



EMPLOYMENT LAW

A Guide for Nonprofit Organizations and Small Businesses

Philadelphia LawWorks, a project of Philadelphia VIP, contributes to Philadelphia's economic development by ensuring that homeowners, nonprofits and small business owners' legal needs are met and by educating clients and the community to prevent legal problems.

Philadelphia LawWorks prepared this guide to help distribute basic legal information to the community at large. While the information contained in this publication concerns legal

issues, it is intended solely to provide general information. This guide is not intended to constitute legal advice or substitute for obtaining the advice of an attorney. It is understood that Philadelphia LawWorks' providing of this guide and your reviewing of this information does not establish an attorney-client relationship. No action should be taken in reliance on the information provided in this guide, except after prior consultation with a lawyer.

EMPLOYMENT AT WILL

The law in Pennsylvania assumes that employees are employed "at will." Employment at will means that either the employer or employee can end the relationship at any time or for any reason. There are exceptions to this; the most common being federal and state laws that prohibit discrimination.

Employers and employees can avoid an at will relationship by entering into an employment contract. Employment contracts can be written or implied. Written contracts are most commonly used for executives of large corporations. Implied contracts can be created when an employer behaves in a way that leads a reasonable employee to believe he is guaranteed a job. Some common implied contract claims arise based on:

- promises by the employer that an employee will have a job permanently;

- an employer's general policy of only firing employees for cause (disciplinary problems, absenteeism, not doing work, etc.)
- wording in employee handbooks or manuals; and/or
- letters offering the employee a job that state a weekly, monthly or annual salary.

Generally, Pennsylvania state law does not recognize implied contract claims in these situations, but it is important for employers to know that employees may claim these as reasons for an implied contract. Employees may not be considered employees at will if they prove they provided their employer with benefits beyond what they were hired to perform or that they experienced substantial hardship other than the services they were hired to perform.

EMPLOYMENT DISCRIMINATION

There are multiple federal, state and local laws that make it illegal to discriminate against employees. Some of the more important laws are discussed below.

FEDERAL LAW

- Title VII of the Civil Rights Act of 1964 (Title VII) – Title VII prohibits discrimination against an employee on the basis of race, color, religion, sex and national origin. Title VII applies to all aspects of the employment relationship and makes it illegal to retaliate against an employee for filing a complaint that discrimination occurred. Title VII applies to both intentional and unintentional discrimination. Title VII applies to employers with more than 15 employees.
- Age Discrimination in Employment Act (ADEA) – The ADEA prohibits discrimination against an employee because he or she is over the age of 40. The ADEA applies to employers with more than 20 employees.
- Americans with Disabilities Act (ADA) – The ADA prohibits discriminating against an employee who is disabled. Disabilities include both physical and mental impairments. The ADA only prohibits discrimination against employees who can perform the essential attributes of their job with or without reasonable accommodation. The ADA applies to employers with more than 15 employees.

- Uniformed Services Employment and Reemployment Act (USERRA) – USERRA grants a right to military leave and requires an employer to protect an employee's job status during military leave. USERRA also prohibits discrimination against members of uniformed services.
- Immigration Reform and Control Act (ICRA) – ICRA requires employers to verify employment eligibility and prohibits discrimination on the basis of national origin or citizenship status.

PENNSYLVANIA LAW

Pennsylvania's anti-discrimination law is similar to federal law. The Pennsylvania Human Relations Act prohibits discrimination on the basis of disability, race, color, family status, religion, sex, age, national origin, and ancestry. Like the ADEA, Pennsylvania only prohibits age discrimination against employees over 40.

The Pennsylvania Military Affairs Act requires employers to grant military leave for active duty, reinstate employees at the end of service and continue employer-provided benefits, such as health care.

PHILADELPHIA LAW

The Philadelphia Fair Practice Ordinance covers the same subjects as state law but also makes it illegal to discriminate against an employee because of his or her sexual orientation or gender identity.

HIRING EMPLOYEES

Hiring the correct employee is very important. However, there are legal restrictions on what an employer can and cannot ask in interviews. If an employer uses inappropriate questions in interviews, then these questions can be used as evidence of employment discrimination. Similarly, inappropriate behavior can be evidence of sexual harassment.

As an employer, you should only ask questions that are necessary to determine if the employee is capable of performing the job. You should ask specific questions about an employee's education, experience and work history.

WHAT TO AVOID

An employer should avoid commenting on or asking questions designed to obtain information about an employee's:

- sex, race or national origin
- disability or health status
- citizenship
- marital or family status
- height, weight or appearance
- military status
- age
- membership in religious or other organization
- arrest records

WHAT IS ALLOWED

However, an employer may ask about:

- name changes
- residence
- proof of age
- work permits
- references
- whether an employee can perform a specific job task
- availability or work schedule

PAYING EMPLOYEES

UNLESS OTHERWISE INDICATED, THESE REGULATIONS APPLY TO ALL EMPLOYERS

WAGE AND HOUR REGULATIONS

The Fair Labor Standards Act (FLSA)

The FLSA regulates employees' wages and hours. First, the FLSA sets a minimum wage for all hourly employees. Currently, the minimum wage is \$5.15/hour. Second, the FLSA requires that employees who work more than 40 hours a week be paid one and one-half (1.5) times their regular rate for each hour they work over 40 hours. The FLSA's overtime provisions generally do not apply to executives, administrators, professionals or outside sales people. The FLSA also regulates child labor, setting 18 as the minimum age for workers in dangerous industries and 16 as the minimum age for non-dangerous industries. The Pennsylvania Wage and Hour Law contains provisions similar to the FLSA.

Equal Pay

The Equal Pay Act requires an employer to pay male and female workers the same wage for similar work under similar conditions. The Pennsylvania Equal Pay Law also prohibits paying employees different wages on the basis of sex.

Pay Periods

The Pennsylvania Wage Payment and Collection Law (WPCL) requires employers to pay employees on regular paydays specified in advance by the employer. All workers must be paid by check or in U.S. currency. If an employee leaves, WPCL

requires the employer to pay him all wages owed on or before the next regular payday.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

The FMLA applies to employers with more than 50 employees and requires employers to grant up to 12 weeks of unpaid leave over a 12 month period for the care of a newborn or newly-adopted baby or for a serious health condition of the employee, his spouse, child, or parent. The employee may take all the time at once or can take it smaller increments.

VACATION

Employers are not required to provide vacation time. If you want to provide vacation time, then you should establish a formal plan for all employees. You can adjust the time awarded based either on employment status (i.e. managers or non-managers) or seniority. If you grant paid vacation time, you may require that employees give you notice before using their vacation. You also may restrict when an employee can use his vacation to ensure enough staffing (i.e., restrict use over the summer or on holidays).

HEALTH CARE

Employers do not have to provide health care for their employees. If you wish to provide health care, you should consult with a lawyer to ensure that you are complying with legal requirements.

MAINTAINING A POSITIVE WORK ENVIRONMENT

UNLESS OTHERWISE INDICATED, THESE REGULATIONS APPLY TO ALL EMPLOYERS

When employees are happy, they are more productive. Therefore, it is beneficial to maintain a safe and positive work environment.

HEALTH AND SAFETY REGULATIONS

An employer is responsible for maintaining a healthy and safe work environment for all employees. The federal, state and local laws that regulate employee health and safety are listed below.

- Occupational Health and Safety Act (OSHA) - requires employers to keep their workplaces free of dangers that are likely to cause death or serious injury to employees.
- Pennsylvania Workers Compensation Act – provides for compensation of employees who are injured on the job. Generally, an employer must provide compensation if, at the time of injury, the employee was performing services within the scope of employment and if the injury was not self-inflicted.
- Pennsylvania Worker and Community Right-To-Know-Law - requires employers to maintain and release information regarding the employer's use of hazardous substances.
- Philadelphia AIDS Ordinance – requires employee education concerning the transmission of HIV and the rights of employees infected with HIV, and prohibits non-job-related HIV testing.

COMPLAINTS & INVESTIGATION

You should take all employee complaints seriously. An employer has a responsibility to investigate complaints and take action to fix problems. You should create a system for employees to report complaints and specific procedures for investigation.

When investigating a complaint, you should remain neutral and gather all relevant factual information. You should keep all of the information confidential. You should keep written records of what you did during the investigation and of all conversations with employees.

If you determine that there is a problem, you should take steps to correct it. Dealing with a complaint and resolving the problem internally might prevent a future lawsuit. Even if you determine that there is not a problem, you should never retaliate against an employee who files a complaint.

Sexual Harassment

One of the most common employee complaints is sexual harassment. Sexual harassment in the workplace is illegal. Sexual harassment occurs when (1) submission to or rejection of sexual demands is used as a basis for employment decisions, or (2) the sexual conduct, advances or references are so severe and pervasive that it creates an abusive work environment. Employers are not only liable for their own conduct, but can sometimes be liable for the conduct of employees. You should inform all employees that sexual harassment will not be tolerated and educate them on what is and is not appropriate workplace conduct.

EMPLOYEE HANDBOOKS

Employee handbooks are a good way to explain policies, rules and job requirements to employees. Employee handbooks do not have to be long, but they should explain your policies on hiring, pay, benefits (i.e. vacation or health care) and performance reviews. The handbook should also contain a summary of the workplace rules and explain the conduct that will result in discipline. The employee handbook also should state that your business will comply with all federal, state and local employment

laws. You should have all employees sign a form acknowledging that they received the employee handbook.

Generally, employee handbooks are not considered binding contracts unless an employer indicates that he intends to be bound by the handbook's terms. However, an employee handbook should contain a disclaimer that the handbook is not intended as a contract and does not alter the employment at will relationship.

EMPLOYEE EVALUATION AND DISCIPLINE

PERSONNEL FILES

You should maintain a personnel file on every employee. This file should include the employee's personal and contact information. The personnel file should also include records of the employee's time and pay. Copies of the employee's performance reviews and records of any complaints made by or against the employee should be placed in the personnel file.

PERFORMANCE REVIEWS

Regardless of the size of your business, you should evaluate employees at regular intervals. Performance reviews can be used to reinforce positive performance or alert employees of areas in which they need to improve. Performance reviews are helpful tools for employers if they are sued over a staffing decision.

You should use the same criteria to evaluate each employee in the same position. The criteria should be objective and may include things like competence, judgment, interpersonal skills/interaction with other employees and customers, and attendance. Objective criteria will help insure that you are treating all employees fairly and equally.

The results of a performance reviews should be explained to the employee orally, but you should also provide the employee with a

written evaluation. You should place a copy of the written evaluation and a summary of the meeting in the employee's personnel file.

EMPLOYEE DISCIPLINE

Disciplining employees can be a difficult process. Employees who feel they have been unfairly treated can bring legal claims against an employer. Some general tips for creating an effective disciplinary system are:

- establish clear, specific standards for conduct and provide employees with notice of these standards;
- provide employees with an opportunity to be heard before taking disciplinary action;
- conduct timely investigations and follow-up regarding violations;
- use a progressive system of discipline—for example: give harsher punishments for more severe violations;
- be consistent—treat all similar violations in the same manner regardless of the employee involved;
- provide employees with an unbiased review and give them the ability to appeal; and
- keep documentation on all investigations and violations.

FIRING EMPLOYEES

Under employment at will, you can fire an employee for any or no reason. Although employment is at will, you cannot fire employees for reasons that are against public policy. Reasons that are against public policy include firing an employee for refusing to commit a crime, retaliation for filing a complaint or worker's compensation claim, or for serving jury duty. If an employee acts in an inappropriate manner or his or her performance is not satisfactory, then you have the right to fire the employee.

Before firing an employee, it is important to take certain steps to avoid a lawsuit:

- ensure that the employee has been warned about his inappropriate conduct or poor performance and has had an opportunity to correct the situation;
- consider whether you have fired other employees for similar actions or performance deficiencies;
- if the employee is one of the types of people protected by employment discrimination laws, consider whether you have treated employees who are not members of protected groups in the same way; and
- assess whether there are other potential disciplinary actions besides firing.

If you choose to fire an employee, you should conduct an exit interview. An exit interview gives you the opportunity to explain why the employee is being fired. An exit interview also allows you to deal with administrative matters, such as the employee's final paycheck. You should keep

the interview brief. After the exit interview, you should document the conversation.

UNPAID WAGES

After the employee is fired, the Pennsylvania Wage Payment and Collection Law requires employers to pay fired employees earned and unpaid compensation on or before the employer's next regular payday.

UNEMPLOYMENT

Pennsylvania law provides that employees who lose their jobs through no fault of their own are eligible for unemployment. An employee is not entitled to unemployment benefits if he voluntarily resigns or is fired for willful misconduct. Employers are required to pay taxes to support the unemployment compensation system.

REFERENCES

Other employers will call you for references about former employees. There are different ways to handle these calls. You may provide an honest answer, but an employee might sue you if you give negative comments. You may also provide only basic employment information – dates of employment, position, salary and the reason the employee left. When you start a business, you should establish a consistent policy on how to handle reference calls. You should communicate your policy on references to all employees when they are hired and fired.

ADDITIONAL RESOURCES

United States Department of Labor:

<http://www.dol.gov>

Department of Labor Guide for Employers:

<http://www.dol.gov/dol/audience/aud-employers.htm>

United States Equal Employment

Opportunity Commission:

<http://www.eeoc.gov>

Pennsylvania Department of Labor &

Industry: <http://www.dli.state.pa.us/>

FindLaw.com Employee Rights Center:

<http://employment.findlaw.com/>

FindLaw.com Small Business Employment

Law and Human Resources:

<http://smallbusiness.findlaw.com/employment-employer/>

Pennsylvania Chamber of Business and

Industry Human Resources Reference Page:

<http://www.pachamber.org/brd/Fact%20Sheets/hr/main.asp>