunch, this is a problem. And HR needs to get involved again.

So we're back to Terry. We're back to Hasan. We're back to the fact that he's not being invited to lunch, and those Bible verses continue to appear on his windshield. Then someone uses a Sharpie to write a racial slur on his locker. Is this a red, yellow, or green situation?

I'm sure at this point those of you who picked red are feeling very comfortable with your red, saying this is a stop moment. This should not be happening. Anytime we get a racial slur or an ethnic slur written on someone's locker, or someone's car, or on someone's chair, that's when we know we have a serious problem. Because at this point we don't know who's doing it, and we not only have a culture issue, but we have a legal issue. And that is Hasan has the right to work in a discrimination-free environment. And now we have not only Bible verses, not being invited to lunch, but now we have a racial or ethnic slur written on his locker. So this is definitely a moment for HR to get involved and risk management to get involved to see what it is they can do to stop the situation from continuing to escalate.

If you chose yellow, you're probably still seeking additional information. You want to know who's putting those Bible verses on Hasan's windshield and why is it that he's no longer being invited to lunch. Maybe he said something that offended somebody else. Maybe he's dating somebody's ex-girlfriend. We don't know. And so you're the curious type who wants a little bit more information.

But the fact that someone wrote a racial or ethnic slur on Hasan's locker, that gets us more into a red moment than a yellow moment. And HR will be certain to get involved.

For those of you that chose green, you're probably still of the belief that boys will be boys, or perhaps, you know what? This is something that they need to deal with without getting the company involved. And that's not an assumption that's going to help save your company or save your company's bottom line. Because Title VII provides Hasan with a discrimination and harassment-free workplace. So even though you still may be on the fence here on the Bible verses or his not being invited to lunch, but there's no being on the fence regarding racial slurs being written on Hasan's locker. This is definitely a moment for HR to get involved.

OK. Hasan has had a lot of problems in the past few weeks since he asked Terry to-- well he asked HR to have Terry put the posters down. So let's talk about what protected categories we have in this situation. We possibly have race. We're not sure. Hasan may have converted to Islam and changed his name. We possibly may have national origin in that he may be from a country where Islam is the predominant religion.

But we do know that we have a problem with religious discrimination under Title VII. And we have a retaliation cause of action, because it appears that Hasan is suffering from an adverse employment action due to having made a complaint. And when that happens, you also have an additional cause of action. And remember, Title VII not only protects you from harassment and discrimination, it protects you from retaliation for having complained about being treated differently based on a protected category.

So what can you as risk do to help the company in being able to resolve this troubling situation? One of the things you might want to consider doing is monitoring or installing surveillance cameras. Because you want to make sure that if anyone is writing racial or ethnic slurs, that stops immediately. You want to know who's doing it. You also might want to know who's continuing to tuck those Bible verses under Hasan's window shield. Because that may give you an idea of whether it is someone on the maintenance team or whether it's someone totally different who just may feel like they need to proselytize and they figure Hasan is a good target.

You also want to look at participating in team building or diversity training. You want to work with HR and legal. Because you want to be able to put an emphasis on compliance. You want to put an emphasis on we do the right thing. Because if you don't, we all know what's coming next. And that's an EEOC charge. That's what's coming next. And that's where you know without a shadow of a doubt, not only will the company's bottom line be impacted because attorney's fees will mount as a result of an EEOC charge, but you'll continue to have possible morale issues, and culture issues, and team issues as people may side up as team Terry or team Hasan, and say, well, you need to do this differently. You need to perceive this in a different way.

And you're going to have a whole lot of drama when the answer is, let's try and figure this out now. Because up till now, Terry hasn't necessarily been a problem employer for you and neither has Hasan. So let's see what we can do to put the company back on the right track and reinforce that culture of compliance.

Chapter 5

Americans with Disabilities Act (ADA)

Americans with Disabilities Act (ADA)

Let's talk about the Americans with Disabilities Act, otherwise known as the ADA. The ADA is a civil rights law that prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation, and all public and private places that are open to the general public. The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else. So the ADA gives civil rights protections to qualified individuals with disabilities, similar to those provided to individuals under Title VII on the basis of race, sex, national origin, or religion.

It also guarantees equal opportunity for an individual with a disability and making sure that they can receive appropriate state and local government services, telecommunications, and transportation. So let's go back and talk about the ADA in general and let's talk about the fact that, do you remember the last time you went to a movie theater and you walked in and you got to your seat. Did you actually take stairs to get halfway through or did you walk in on a ramp and the ramp led you to a very wide row with wheelchair seating? Probably didn't pay attention, because it's become such a part of your life that it's normal.

Same is true if you've been to a concert or a football game, any sort of stadium activity. You walk in through a ramp or you walk in through one of those ramps that goes up and up and up in a circle like the Guggenheim. That's because instead of stairs, people with crutches, wheelchairs, and other disabilities can have an easier time of it, because ramps are appropriate and ramps permit access to things that, otherwise, people with disabilities wouldn't have and every bathroom you've been in lately for any larger establishment that's not historic, you'll probably notice that there's a handicapped bathroom.

These things have become such a part of our daily life, we don't even think about them. We don't think about the fact that when you step off a sidewalk at the end of a curb, it's not a curb at that point, it's a ramp. It's been graded down.

These are the things that show that sometimes civil rights acts work and the ADA is definitely at work on a daily basis as far as public accommodations and making sure that people with disabilities can enjoy movies and stadium activities and to be able to get into various businesses to enjoy the same things as people who don't have disabilities get to do without having to think about, well, where do I park? How do I get up those steps? How do I navigate that curb? So these are the things that the ADA protects in general, but we're going to focus on what the ADA protects in the employment context.

ADA Scenarios

I'm going to present you now with an ADA scenario. And we're going to start with Becca. Becca is a proud veteran of the Gulf War. She's also an amputee starting at her left thigh, and she wears a modern prosthesis. She believes in keeping fit and is a regular at the company's gym. She has shared with colleagues that she's training for her first Wounded Warrior Triathlon, and she's very excited about it. And her colleagues are very supportive of her engaging in this event.

Becca tells HR that she's having issues getting up to the third floor, which is where her department and team are located, as the elevator is constantly out of order in the building. And she simply can't get up and down three flights of stairs regularly. So she asked to have a desk on the first floor, and have conferences scheduled for the first-floor conference room instead of the third-floor conference room.

So does the company have to accommodate Becca's request to have her desk moved to the first floor, and to have conferences be scheduled on the first floor? If you believe that this is a reasonable request, you need to consider green. If you're not sure, you might want to consider yellow. And if you think, no way does the company have to do this, think about red.

So if you chose red, you were probably focused on the fact that Becca is fit. And we talked about her being a regular at the company's gym. And you're probably thinking, well, if she can go to the gym every day, and she can train for a triathlon, why can't she get up and down the stairs?

Well, that's not a decision we get to make. Becca is obviously a person with a disability. She has a prosthesis. Something that we can see is something we know. It's not a question of whether she has a disability.

What you're questioning, if you picked red, is whether she needs the accommodation to have her desk moved from the third floor to the first floor. And where everybody else might need to be inconvenienced to come from the third floor to the first floor to accommodate Becca. So if you're focused on-- well, she's training for a triathlon, she should be going up and down the stairs-- you're not focused on the right thing.

What you need to focus on is whether Becca's request is reasonable, and whether the company can accommodate her request without undue hardship to the company. In this case, she's asking to be moved. And, yes, it may inhibit some of the teamwork. But a trip to Walmart will probably achieve the purchase of a desk, if there isn't an additional one at the company. And asking for what is probably a weekly conference to be held downstairs is probably not that big of a deal.

It's not necessarily going to impact the company. It's not going to cause hardship to the company. And it's certainly not going to cost them any money.

Yes, I understand you're still thinking about, what about the team? And the cohesiveness of the team? And the ability of the team to interact with each other with Becca downstairs? Well, that's something everyone's going to have to learn how to address and accommodate.

Now, if you picked yellow, you were probably focused on the fact that Becca is very physically fit. She attends the gym regularly. And, again, she's thinking, I'm going to train for a Wounded Warrior Triathlon. So you're thinking her physical fitness level may not warrant a request to be granted that her desk be moved from the third floor to the first floor. So you're not sure as to whether the company needs to accommodate Becca's request. But you're also not sure that the company doesn't have to do that. You may want a little bit more information. You may want to understand what the impact will be of moving Becca's desk from the top floor to the bottom floor, as far as how that impacts the company's resources and how that may impact the team.

But what we need to focus on is whether Becca is a qualified individual with a disability. In this case, yes, she has an obvious disability. So is her request reasonable? Is it reasonable to say, move my desk from the top floor to the bottom floor because I cannot get up and down those steps?

And, last but not least, what is the cost to the company? Is this an undue hardship for them to move Becca from the top floor to the bottom floor? In most cases, the answer to that will be no. But if you picked yellow, you probably want to know a little bit more about how the company's space is necessarily handled. But again, if it's a reasonable request, and it's an inconsequential cost to the company, Becca's request should be accommodated.

If you picked green, you were focused on Becca and the fact that she's requested an accommodation. And you believe that her request is probably reasonable. You're not focused on how physically fit she is. You're not focused on her training for a triathlon. You're focused on the fact that you have an amputee who is saying, the elevator doesn't work most of the time, and I have a hard time getting up and down the stairs regularly.

Again, it's not our decision as risk managers and human resource professionals and, frankly, as individuals to say, well, Becca, you should, you know, suck it up a little bit and figure out how to get up and down the stairs. Becca obviously has a disability. She's requesting an accommodation. That accommodation is reasonable, as far as it doesn't seem to be particularly costly in saying, well, move her desk to the bottom floor. And, if you're having a team meeting on a weekly basis, move that to the bottom floor. So in this case, green was probably your best answer.

So, as risk managers, when you think about reasonable accommodations, what would be a reasonable accommodation in Becca's case? Is it reasonable to propose that Becca move her chair and her desk to the bottom floor? Most of us will probably say, well, it doesn't seem to be an unreasonable request. It certainly isn't a pricey request, thinking if the only cost is going to be the purchase of a new desk, if the company doesn't have one. That would be a reasonable accommodation.

So when you think about what you need to do when you are considering a reasonable accommodation from a qualified individual with a disability, you need to think of these magic words. How can we help you? It's one of the few times in employment law we do have magic words. Most of the time, we have to sit there, shake our heads, and think about it, just the same as anybody else.

But when you're dealing with a qualified individual who's asking for a reasonable accommodation so that their disability doesn't impact their ability to contribute, you ask, how can we help you? And you balance the needs of the company with the individual's request. So as risk management, how do you assist with Becca's particular issue?

Well, number one, you're going to look at the space issues. Number two, you're going to look at, well, what's the cost of a desk? And that's going to be nominal at best. And number three, you're going to look at the impact on the team, and how would you necessarily assist with reducing that impact?

Is there a way to think about Skype meetings, or webinars, or GoTo web meetings, so that Becca can participate in impromptu conferences and calls? Or is there a way to say, we're going to set up sort of a regular meeting, so that even though you may not have a weekly meeting on every Friday morning, you're going to have a Thursday lunch, so that everyone can have a chance to interact, and the team morale remains high, and the team's ability to work well with each other also remains high.

So what about the feasibility of moving the entire team to a different floor? That may be something to consider as well. As to whether the entire team could be relocated from the third floor to the first floor. And some of the people on the first floor could be located to the third floor, because they may not have someone who needs the reasonable accommodation that Becca has requested. So, again, what kind of hardship would this be to the company, to engage in the analysis of move this group of people this way, this group of people that way?

As risk, that's going to be one of your jobs. And one of the value adds you have to the company is how do you balance the company's needs with Becca's needs?

Now, what if the company declines Becca's request, because they just don't believe that she needs it? Or they don't believe that they're going to be able to rearrange the space on the first floor? Or they don't believe that there's any way to move the entire team from the third floor to the first floor and move a team from the first floor to the third floor?

And you find out a month later that Becca actually did engage in a triathlon. She placed second in her age group. She was very proud. Her team members were very proud of her. It's common knowledge throughout the company that she ran the triathlon. She placed second. And she has described her experience to many people.

And she meets with HR that same month and says, I'm making a complaint that I believe I'm being treated differently at work due to my disability. Because she still hasn't been accommodated. She's still having to go up and down those steps. And she's still feeling that she needs a reasonable accommodation in order to be able to perform her work. Is Becca's making a complaint to HR a red, yellow, or green situation? In other words, is the conduct she's describing, as far as feeling treated differently, a moment where you say, stop, we need to address Becca's complaint? Yellow, not sure. Or green, no problem, we don't need to address her complaint.

So, if you picked red, and you said, stop, we need to make sure that we're considering balancing the company's needs with Becca's need for a reasonable accommodation, think you've picked the right category. Because even though we are probably a little distracted by the fact that she did very well in her triathlon-- she placed second in her age group-- it doesn't mean that she can regularly go up and down three flights of stairs. She's asking again to be accommodated at work due to an obvious disability. So, in this particular case, as risk management, you're looking at protecting the company's bottom line.

And let's think about a disabled Gulf veteran who's asking simply to have her desk moved in front of a jury. We have a sympathetic plaintiff. We have someone who the jury is probably going to admire and respect. And the fact that she ran a triathlon and placed second is probably something they're going to commend her for, as compared to say, well, if you could do that, you can get up and down three flights of stairs.

So this is the type of situation where risk management needs to be involved. And they need to be asking HR, and asking the company in general, how can we help Becca and balance the needs of the company at the same time?

If you picked yellow, you're probably wondering, well, she placed second in the triathlon. What are we going to do? She placed second, so why can't she go up and down three flights of stairs? Well, we don't know. And we don't actually get to decide that for Becca. Becca is telling us, I am having a problem. I'm a qualified individual with a disability. I need an accommodation to be able to do my job.

And we don't necessarily need to consider what she's doing outside of work, or whether that triathlon impacts her ability to go up and down three flights of stairs regularly, because even though a triathlon involves running, doesn't involve running up and down stairs. So the people who picked yellow probably wanted to know a little bit more information about why it is that Becca continues to feel that a reasonable accommodation will help her do her work better, and how it is that that accommodation is necessary because of her ability or inability to walk up and down three flights of stairs.

So if you picked green, I have no doubt you were focused on Becca's second place finish in a triathlon. And you were continuing to hold onto the belief that if she can run a triathlon, she can go up and down three flights of stairs. Again, that's not a decision that we necessarily get to make. We're not Becca. We're not the person who has a disability who is asking for a reasonable accommodation to do her work.

We aren't the ones who have said, I really do need this. I don't understand why I can't have a desk elsewhere, and why it's that big of a deal for the company to provide her a desk on the bottom floor and engage in team meetings-- which are not that frequent-- on the bottom floor when she asks for it.

So, how do you as a risk manager get involved in protecting the company in a situation such as this? Well, let's start with the basics. As risk management, you're usually in charge of facilities management. Did you think about trying to force the issue of getting the elevator fixed? Or start off with that very basic issue of maybe that'll solve the problem all the way around.

And you won't have to worry about, well, how do we keep the team intact? And how do we deal with the logistics of moving an entire team from the third floor to the first floor-- if that's the decision that's made-- and displacing a team from the first floor to the third floor? Or how you deal with webinars, and how you deal with Skype, and how you deal with other video conferencing?

So these are the sort of basic issues that you want to look at and say, is there a simple solution that goes beyond having to engage in the interactive dialogue, and doing a whole lot of rigmarole to make sure that a qualified individual with a disability gets what they need to perform their job? So if it's going to be too expensive for this year's budget to necessarily fix the elevator, then you want to get involved in protecting the company to say, well, let's work with Becca. Let's see what it is she needs. Let's see if we can reduce the amount of time she has to go up and down the stairs.

Why is it she has to go up and down the stairs regularly? Is she OK with going up and down the stairs once to get to work, once to leave work? Has anybody had this conversation with Becca, to find out what exactly it is that she needs, and how it is that you or the company can look at her and say, how can we help you, and mean it, and make it happen.

Chapter 6

Pregnancy Discrimination

Pregnancy Discrimination

Let's talk about another protected category, pregnancy. Title VII was amended to prohibit sex discrimination on the basis of pregnancy. So we have the Pregnancy Discrimination Act.

The terms because of sex, or on the basis of sex, include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. And nothing in the act necessarily shall be interpreted to permit otherwise. So pregnancy is pretty much a but for standard, in that but for the pregnancy, the decisions wouldn't be made. So now we're going to take a look at a scenario involving pregnancy.

Let's talk about Mindy. She's an employee who works in the warehouse as a picker gather, gathering items for packages. She announces to her team that she is three months pregnant, and she's excited to be having a Christmas baby. She reassured her coworkers that she'd be back to work early in the new year.

Mindy's always been a reliable employee, hardworking, and very encouraging to her coworkers. But she's also not afraid to call someone out when they're not pulling their weight. The company had been internally looking at options to give Mindy training opportunities in order to promote her to a team leader supervisory position. Again, she's impressed both her colleagues and management.

With Mindy's announcement that she's due to give birth during the busiest time of the year, the Christmas holiday, the company gives the team lead supervisory position to Fred, a longtime employee who has repeatedly expressed interest in making advancements in his career with the company. Is the company's offer of the job to Fred a red stop moment, a yellow maybe it's OK, or green a no problem moment?

If you picked red, you were probably focused on the fact that Mindy seemed to be well regarded, that the company had clearly been grooming her for a supervisory position, and that it seemed like her announcement that she'd be giving birth during the busy holiday season impacted their decision to not promote her and instead promote Fred. So this is the sort of decision that risk management should probably be involved in to be able to ensure that not only will the needs during the busy holiday season be met, but whether they have the right team leader in place.

If you picked yellow, you probably wanted to know more information about Fred. We heard a lot about Mindy. We heard that she was reliable, hardworking, and well respected not only by colleagues but by management. But we don't know a whole lot about Fred.

We know he's a long-term employee. We know he's expressed an interest in having a promotion, but do we know how he's regarded by other people? Do we know that he has the respect of his colleagues and management like Mindy does? And you probably want to know more about that before you say yeah, don't think it was a good idea to promote Fred, or a no, Fred was a fine candidate. He's the right man for the job.

If you picked green, you're probably thinking it's not a problem. Fred is a long-term employee who repeatedly expressed interest. If the company thought he was qualified, then he's qualified.

They made a decision based on the needs of the company. But we still have to consider whether that decision was made because Mindy won't be there during the busy holiday season, or whether Fred was truly the best person for the job. So that's still to be a cautionary note to picking green in this particular situation.

As a risk manager, what do you want to know about the company's decision to pick Fred for the position instead of Mindy? Do you want to know about Fred's managerial skills? Do you want to know about his people skills in general? Do you want to know how he is thought of with his coworkers? Do you want to know if he's had decision-making ability in the past? Do you want to know whether he has good rapport with the team that he's going to be leading?

Do you want to have a better idea as to how he and Mindy get along? Do you want to know whether that department runs well because of Fred's contributions, Mindy's contributions, or the entire team's contributions? Those are the things you really want to have an opportunity to explore as risk management, because together with HR, you can also decide how to best make sure the departments are appropriately staffed.

Now, would you have a different opinion as to the risk to the company if you learned that the team that decided to give the job to Fred had made the following comments to Mindy after her announcement of her Christmas baby? Mindy's supervisor stated to her in a staff meeting that Mindy will never be able return to her job and leave her baby once that baby is placed in her arms. Mindy's area manager, Alice, tells Mindy at lunch that babies need their mommy, and Mindy should consider staying home for a while.

How are you feeling about the promotion for Fred at this point? Are you still feeling that that's a red moment, a yellow moment, or a green moment that Fred was promoted over Mindy based on these recent comments from management?

Now if you picked red, and that you said OK this is a stop moment, this is we really don't need to think a whole lot about Fred at this point, because now we're concerned about these pregnancy-specific comments that were made to Mindy. Does this put Mindy in a position that she has a pregnancy discrimination claim? That but for her pregnancy, would she have been promoted? Would she have been given the team lead position?

So if you're in the red position of saying no, no, no, no, no, we shouldn't have Fred at this point in a leadership position over Mindy based on the fact that her supervisor, and her area manager, two people in a position to adversely affect Mindy's employment, not coworkers, commented to her about the fact that moms shouldn't be at work.

If you picked yellow, you probably went well, Alice told her this at lunch. They were at a social engagement. It wasn't necessarily related to work, and Alice was just sharing her personal opinion.

But how do you feel about Mindy's supervisor at a staff meeting commenting that her opinion is Mindy won't be back because once she sees that baby, she's not going back to work? You're probably wanting to know a little bit more about whether that supervisor has said other comments in the past, particularly in a on the site, work context at a staff meeting.

And if you said green, this still isn't a problem, you're not worried about it. You might want to reconsider what the risks are, considering these were pregnancy-specific comments made to a pregnant employee about her future career at the company.

Chapter 7

Age Discrimination in Employment Act (ADEA)

Age Discrimination in Employment Act (ADEA)

Anyone over the age of 40 in the United States is covered by the Age Discrimination and Employment Act. This is an act that provides you with the ability to have the same opportunities as someone who's 39 or under. That your age should not be a factor in considering whether you have employment opportunities, promotion opportunities, or anything related to how the workplace treats you as someone who's over the age of 40.

The ADEA was passed in 1967 . And it protects applicants and employees 40 years of age from discrimination on the basis of their age in hiring, promotion, discharge, compensation, or terms, conditions, or privileges of employment. And that one is the one that really gets tricky. Because a lot of times there can be ageist comments made in the workplace that don't necessarily adversely impact someone's employment, but still may cause someone to feel as if they're working in a hostile environment, and that their age is the reason that people are treating them differently.

The ADEA, like many of the issues we've talked about previously with Title VII and the Pregnancy Discrimination Act, and the Americans with Disability Act, are enforced by the EEOC. So if you have someone who believes they've been treated differently on the basis of their age, you can expect an EEOC charge .

So let's talk about an age-related scenario in the workplace. Jerry's been with your company for 30 years. And he's turning 60 that same month. So Jerry's department plans a surprise party to celebrate his 30th work anniversary and his 60th birthday. And they invited the entire company to attend. Jerry's actually very popular. He's been a very good manager. People enjoy working with him. And people are actually delighted to have a chance to celebrate his contributions to the company.

Jerry's very surprised when he walks into the break room and sees his many coworkers there with black balloons and a large black cape that says "Over the Hill" on it, with scattered candy tombstones on the cake. Is this a red moment, a yellow moment, or a green moment? Should we stop and say, this should not be happening? Is this a, well, maybe? Or is this a green, it's all good moment?

So let's talk about red. There's a lot of people who are not comfortable with aging. They're not particularly happy to be celebrating birthdays showing I'm getting older. But in this particular case, do we know how Jerry feels? And that impacts that ability to say, is this a stop moment?

But let's also take it that step further. Many coworkers were there. They were there to celebrate Jerry and his contributions to the company as well as his birthday. Maybe some of them were uncomfortable with the black balloons, and the over the hill, and the tombstones theme. Maybe some of them will say, I feel uncomfortable, and I feel that my age was necessarily impacted as far as being treated differently because I'm older. So even if Jerry wasn't necessarily offended, maybe somebody who attended was. And that may turn this into a red moment.

If you picked yellow, you probably wanted to know more about Jerry and whether this is the type of thing that he would welcome, and find funny, and find just a happy moment in, because all of his coworkers came together. And he's got a sense of humor, so the over the hill cake didn't bother him. What about the corporate culture? Is this the kind of company that regularly celebrates birthdays in this way, and that people enjoy each other's company? And it's beyond, just go to the break room, there's a free piece of cake. As compared to, let's celebrate the fact that this is our friend. This is our colleague. This is our coworker. And that we know Jerry has a sense of humor. And so we all enjoyed getting together and finding the various items, such as the black balloons, and the over the hill cake, and the candy tombstones.

Now if you picked green, it's probably because you work in a corporate culture where this type of thing is completely acceptable. Everyone seems to enjoy it. Everyone seems to partake in it. There doesn't seem to be anyone who is offended by it. But just be careful. Because at some point, Pandora's box is opened, and it can't be closed. So that notion of where the line is-- maybe the over the hill caused someone to feel a little uncomfortable. Because they're approaching an age they may not be comfortable with. But if you picked green, it's probably because you're looking at this and thinking, Jerry is fine with it. In our corporate culture, we're fine with it. Everyone enjoys in the fun. So what would be the problem?

So let's talk about what might be the problem. Do we know how Jerry feels? And is Jerry the only one whose feelings matter? Absolutely not. So even if Jerry thought this was great, and he had no issues with it, there may be other people in the company who feel that this was ageist. There may be other people in the company who feel that black balloons indicating that getting older means death is not something they're comfortable with. So those are the things as risk managers we need to keep involved. Because it's not always so simple as saying, oh, lighten up. Have a sense of humor. When you have age directly being targeted, which you do with an over the hill cake, someone may have a concern and feel as if they don't have as much value as somebody who isn't over the hill.

So let's take the scenario a step further. At the party, a longtime coworker of Jerry's, Marcy, tells a joke to the crowd starting with, "Well, back when Jerry started here, the dinosaurs roamed the Earth." It's corny. It's a little cheeseball. But it got a laugh. Alan follows Marcy's joke with, "For Jerry, these days an all-nighter means not getting out of bed to pee." Again, it's corny. Jerry laughed. It didn't seem to be a problem. Then Nilda jumps up and says, "Jerry, these days getting a little action means your morning dose of Metamucil worked."

So are these jokes a red moment-- stop, shouldn't be happening-- a yellow moment-- well, maybe-- or a green moment-- not a problem?

So if you picked red, you probably had a reaction to these are definitely jokes based on age. And you're not comfortable with the ageist jokes. Because you're looking at Jerry, and you're thinking, he looks like a fit, happy, active guy. These jokes don't seem appropriate. Or maybe you're looking at the faces of other people in the room who are doing the polite laugh and not necessarily engaging in true joy at the moment, as compared to, I'm going to go along with it. So the red moment here is these are definitely age-related jokes. So even if Jerry's comfortable with it, doesn't mean everybody else is.

So if you picked yellow, you again are probably focused on, well, she said Jerry laughed. So if Jerry's OK with it, and everyone else seems to be OK with it-- and these are his coworkers making these age jokes-- well, why is it a problem? Maybe it isn't. So that's why you went with yellow. Let's go back to the perception of the person who's offended is what matters, not the intent of Alan, Marcy, or Nilda. They may have been perfectly comfortable, and they thought Jerry would appreciate the jokes, and that they've known each other for a long time, and this is the sort of thing that they have no problem with as far as engaging in this way with each other. It doesn't mean that the many other coworkers who attend the party are comfortable with these age-related jokes.

So green. If you pick green, you probably, again, have a corporate culture, or you're familiar with these type of parties, and these type of black balloons, and over the hill cakes, and you think, have a sense of humor. It's not a problem. Again, it's not a problem until it's a problem. And in this case, you may upset somebody in the room who's not dealing well with aging, and who says, I didn't like the jokes. I didn't think they were funny. I didn't think that just because Jerry turned 60 that all of a sudden he has all these physical problems that we need to be talking about. So green in this case is probably not going to be your best choice. But again, it could be a culture issue. But even with a culture issue, if you have someone who's offended, you may end up with a complaint. And you may end up with HR involved.

So let's go back to, do we really know how Jerry feels? And again, is Jerry the only one whose feelings matter? Since we don't know how Jerry feels-- we know he laughed. We know he had a moment or two where he enjoyed the camaraderie. And he enjoyed the silliness. But did he do the polite, yeah, I'll laugh, but it really didn't make me happy. And I didn't like having my age poked fun at. We don't know in this particular scenario. But we also don't know, was Jerry the only one who necessarily had to have his feelings considered? No. We had many coworkers at the party. And they may not have been comfortable with the ageist jokes. Or maybe they were. And that's this sort of thing, unfortunately, we find out after the fact.

So let's say, as the risk manager, what would you do if one of Jerry's coworkers had reached out to you to assist with the party planning? Would that be a red, oh no, I won't get involved? Yellow, maybe? Or green, absolutely, I love Jerry, moment?

So if you picked red, you probably were erring on the side of caution in that, whatever's going to happen, I don't want management to be a part of it moment. And that's probably the safe way to go. At the same time, maybe you've known Jerry for a long time. And you want to be involved in the party planning. But this is also one of those moments where maybe you get some other people involved as well to make sure that everyone's feeling comfortable with the plans. Because 30 years is something that definitely deserves a little respect and a little honor.

Now if you picked yellow, because as the risk manager you were trying to weigh, well, I really like Jerry. I'd like to help with the party planning. Maybe if I was involved, things wouldn't get out of hand. But even if you were involved, we had black balloons. We had a black cake, over the hill, and tombstone candy. So this was still a moment where you were probably gauging, but in my culture, people like Jerry would think this was funny. Most of us would think it was funny. And so we're going to go with that. Again, just be prepared. There's still probably a risk. And as the risk manager, as a member of the management team, you being involved could put a stamp of approval that the company is necessarily engaging in age-related conduct.

So if you picked green, you're probably saying, what's the problem? Jerry has been with us a long time. I know Jerry as a risk manager. I'm going to participate in the party, because I know he'd appreciate having a good party thrown. Thirty years of service is something we need to honor. But again, that notion of as the risk manager you are a member of management. So unlike a coworker, unlike Marcy, and Allen, and Nilda, you're actually management. And so what you do can necessarily bind the company. So that's a little bit of caution on being involved in party planning where you know a protected category is going to be front and center as far as the theme of the party.

Now, would you change your mind if Jerry had been a mentor to you in your early days at the company? And you knew he had a great sense of humor? And you knew he'd engaged in this kind of humor with his colleagues, this banter with his colleagues? And that he would have no problem at all with the black balloons, the cake, and the tombstone candy? Is that a red, yellow, or green moment based on the fact that Jerry was your mentor? Red, doesn't matter if he's my mentor. Still not going to do it. Yellow, well, maybe that mentor puts me in a different position. Or green, yeah, it's my mentor. I'd certainly do it.

Let's go with red. He may have been your mentor. He may have a great sense of humor. But you're management. And as management, your actions bind the company. So even though Jerry may have a great sense of humor, and he loved every minute of it, and he wasn't offended in any way, does that mean that somebody else who was 64, or somebody else who is 50, or someone else who just turned 40 may not have been offended by the focus on the age and the age-related jokes? So as management, we still need to keep that in mind.

Now if you picked yellow, you were probably trying to weigh your relationship with Jerry to your duties to the company as a manager. And even though Jerry's been your mentor, and even though you know he's had a great sense of humor for years, you're still management. It still may be problematic later to say, yes, as manager, even though he's been my mentor, and even though I know he had no problem with it, I participated in an event that was directly related to his age. And even though we're also celebrating the fact that he has 30 years of service with the company, it seemed as if the 60th birthday took over with the over the hill cake.

Now if you picked green, you're obviously focusing on your close relationship with Jerry and his being a mentor to you. And you want to be able to honor it in a way that you know Jerry would appreciate. That he has a great sense of humor. That he would enjoy every minute of this. But let's go back to the fact that you're a manager. And your conduct binds the company. So as a manager, you still need to have a sense of caution about participating in an event that is obviously focusing on age.

Chapter 8

Family and Medical Leave Act (FMLA)

Family and Medical Leave Act (FMLA)

Let's talk about the Family Medical Leave Act, which can be the bane of the existence of many in HR and risk manager. It's difficult to apply the act because of the 12 weeks of leave and necessarily how it starts and how it ends, and to balance these of the company during that time. But the FMLA exists for many purposes.

It provides certain employees with up to 12 weeks of unpaid, job-protected leave per year. It also requires their group health benefits to be maintained during that leave. So employees are eligible for FMLA leave if they've worked for their employer at least 12 months and at least 1,250 hours over the past 12 months prior to the request for leave, and they work in a location where the company employs 50 or more employees within 75 miles. So those are your parameters.

Whether an employee has worked the minimum 1,250 hours of service is determined according to FLSA principles, that Fair Labor Standards Act, for determining compensable hours of work. So the FMLA applies to public agencies, all public and private employers, and secondary schools and companies with 50 or more employees. So if you don't have 50 employees, this doesn't apply to you. But if you do have 50 employees, this definitely will apply to you.

So employers in this particular circumstance must provide an eligible employee with up to 12 weeks of unpaid leave each year. And again, you get to define the year, whether it's a rolling year or calendar year, look forward or look back, for any of the following reasons-- for the birth and care of a newborn child of an employee, for placement with the employee of a child for adoption or foster care, to care for an immediate family member, spouse, child, or parent-- it's very important. Notice sibling isn't necessarily mentioned-- spouse, child, or parent with a serious health condition.

And it can be a person who stands in loco parentis-- in other words, someone who served as the parent. An aunt or a grandparent can sometimes serve as the parent. In that case, they become an immediate family member. Or to take medical leave when the employee is unable to work because of a serious health condition of their own. That's probably the most common. There's also some leave for military status and military care and things like that.

So workers comp leave, ADA, and FMLA tend to intersect a lot. And it's usually not just one, but a combination of more than one thing. So let's talk about a scenario. We're going to go back to Mindy to do that.

We're going to add some facts to Mindy's situation. She's been with the company for six years prior to announcing her pregnancy. She's eligible for FMLA, and she requests the full 12 weeks at the FMLA leave. Her doctor completes the necessary FMLA paperwork for the full 12 weeks of FMLA leave.

Keep in mind for the birth of a child, it's not just the childbirth, but also what they call play with the baby time-- in other words, bonding time. So she has the full 12 weeks of leave. Her doctor has said she needs it. And she's scheduled for her leave starting on December 1st. Because remember, she is excited to have that Christmas baby.

On November 20th, Mindy has a work injury. She did nothing wrong. Certain boxes weren't stacked properly. And when she went to pick an item out of the box, the entire box tipped, and the items fell on her, and she fell down on the floor. She sprained her ankle, sprained her wrist, and had contusions on her right knee and hip.

As Ms. Risk Manager, you were made aware of the accident, and you're a bit concerned, knowing that Mindy is eight months pregnant. You personally engaged with the adjuster via phone on November 24, and the adjuster tells you that she wants to send Mindy for a CT scan.

Mindy has told the adjuster not just no, but emphatically no, no, no. She will not go for a CT scan. She feels really uncomfortable because she is very pregnant. And even though the doctor has not provided Mindy, to date, with a no-return-to-work slip, Mindy hasn't come back to work since November 20th, the date of her accident.

So a lot of things to consider here, but we're going to break it down a bit. How do you deal with Mindy's return to work-- the fact that she hasn't come back to work since November 20th, she doesn't necessarily have PTO time left. She's used it up during her pregnancy. She's supposed to be going on FMLA leave on December 1, and she's had a workplace accident where she's refusing treatment.

So again, we're breaking this down to the return to work. She's not willing to come back to work, and the doctor hasn't yet provided her with a no-return-to-work slip because she hasn't gone for the CT scan. So in thinking about all of these things at once, as the risk manager, how do you respond to Mindy's conduct?

Do you keep her employed? Do you tell her she can't come back to work? Do you tell her she's violated company policy by refusing to work and that she's terminated?

So if you believe that Mindy's return to work and her refusal to return to work is a stop moment, that she is violating company policy, and you're going to fire her, we're going to tell you to pick red. If you're not sure what to do, because we have so many different things intersecting, we're going to tell you yellow. And if you're looking at it and saying, I'm just not going to see this as a problem in any way, she's pregnant, of course she doesn't want a CT scan, no issues at all, I want you to pick green.

So for those of you who picked red, you're focusing on the fact that she's had a work comp injury. She's not returned to work without any excuse from a doctor saying she shouldn't be at work. You're focused on the company policies, which say no show, no call means you're terminated.

But think of how many protected categories we have here. We have pregnancy. We have a work comp injury, and we have the fact that FMLA leave is scheduled in days. So you're looking at the potential for pregnancy discrimination claim. You're looking for the potential for a work comp retaliation claim. And you're also looking for the potential of a FMLA interference claim.

That's called a lot of zeroes. And that's also called a lot of risk for your company. So this is the time where you may not want to necessarily take that hard line. You call in a team, you consider what's going on, and you consider all of your options as well as your risks.

So if you picked yellow, you're not really sure what to do. I don't blame you. This is usually a call a lawyer moment. At the same time, you're an experienced risk manager. You've got a team behind you.

Gather that team together. Talk about how do we address this. I think everyone can agree that Mindy is probably being very cautious in saying I don't want to hurt the baby, I'm not doing a CT scan. I haven't necessarily read a whole lot of information that makes me feel comfortable that I should be doing this at eight months pregnant.

And you also consult Dr. Google, and you find out that, yeah, it's probably not a good idea to necessarily be having a CT scan when her accident was what? Sprains and bruises. Now, again, we all know that can get a whole lot worse. But this is definitely a caution moment, so I don't blame you for saying maybe I need a little bit more information before I make a decision.

So when you're looking at green and you're saying, no problem, we're not going to deal with this at all, we're just going to let December 1st get here, we're going to just have no pay for that time period, and we're going to let her go quietly on her FMLA leave, and we'll let the adjuster continue to do their work on the workers comp side and let them know she's very pregnant and really does not feel that it's appropriate to have a CT scan.

So as risk manager, how do you necessarily respond to Mindy's conduct of saying I'm not doing this, I'm not doing this, and her not returning to work? Do you call her? Do you call the adjuster? How do you necessarily deal with that?

Well, there's more than one way to consider how to approach Mindy. But think about this. She's excited. She's having a baby. And then she has a work accident that she didn't cause. You heard in our scenario she did nothing to make this happen.

So she's probably feeling scared. She's probably feeling uncertain. She's probably worried about her employment. She's worried about her job. And she's probably focused on the fact that-- come on, I've got FMLA leave in less than this many days. Can we just get me there?

So let's talk about just getting Mindy there. Knowing that Mindy had FMLA leave planned in less than two weeks from the date of her accident, you're looking at her PTO, you see she's exhausted all of the leave available to her other than that FMLA leave that's coming up because she had some serious pregnancy-related absences and issues. She had a few issues that required her to be away. And again, she was being cautious and making sure she was taking care of her baby.

Now, the company's handbook actually says that without having accrued leave, having three days off will result in termination. Would you terminate Mindy on November 24th? Because that would be her third day off without a doctor's note and without having the leave that the company says she has to have to be off.

So is this a red moment of no, no, no, no, we don't terminate Mindy, a yellow moment of not sure, or a green moment of yeah, employee handbook says we terminate?

So if you picked red, saying no, no, no, no, no, I'm too worried about those three protected categories of she's pregnant, she had a work comp injury, and she also has FMLA leave coming up-- even though the handbook says you're going to be terminated, you might want to talk to HR about having a little bit more wiggle room in that language in the future. Because you don't want to necessarily have an automatic termination.

Because think of the situation we just talked about. These things happen in real life. And so do you really want to terminate an employee who's been very good for you, who has been a value to not only to the team but the company, on November 24th simply because she no longer has three days of PTO because of pregnancy-related complications?

So let's take a look at yellow. If you picked yellow, you probably did it because, well, the handbook says it. But you feel very uncomfortable, because you remember Mindy was a valued employee by both her teammates and management. You're worried that she's pregnant with work comp injury on FMLA leave.

So even though the handbook says that, you're not quite sure that you want to necessarily enforce that handbook policy. So you're, again, going to look at maybe we need to soften how that policy is written. Because, of course, the ADA could also require you to have additional days off.

So those of you that said green-- she's terminated, handbook says it, we follow the policy-- that can be risky business, simply because following a policy without thinking about the various laws that impact that particular employee and the protected category won't necessarily put you into a defensible position in any litigation or in any EEOC charge.

Because let's go back to that whole notion of reasonable accommodation, and let's go back to the Pregnancy Discrimination Act. And Mindy just had a work comp accident. So even though there's no guaranteed protected leave, like under the FMLA for work comp accident, what kind of an employer are you going to look like that when someone has an injury and they're eight months pregnant, that you terminate them within three days of having the injury? That will definitely lead you not only to several lawsuits, but probably a retaliation lawsuit as well.

One other thing I want to remind you of in this particular scenario is possibly the ADA. We don't know if Mindy has any other issues that she's never made us aware of, perhaps. But keep this in mind. The ADA says leave can be a reasonable accommodation.

Now, is work comp leave protected? No, it's not. But we also have the notion of pregnancy-related leave can be protected. So the fact that she was pregnant when she had the work comp injury may come into play.

So let's say the company makes the prudent and risk-averse decision to provide Mindy with unpaid leave starting on November 21st until her FMLA leave on December 1st kicks in. And let's say that instead of addressing any promotions prior to Mindy's FMLA leave, during her leave, Fred is actually promoted.

Fred engages in some department reorganization as soon as he's promoted to that team lead position, and it's decided that Mindy's position will be eliminated in that department. Is Fred's decision to eliminate Mindy's position while she's out on FMLA leave a red, yellow, or green moment?

So if you pick red, a stop-- no, Fred should not be terminating Mindy while she's out on FMLA leave, you're probably focused on the fact that during leave, that employee is protected. In other words, when they come back, they're supposed to return to the same or a similar position.

However, Fred engaged a reorganization. He didn't just pick Mindy out because she was on FMLA leave or because she had recently given birth. He picked her out because he reorganized the department and said we simply don't need her position. Is that defensible?

Well, I guess that depends on what the company's corporate records look like. Is it necessarily a decision that you want Fred making while she's out on leave? Probably not. But it still may be-- look, we've been losing money in this department for the past year and a half. This is what we need to do to be able to return the company to a positive revenue position. But again, is that going to stop the lawsuit from coming? Probably not.

So those of you who picked yellow, again, were being cautious. You wanted to make sure that, well, why did Fred pick her position for elimination? Because back when we said Mindy was well-liked, Mindy was being considered for that promotion. And during her leave, they promote Fred.

So you've got a moment where you really want more information. You want to know about Fred's background, what his personnel file looks like, how he's thought of by colleagues, and whether, in this case, he is the better candidate than Mindy.

So if you picked green, you're like, you know what, reorganizations happen all the time. They didn't select Mindy on purpose. They simply selected her position. And even though she's on FMLA leave, she's not protected from the company doing a reorganization, which would be true. But it's still something that you might want to think about before you just jump off a cliff and say it's not going to be a problem.

How many protected categories does Mindy have? She has pregnancy, she has a work comp injury, and now she has an FMLA issue where, during her leave, an adverse employment decision impacted her. So could she say it's because she took leave? She certainly could allege that.

So as a risk manager, what do you need to know was done to defend the decision for the reorganization and to make sure that the decision wasn't pregnancy, work comp injury, or FMLA leave related? Well, you're certainly going to want to look at personnel files.

You're certainly going to want to look at whether there was a possibility, possibly, for Mindy to switch to another job, whether there was a possibility that Fred may have been promoted simply because Mindy wasn't there. These are all things, as risk manager, you want to work with HR to have an opportunity to explore to better put the company in a position where they will be able to be in a defensible position and be able to have that very difficult conversation with Mindy when she comes back.

What if, instead of terminating Mindy during her FMLA leave, they say although your position has been eliminated, there is a job opening in another department where you'll make the same wages, but it's a night shift position? Is moving Mindy to a night shift position a red stop moment, a yellow-- maybe it will be OK, or a green no problem moment?

Well, if you picked red, you're probably worried about the fact that there is a big difference between a day shift position and a night shift position. And there are times when moving someone from day shift to night shift can be perceived as retaliatory, and it's a way to rather force somebody to quit.

Particularly in light of the fact that we all know Mindy is having a baby-- so finding a babysitter who will necessarily cover the night shift is going to be even harder. And we hear that complaint a lot from people who are on the night shift. So this is probably a caution moment and a stop moment where you say, yeah, even though it's the same job, basically with the same wages, that night shift position makes it problematic.

So if you picked yellow, you probably did it going, well, maybe Mindy wants the night shift. Maybe the fact that she has someone who can care for her child at night a whole lot easier for her, and that she has always wanted night shift. But do we know that? We don't know that without knowing what Mindy wants. But that may be what you're thinking. Well, let's find out what Mindy wants before we say we should or shouldn't do this.

And if you picked green, saying, not a problem, it's the same amount of money, we're not worried about it, you want to have a moment to step back here and say what will be the impact of night shift on Mindy where she's always had a day shift position. Would this be a moment where you look at the FMLA, where you look at pregnancy, and you look at the fact that she had a work comp injury, and you go, yeah, you're trying to force me out the door because you know this won't work for me. So green probably isn't going to be your best choice here.

So as risk manager, would you have been involved in the planning of the reorganization? I'm certain you would've liked to have been at that table, because you would have had an opportunity to say let's talk about the risk. Let's talk about how much this could impact the company as far as litigation after the fact, and frankly, possibly losing a valuable employee, because we've said many times, Mindy was well respected by both her colleagues and management.

What may you have done differently if you had been at that table? You may have done a lot of things differently. But at the same time, you have to get yourself invited to that table, even if you forced that invitation, to make sure that you're there to say, look, I want to know why are these decisions being made, how they impact the team, how they impact the organization, and how I may be able to be involved and interact with all of these parties so that we can keep the corporate culture alive and we can keep our culture of compliance alive.

Is Mindy protected from change simply because she's on FMLA leave? No. Changes can still happen. But it's better when they are a formal, company-wide reorganization rather than just Fred and Fred's department, and Fred possibly having an issue with Mindy and wanting to move her along because she may be better liked than he is.

So these are all issues that you and risk management need to keep in mind and keep that place at the table so that you can have an opportunity to not only impact the organization, but help save the organization as far as a bottom line number and as far as keeping valuable employees.

Chapter 9

Retaliation

Retaliation

And just when you think it's safe to enter the water again, we're going to talk about something that can impact you even if you are able to prevail on the underlying claim that you didn't discriminate on the basis of race, gender, national origin, religion, pregnancy, age. All those categories.

It's called retaliation. And retaliation is a separate cause of action. You can sue for just retaliation. You can sue for having said, I made a complaint. I was treated differently after making the complaint, and, therefore, you have retaliated against me. So there's three elements to a retaliation claim.

The first is, one, you engage in protected activity. An employee complains about harassment to the HR department. Two, there's an adverse action. The employee's demoted or treated unfairly or treated differently after making the complaint. And this can actually be interpreted very broadly. And three, there has to be a causal connection. You have to be able to demonstrate as the employee that the treatment was because of the complaint that you made.

So retaliation claims are difficult, because they're based on fact, not law. It's harder to get a summary judgment, which is a legal term for saying, we don't have to go to trial. Because factual issues aren't appropriate for summary judgment. Those go to trial.

So let's talk about an adverse action. An adverse action can be a very slight thing. It's anything an employee perceives as retaliation from the employer. Examples include demotion, pretty easy. Failure to promote, saying, well, but for me having made a complaint, I would have that job.

A lower valuation than the prior year after having made a complaint. A change in hours or shift. A change of office or workspace. Change of title. A change or reduction of job responsibilities so that you become insignificant. Shunning, which is not going out to lunch with colleagues, not being invited to go out to lunch, not being invited to go to happy hour, not being invited to go bowling, hunting, fishing, whatever it is.

There was even a case where not making eye contact regularly with the employee in the hallway was viewed as retaliation. Retaliation claims are the largest and fastest-growing employment claim type. So out of the 97,443 charges filed with the EEOC in 2016, 42,018 of those were retaliation claims. In other words, 45.9 percent of all claims filed the EEOC included retaliation or focused on retaliation.

Now retaliation is usually brought in combination with another claim. In other words, I was sexually harassed, I complained about it, they retaliated against me. Retaliation claims are just troubling to have to defend. Because, again, even if the employer prevails on the fact that someone was not sexually harassed, it doesn't mean that they can't say, well, they weren't retaliated against for having made that complaint.

So let's give you an example. A female employee complains of discrimination after a promotion is given to a less-qualified male. Following the complaint, her hours change from 7:00 a.m. to 3:00 p.m. to the night shift, 11:00 p.m. to 7:00 a.m. The lawsuit asserted discrimination in retaliation. And ultimately, that particular employee lost her discrimination claim, but the retaliation claim was held to be valid.

So why that's important is that impacts risk management, because attorney's fees are going to be involved. So even though, in a way, they won the battle, they lost the war. Because their retaliation claim was going to go forward. And attorney's fees were still going to be an issue.

So let's talk about a workers compensation retaliation case. Because this is something you're probably going to either see a lot of or experience as a risk manager. So if an injured worker is fired in close proximity to the workplace accident, the injured worker can have an additional cause of action against their employer for workers compensation retaliation.

This is a discrimination cause of action. And why that's really important is your workers comp policy doesn't cover retaliation. As a matter of fact, it specifically excludes it. So retaliation cause of action is filed in circuit civil federal court. Because it's retaliation. It's a discrimination cause of action.

Which means unless your client has employment practices liability insurance, there is no insurance for it, and they're going to be paying the fees for that for both their lawyer and possibly the other side's, if they lose. So it's really important to keep in mind that anybody who is looking at terminating an employee within hours-- or frankly, days and a few weeks-- of someone having a work comp accident, you're practically inviting a retaliation claim.

So let's talk about Mindy again, because we know she already had that work comp accident. Mindy is told her position has been eliminated. She's offered that night shift position, she doesn't accept it. Instead, she tells you as the risk manager-- who's been working with her throughout her work comp leave, throughout her FMLA leave-- that she believes the company views her as a liability and damaged goods, and she wants to make a formal complaint to HR.

You advise HR that Mindy has a concern to share. HR reaches out to Mindy and conducts an investigation, as they should and as is stated in your company's employee handbook. And during that investigation, you learn that Fred was concerned that Mindy was outshining him. And that he told other employees that he'd get rid of her first chance he had.

At the end of the investigation, HR determines that Fred's decision had legitimate business reasons behind it, due to the reduction in orders received in that particular department.

So is the decision to not provide Mindy with a new job or to say that Fred made an inappropriate decision a red moment? In other words, stop, this should not be happening. A yellow moment, I still need more information. Or a green moment, not a problem. So let's talk about red, the stop moment that Fred should not have been making the decision to get rid of Mindy, in light of the fact that he obviously was a little jealous of her and was telling other employees, I'll fire her as soon as I have the chance. Those are the sort of things that make for great deposition testimony and great testimony on the stand at any trial.

Because Mindy was a valued employee. Mindy was liked by management coworkers. So the fact that Fred may have been jealous of her is a problem, because Fred is male and Mindy is female. But we're also focused here on workers comp retaliation. We're focused on the fact that she had an accident. And within weeks of having had an accident, she's terminated.

Most employers wouldn't keep a poorly performing employee on the books for months just to avoid a retaliation claim. So most judges don't look at keeping an employee employed as a problem. But in this case, the company didn't keep Mindy employed. She was fired during her leave. She was fired during her FMLA leave, which, again, could be a retaliation claim under FMLA. But she was also fired within close proximity to her workers comp injury. So let's say it was within four weeks. So that's probably going to be not a good decision, to have permitted Fred to terminate her. And for HR to go, oh, no, we'll rely on the legitimate business reasons that Fred said he had for eliminating her position.

This is definitely a moment where-- as risk-- you want to say, I'm here to protect the company. I'm here to protect the company's bottom line. And this is going to cost us a lot of money in litigation fees, even if we prevail. You can still spend six figures in attorney's fees.

So let's take that yellow moment, all of our cautious people. You're wondering, well, what were the legitimate business reasons behind Fred eliminating Mindy's position and terminating her? Because he said it was because there was reduction in orders received in that department.

You'd want to know as risk manager, how many months of that do we have? How many years of that do we have? Or do we simply have four weeks of time? Which, of course, would cause you to want to put the brakes on any termination of Mindy. Because there's simply not enough data to say, well, that was a legitimate business reason to eliminate a productive employee who was well-liked and performing well.

So, green. Not a problem. You're saying, HR conducted the investigation. We have confidence in HR. HR says it's fine. They say we have legitimate business reasons. We're going to go with that decision.

This is the take a deep breath and think about attorney's fees. Think about how much this could cost you if Mindy files a charge of discrimination, goes the route of filing pregnancy discrimination claim, Family Medical Leave Act claim, and then hitting you on the state court side with the workers comp retaliation.

Because she was terminated within weeks of having a work comp injury. And other than the fact that allegedly, there is a reduction in orders, she's got a beautiful personnel file with glowing performance evaluations and great comments from not only management but coworkers.

So this is the opportunity for risk to get involved and say, we want to try to make sure that we don't have any issues related to discrimination. Whether it's work comp retaliation, a discrimination cause of action, or Mindy's other protected categories. So let's talk about those protective categories for just a minute.

We know we have potential for work comp retaliation. We know we have pregnancy discrimination. We know we have FMLA. Mindy's female and Fred is male, so we're going to add gender discrimination to that. We also don't necessarily know Mindy's age or national origin or race.

So we could be racking up the categories to six, seven, possibly more protected categories. So this is the type of situation where you want to proceed extremely cautiously. You want to make sure that you've done the right thing for both the company and the employee. If you have two years of data showing that that particular department is poorly performing, well, you might have something to talk about.

But why Mindy? Why the choice to get rid of Mindy, who otherwise has a beautiful record of employment? Who is well-liked and respected by colleagues. Who is well-liked and respected by management.

So in the world of retaliation, keep in mind that even though you may have a legitimate business reason for having done what you did, if you're dealing with workers compensation retaliation, if it's within a few short weeks of someone having a workplace injury, you are providing them with a retaliation cause of action that they can file separately from any work comp claim, or from any other federal claims we discussed that Mindy is likely going to be covered under.

Glossary

ADA—See Americans with Disabilities Act.

ADEA—See Age Discrimination in Employment Act.

adverse action—One of the elements of a retaliation claim. Examples include denial of a promotion, refusal to hire, demotion, suspension, discharge, threats, reprimands, negative evaluations, harassment, and change in hours.

Age Discrimination in Employment Act (ADEA) of 1967—A law that prohibits the making of employment decisions (e.g., hiring, promotion) based on age. It applies to employees or applicants who are 40 years or older and to companies with 20 or more employees. The ADEA specifies various remedies if a firm is found to have violated the law. Some of these include hiring an applicant who was discriminated against, reinstating a terminated employee, and paying of back wages, liquidated damages, “front” pay until an employee reaches the age of 70, court costs, and attorneys’ fees.

Americans with Disabilities Act (ADA) of 1990—A federal statute passed in 1990, primarily aimed at preventing discrimination in hiring persons having a “disability” as defined by the Act. Under the ADA, employers must afford job applicants equal opportunity (i.e., evaluating an applicant solely on his/her ability to perform the essential functions of a job, regardless of disability) and make reasonable accommodations to allow disabled employees to perform job functions. However, employers are relieved from the reasonable accommodation requirement if it creates an “undue hardship,” such as excessive costs or considerable work disruption. Alleged violations of the ADA are one of the leading perils covered by employment practices liability insurance (EPLI) policies.

at-will employment—Employment can be terminated for cause or for no cause, at any time, and with no advance notice. The “at-will” employment doctrine is recognized in most jurisdictions.

bullying—A type of conduct in which one person harasses another person over a time period in a workplace environment. Bullying is characterized by a pattern of deliberate, hurtful, and menacing behaviors. Bullying can have two aspects: physical—such as making intimidating physical threats, pushing, shoving, and invading an individual’s personal space—or psychological—such as emotional intimidation that is mostly covert, including joking or initiation rites that may mask sadistic behavior. Employees who claim to have been bullied by other employees are increasingly suing employers. Bullying has become so common that more than 30 of states have passed anti-bullying legislation.

Civil Rights Act of 1991—A federal act that broadened the scope of Title VII of the Civil Rights Act of 1964. The Civil Rights Act of 1991 gives employees who sue their employers the right to a jury trial and the right to recover compensatory and punitive damages. Prior to passage of the Civil Rights Act of 1991, successful claimants were entitled only to awards of back pay and lost benefits and were not afforded the right to a jury trial.

common law—Unwritten law derived from court case decisions based on custom and precedent. It is contrasted to statutory law.

disability—A condition that incapacitates a person in some way so that he or she cannot carry on normal pursuits. The definition of “disability” in disability income policies varies substantially and should be carefully examined. Disability may be total, partial, permanent, or temporary or a combination of these. In the context of the Americans with Disabilities Act (ADA), “disability” is defined as a recorded or perceived physical or mental impairment that substantially limits one or more major life activities of an individual.

discrimination—(1) The act or process of evaluating insurable risks and determining premiums on the basis of likelihood of loss. Insurance laws prohibit “unfair discrimination”—that is, the formulation of rates on the basis of criteria that do not fairly measure the actual risk involved. (2) Unfair or illegal treatment of or denial of rights to persons on the basis of certain arbitrarily chosen attributes or characteristics, including race, gender, religion, creed, age, medical condition, pregnancy, sexual orientation/preference, physical appearance, marital status, physical or mental disability, or national origin. Discrimination does not usually fall within the coverage terms of the commercial general liability (CGL) policy (and may even be specifically excluded by endorsement) but may be covered as a form of personal injury (PI) under some umbrella policies. However, employment practices liability insurance (EPLI) covers a variety of employment-related claims, including discrimination.

employment-at-will doctrine—A legal doctrine holding that, absent a contract for a specified duration, both employers and employees are free to terminate the employment relationship at any time, with or without cause, and with or without notice. In recent years, however, both courts and legislatures have developed a number of exceptions to this doctrine, a factor largely responsible for a marked increase in claims alleging wrongful termination.

Equal Pay Act of 1963—A federal law prohibiting pay discrimination against employees because of their gender. The Act compels businesses to pay equal wages to employees performing substantially equal work, regardless of the sex of the individual employees. Pay differentials may be based on merit, seniority, or any lawful factor other than sex. The Equal Pay Act applies to all businesses regardless of the number of employees. Inequalities in pay between men and women for performance of “substantially equal jobs” are prohibited, unless the differences are due to a factor other than sex, such as a seniority system or merit system. Claims alleging violation of the Equal Pay Act are covered by employment practices liability insurance (EPLI) policies.

fair employment practices laws—Legislation enacted in every state that bars discrimination by private employers against defined categories of individuals. Fair employment practices laws are generally broader than their federal counterparts, but they are not uniform in their protection.

Fair Labor Standards Act (FLSA) of 1938—A law that established a national, hourly minimum wage and promulgated eligibility rules for overtime pay. The Wage and Hour Division of the US Department of Labor administers the law, and virtually all wage and hour claims cite a violation of the FLSA. Wage and hour claims allege that workers classified by employers as “exempt” (and therefore ineligible for overtime pay) are, in fact, entitled to overtime pay. Wage and hour claims are a serious exposure for employers; a number of class action wage and hour claims have settled for more than \$10 million.

Family and Medical Leave Act (FMLA) of 1993—A law allowing employees to take up to 12 weeks annually of job-protected unpaid leave. Such leaves are permitted in the event of a serious illness of the employee or family member or the birth or placement (through adoption or foster care) of a child. The law applies to employers having 50 or more employees and to employees who have worked for the employer for a minimum of 1,250 hours during the prior year. Charges of discrimination against those taking leave under the Act (or by those prevented from taking leave under the Act) can be filed with the Department of Labor, which investigates and enforces claims. In addition, an employee can sue his or her employer individually. Such claims are covered by employment practices liability (EPL) policies.

FLSA—See Fair Labor Standards Act.

FMLA—See Family and Medical Leave Act.

hostile work environment sexual harassment—A form of sexual harassment occurring when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Coverage for such claims is covered under employment practices liability (EPL) policies.

negligence—A tort involving failure to use a degree of care considered reasonable under a given set of circumstances. Acts of either omission or commission or both may constitute negligence. The four elements of negligence are a duty owed to a plaintiff, a breach of that duty by the defendant, proximate cause, and an injury or damage suffered by the plaintiff. Liability policies are designed to cover claims of negligence.

reasonable accommodation—As defined in the Americans with Disabilities Act (ADA) of 1990, either modifications or adjustments to a job application process or a job performance process that enable a qualified applicant with a disability to be considered for or perform the position or modifications or adjustments that allow the disabled worker the same benefits and privileges afforded other similarly situated employees without disabilities. This modification or job adjustment must be achieved without imposing an undue hardship on the employer's operations.

retaliation claims—Such claims result when an employee alleges discrimination based on protected status (e.g., race, gender, disability), and, in retaliation for making such a claim, the employee is treated adversely (e.g., the employee receives a demotion). A successful retaliation claim must prove three elements: (1) that the employee engaged in a "protected activity" (filing a discrimination claim, alleging corporate misconduct), (2) that the employee suffered an "adverse action" (termination), and (3) that there was a causal connection between the adverse action and the protected activity. Employment practices liability insurance (EPLI) policies cover retaliation claims. In recent years, retaliation claims have also been made in conjunction with workers compensation claims. That is, employees have sued their employers when, in response to filing a workers compensation claim, an employer took some form of adverse action against the worker (e.g., imposing a change in work hours, giving the employee a demotion or a reprimand).

sexual harassment—Conduct involving unwelcome sexual advances, requests for sexual favors, and verbal, visual, or physical conduct of a sexual nature. There are two types of sexual harassment: quid pro quo sexual harassment, in which sexual contact is made a condition of employment, and hostile environment sexual harassment, in which such conduct creates an intimidating, hostile, or offensive working environment. Lawsuits against businesses that allege sexual harassment have increased significantly during the past decade. Accordingly, around 1990, the insurance market began offering employment practices liability (EPL) policies, a specialized form of insurance covering claims of sexual harassment as well as other employment-related torts.

Title VII of the Civil Rights Act of 1964—A law prohibiting discrimination by private sector employers. Title VII bars an employer from discriminating on the basis of race, color, religion, sex, or national origin in hiring, discharge, or compensation and with regard to any terms, conditions, or privileges of employment. An "employer" is defined under Title VII as any person "engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." An "employer" can be a sole proprietor, partnership, or corporation. A partner is not considered an employee under Title VII. The majority of employment-related lawsuits alleging discrimination are brought under Title VII.

wage and hour claims—An assertion by an employee-plaintiff that his or her employer has failed to pay overtime wages owed to the employee. Within the past several years, a number of high-profile, high-dollar wage and hour claims have been filed on a class action basis, a fact that has vastly increased the dollar amount payable under such lawsuits. Given the magnitude of this exposure, most employment practices liability insurance (EPLI) policies specifically exclude coverage for wage and hour claims.

whistleblower claim—An assertion that an employee was penalized (e.g., terminated, demoted, disciplined) for complaining of or opposing certain employer actions (e.g., fraudulent billing practices on a government contract), refusing to engage in illegal or unethical conduct, or exposing such conduct via testimony at a trial or administrative hearing. Whistleblower claims are a type of retaliation claim and are covered by employment practices liability insurance (EPLI) policies.

wrongful termination—The act of terminating an employee in a manner that is against the law. In recent years, erosion of the employment-at-will doctrine has been the factor most responsible for the increase in claims alleging wrongful termination. Coverage for this exposure is provided under employment practices liability (EPL) policies.