Navigating Hidden Landmines in HR Law

Marvin L Weinberg

May 20, 2010
1:30-3:00 pm EDT

Fox Rothschild LLP
ATTORNEYS AT LAW

About the Speaker

Marvin L. Weinberg, Partner
T: 215.299.2836
mweinberg@foxrothschild.com

Marv represents management in labor management relations. A substantial portion of his practice involves court appearances and administrative hearings on wrongful discharges, employment discrimination, National Labor Relations Board (NLRB) representation and unfair labor practice proceedings and non-competition agreements.

Marv also handles collective bargaining negotiations and arbitrations and provides guidance to employers seeking to remain non-unionized.

In addition, Marv counsels employers on a wide range of issues including plant closings, discrimination claims, employee discipline, employee benefits and drafting and implementation of personnel policies.

ADA Amendments Act of 2008

- The ADA Amendments Act ("ADAAA") of 2008 resulted in a major change in defining disability which will lead to expanding the number of individuals protected by the ADA.
- President Bush signed 9/25/08; took effect January 1, 2009.
- 60 day period for comment on rules closed 11/30/09.
- EEOC reviewing comments; will issue final Regs.

ADA Amendments Act of 2008

- Broad coverage
- Disability analysis should not require extensive analysis

ADA Amendments Act of 2008

- ADA defines disability as:
  - Physical or mental impairment that substantially limits one or more major life activities;
  - Record of such an impairment; or
  - Regarded as having such an impairment

ADA Amendments Act of 2008

- Before: courts considered “mitigating measures” in determining whether individual is “substantially limited in a major life activity”
- *Sutton v. United Airlines* and its progeny

ADA Amendments Act of 2008

- Under ADAAA: do not consider mitigating measures, except ordinary eyeglasses, or contact lenses, which may be considered
- Explicitly overrules *Sutton* and related cases

ADAAA

- Explicitly forbids consideration of the following mitigating measures:
  - Medication
  - Medical supplies, equipment or appliances
  - Low vision devices

ADAAA—Mitigating Measures That May Not Be Considered

- Prosthetics
- Hearing aids and other implanted hearing devices
- Mobility devices
- Oxygen therapy equipment and supplies

ADAAA—Mitigating Measures That May Not Be Considered

- Use of assistive technology
- Reasonable accommodations or auxiliary aids or services
- Learned behavioral or adaptive neurological modifications

ADAAA

- Under Act, an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

ADAAA

- Impairment need only limit one major life activity

ADAAA—Major Life Activities

- List of major life activities includes, but not limited to:
  - Caring for oneself
  - Performing manual tasks
  - Seeing
  - Hearing
  - Working

ADAAA—Major Bodily Functions

List of Major Bodily Functions includes, but not limited to:

- Functions of immune system
- Normal cell growth
- Digestive
- Bowel
- Bladder

ADAAA-Definition of "Substantially Limits"

- Explicitly overrules *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, in which Supreme Court interpreted "substantially limits" to mean preventing or severely restricting an individual from doing activities that are of central importance to most people's daily lives
- Now, impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

ADAAA - “Regarded As” Claims

- An individual meets the requirement of “being regarded as having such an impairment” if establishes that he/she has been subjected to an action prohibited under the Act because of actual or perceived physical or mental impairment. . .

ADAAA – "Regarded As" Claims

- . . . regardless of whether or not the impairment limits or is perceived to limit a major life activity
- broadens coverage for "regarded as" Plaintiffs
- excludes minor or transitory impairments (e.g. sprained wrist, broken leg)
- individuals who are "regarded as" having an impairment are not entitled to a reasonable accommodation

Practical Import of ADAAA

- Employers should engage in interactive process with anyone complaining of illness and requesting accommodation
  - the scope of who is considered “disabled” will be much broader
  - Focus on need, not coverage

ADA Charges Continue to Rise

- In 2009 disability discrimination charges filed with the EEOC reached a record high
- 21,451 claims; 23% of all charges
- Increase of almost 2000 charges since FY 2008

ADAAA—PRACTICAL IMPORT

- Increased costs of providing accommodations
- Increased defense costs
- Diminished likelihood of success on summary judgment

WHAT COUNSEL EMPLOYERS TO DO?

- With broadened definition of “disability”, amendments will lead to employers having to defend on merits
- Previously, cases dismissed on summary judgment; employees couldn’t prove disability
- Employers should review internal procedures to ensure compliance with protections provided by ADA, as amended
- Employers should keep detailed records of discussions with employees concerning interactive process and decisions on requests for accommodation

Retroactivity

- EEOC takes position ADAAA does not apply retroactively—eff. 1/1/09
  - However would apply to denials of reasonable accommodations where request was made, or earlier request renewed, on or after 1/1/09

Misclassification of Workers

- Secretary of Labor Solis has gone out of her way to state that 2010 will see ramped up enforcement from wage/hour division
- Estimated that tens of thousands of employers are misclassifying employees as ICs (Independent Contractors)
- DOL has submitted request for $25 million for its FY 2011 budget including $12 million for increased enforcement involving misclassification issues

Examples of New Legislation Cracking Down on Misclassification

- 4/23/10 Sen. Brown (D. Ohio) introduced Employee Misclassification Prevention Act (S:3254)
- Act would amend FLSA to require companies to keep records of non employees who work as ICs
- Act would provide penalties for misclassifying those workers

- New legislation in Connecticut will increase penalties for misclassifying workers as ICs
- Current law in Connecticut $300 civil penalty
- New law, each day constitutes a separate offense

- Recent case in PA-dealing with misclassification
- Two subsidiaries of Snyders of Hanover agreed to settle for $10 million a consolidated collective and class action by drivers wrongly classified as ICs

- MISCLASSIFICATION NOT LIMITED JUST TO EMPLOYEES AS ICS
- Common problem is in mis-classifying employees
- Examples include: Inside sales people-not exempt and outside sales persons generally are exempt; CPA's qualify for learned professional exemption as may other accountants who perform similar work
- Entry level accountants and bookkeepers generally not qualify if work is routine
- Workers will be able to file complaints, even anonymously through a website

Recommendations:

- Regularly review job descriptions and classifications to ensure employees are properly classified
- Be familiar with guidelines as to who is and who is not a IC (i.e., 20 factor test)

The Revised Regulations Under the FMLA

- Department of Labor issued new regulations which became effective on 1/16/09
- New regulations address for the first time the military-related leave provisions added to the FMLA in 1/08 with two (2) provisions

- First provision allows an eligible employee who is the spouse, parent, child or “next of kin” of a covered service member who incurs a serious injury or illness while on active duty is entitled to take up to twenty-six (26) weeks of unpaid leave in a single twelve (12)-month period to take care of the service member

- The twenty-six (26) week leave entitlement is inclusive of all FMLA leave taken by the employee during the applicable twelve (12)-month period and not in addition to the twelve (12) weeks of FMLA leave to which an employee is already entitled
- Eligible employee is however entitled to twenty-six (26) weeks of leave for each service member and for each serious injury or illness incurred so long as no more than twenty-six (26) weeks of leave are taken in the applicable twelve (12)-month period

- The second provision allows eligible employees to take up to twelve (12) weeks of unpaid leave for "qualifying exigencies" during the twelve (12)-month period established by the employer for FMLA leave
- Qualifying exigencies are broad. One example includes when an employee's spouse, parent, or child is on active duty or has been called to active duty with the military as a result of a "contingency operation."
- Qualifying exigencies are also other circumstances including: short-term notice of deployment; child care and school activities; counseling; and post-deployment activities
- Qualifying exigencies are new reasons to take up to twelve (12) weeks of leave; not a right to take twelve (12) weeks of leave in addition to the twelve (12) weeks of FMLA to which eligible employees were already entitled

New regulations did not give any greater insight to the definition of “serious medical condition” which has been criticized as being too broad.

- Under the new regulations, a serious health condition includes a health condition that requires the individual to see his or her doctor two (2) or more times. New regulations provide that these two (2) doctor visits must be within thirty (30) days of the beginning of the incapacity and the first visit must occur within a week of the start of the incapacity

- Other changes in how FMLA to be used
- FMLA allows employees to use their earned vacation, personal or sick leave concurrently with FMLA
- Purpose: allow employees to be paid while on leave

- New regulations change the above in a way which may have negative effect on employee
- Employees now required to follow their employer's rules for taking paid leave in order to use that leave while out on FMLA
- So if Employer has rule no paid leave certain times of year or advance notice for vacation, employee will have to follow to get concurrent FMLA leave

- Also changes to length of employer notice period
- Under old law, employers had two (2) business days to inform employee if eligible for FMLA leave
- New rules extend to five (5) days

- Also, under old rule, employee could give notice of need for FMLA leave up to two (2) days after absence starts
- New rules require employees follow their employer's "usual and customary" leave procedures
- Example, if rule states employee must call in to request sick leave on first day of absence, employees must now follow that rule for FMLA leave too

Employee Free Choice Act: Drastic Changes May Be on the Horizon

- The Employee Free Choice Act ("EFCA") may bring about the most drastic overhaul of private sector labor relations since the passage of the National Labor Relations Act in 1935

- If EFCA passes, it will dramatically change the way labor unions obtain employer recognition and would significantly alter current private sector labor laws and the U.S. economy as a whole

Purpose of EFCA

- Eliminate secret ballot elections
- Impose Contracts Upon Employers
- Civil Penalties

Union Organizing

Currently, there are 3 ways a union can become an employee bargaining representative after it has obtained authorization cards from a majority of employees:

1. Voluntary Recognition by employer
2. Bargaining Order imposed by NLRB
3. Secret Ballot Election

Current Law

- Union solicits employee support
- Union obtains signed authorization cards from employees and presents them to the NLRB as proof of support (must have signed cards from at least 30% of petitioned-for unit)
- Employer given choice of voluntary recognition of union or secret ballot election of its employees

Why Secret Ballot Election?

- Employees blindly sign union authorization cards based on union's empty promises; not true vote
- Prior to election employers have up to 42 days to educate employees about the pitfalls of unionization and campaign for employee support
- Allows employees to exercise their right to cast a private vote without pressure from peers or union

Right to Election Eliminated

Under EFCA, once a petition has been filed with the NLRB alleging a majority of employee support, the Board will **automatically** certify the union without an election upon the union's presentation of signed valid authorization cards

Under EFCA, Union Decides Election

- Union controls information to employees
- Uncontested union “promises” and/or “threats” will undoubtedly result in signed union authorization cards
- Employee vote for or against union will be public and subject to co-worker criticism

“Collective Bargaining”

- As the term implies, under current law, employers and unions collectively bargain the terms of their agreement
- The NLRB does not have authority to impose contract terms upon the parties
- Arbitrators are rarely utilized in contract negotiations and where utilized their services are rendered only upon request and consent of the parties

Time Frame for Negotiations Dictated by EFCA

- EFCA requires the parties reach agreement on a first contract within 90 days of the union's request to negotiate

- If an agreement is not reached within 90 days, either party may seek the assistance of the Federal Mediation and Conciliation Service ("FMCS")

Mediation and Binding Arbitration

- If after 30 days the parties fail to reach agreement with the assistance of the FMCS, an arbitration panel is appointed to decide the terms of the parties' contract
- The arbitration panel is not bound by prior negotiations when deciding the terms of the contract
- Arbitrator will have *carte blanche* to set the contract's terms
- The terms imposed by the arbitration panel will be binding for a minimum of 2 years

- Not clear how much support for EFCA before mid-term elections
- If EFCA moves forward, it appears that card check, which is very controversial, will be dropped from EFCA
- According to the NYT (7/16/09), any revised bill will instead require shorter unionization campaigns and faster NLRB elections to determine if employees wish to be represented by unions

Recommendations for employers include:

- Review of wages and benefits to ensure no item lags behind norm
- Training supervisors to be alert for union organizing (i.e., card solicitations) and dealing with it in a lawful way
- Preparing to communicate a campaign strategy

The Obama Board
What Will it Mean for Employers?

- Eight years of Bush appointees meant a number of pro management decisions.
- Many of these decisions were met with dissents by members Liebman (new Chair) or former member Walsh.
- March 2010, President made recess appointments to NLRB: Craig Becker, Associate General Counsel SEIU and Mark Gaston Pierce, Partner in a union law firm. Mr. Becker is by far the most controversial. In the past, he has stated that employers should have no involvement in union organizing elections.

- Recess Appointments will last until end of 2011.
- Democrats now occupy 3 of 4 filled seats. Brian Hayes, Republican nominee awaits Senate confirmation for fifth seat.

- It is expected that a number of current NLRB decisions will be reversed by the new Board. Some of these major decisions include:
- DANA/Metaldyne, 351 NLRB 434 (2007)
- Two employers entered into voluntary recognitions of unions based on a majority of authorization cards signed by employees
- Shortly thereafter, more than 30% of employees signed decertification petitions

- NLRB Regional Director dismissed decertification petitions-recognition bar doctrine
- NLRB modified the decision; held that election bar can be delayed (45 days) during which employees can decide if they want a NLRB election
- Petition can be filed by employees or a rival union
- Unions feel that the DANA/Metaldyne upsets the long standing policy endorsed by the courts favoring voluntary recognition and instead, allows a minority of employees to disrupt collective bargaining

IBM, 341 NLRB 1288 (2004)

- IBM, whose employees not represented by union, denied 3 employees' requests to have co-worker present during investigatory interviews where it was alleged they engaged in harassment of a former employee
- NLRB held that an employees in non union workplace have no rights to a representative

Register Guard, 351 NLRB 1110 (2007)

- Employer had email policy prohibiting use of work email for all “non-job related solicitations”, including union related emails
- Employer did allow emails for some non work related purposes: baby announcements, party invitations, offers of sports tickets
- NLRB upheld employer’s position and found that union messages and personal messages are not “similar” and therefore, do not have to be treated the same by the employer.

Privacy-Sources of Employee Protection

- The Wiretap Act, as amended by the Electronic Communications Privacy Act of 1986 ("ECPA"), prohibits the interception, recording, and disclosure of "any wire, oral, or electronic communication" unless one of a few exceptions applies.
- The Stored Communications Act ("SCA") prohibits unauthorized access to "the contents of a communication while [it is] in electronic storage" unless an exception applies.

Business Extension Exception

a. Excludes telephones, equipment, facilities or related components furnished by a telephone service provider to a subscriber or user in the ordinary course of business.
b. Employers may monitor the statistical aspects of employee telephone communications for data on the origin and destination of calls, call duration, and number of out-going calls.
c. Employers may monitor the content of employee communications only within contextual limits and scope.

Business Extension Exception

(1) To monitor content, an employer must have a reasonable business purpose, such as enforcing a no-private-calls policy or monitoring employee time use and efficiency.

(2) The methods and scope of interception must not be unreasonable.

(3) It is unreasonable for an employer to record all conversations in their entirety; the interception must terminate as soon as the monitored communication indicates a personal content.

Consent Exception

a. It will not be unlawful for a person to intercept a wire, oral, or electronic communication where a party thereto has given prior consent.
b. Interceptions are not unlawful where the interceptor is a party to the communication.
c. Consent may be implied where there is appropriate notice to employees and acquiescence by employees.
d. A surreptitious or secret interceptions negates consent.

Monitoring and Interception of Email-Litigation Update

Stengart v. Loving Care Agency, Inc. (NJ 2010): held that an employee had a reasonable expectation of privacy in emails she sent to her attorney from her personal, password-protected, Yahoo email account using a company-issued laptop.

Stengart Examined

- Plaintiff was director of nursing and a long-term employee of a provider of home-care services for Loving Care Agency, Inc.
- Plaintiff resigned and filed a lawsuit alleging constructive discharge because of a hostile work environment, retaliation and harassment.
- During the course of her employment, Stengart communicated via email with her attorneys about a contemplated lawsuit against Loving Care. She used her company-issued laptop but sent the emails via her password-protected Yahoo email account, rather than her work email account.
- The firm representing Loving Care uncovered the emails during discovery, some or all of which were sent during business hours and dealt with Plaintiff's anticipated lawsuit against Loving Care.

Stengart Examined

- Loving Care's electronic communications policy, contained in its employee handbook, provided that email and Internet use were not to be considered private.
- However, it is also indicated that the "principal purpose" of email was for company business and that "occasional personal use is permitted." While the policy prohibited certain uses of the email system, such as job searches, it did not mention any prohibition against communicating with attorneys. This policy made no specific reference to communications via a password-protected, web-based email account.

Stengart-NJ Supreme Court

- Stengart reasonably expected that the emails sent between her and counsel via her personal, password-protected, web-based email account would remain private;
- The fact that such emails were sent and received using a company laptop did not eliminate the attorney-client privilege that protected them; and
- The firm representing Loving Care violated New Jersey Rule of Professional Conduct 4.4(b) by reading the emails and failing to either promptly give notice to Stengart about them or seek judicial intervention to determine whether the communications were privileged.

Policies Designed to Eliminate Reasonable Expectation of Privacy

- Statement that no expectation of privacy when employees use the computer equipment/system provided by the employer, including the internet and email systems;
- Statement that continued use of the employer's systems constitutes an employee's consent to monitoring;
- Statement that computer systems are the sole property of the employer.

Policies Designed to Eliminate Reasonable Expectation of Privacy

- Reservation of the employer's right to monitor and access all areas of the employee's computer files;
- Statement regarding whether the employer's computer systems can be used for personal business and, if so, any limitations on that use;
- Statement that employer has the right, but not the duty, to monitor internet access, and incoming and outgoing email.

NON COMPETE/CONFIDENTIALITY AGREEMENTS
Establishing Consideration

- When reviewing your current agreements, first examine when the restrictive covenants were made.
- Was the covenant made at the time of hire? If so, check to see whether your state supports hiring as sufficient consideration for the covenants.
- Was the covenant made during the employment relationship? If so, continued employment may not be sufficient consideration in some states (PA) and it may be difficult to enforce the non-compete provision.

Is the Consideration Sufficient?

- Generally, any “real” consideration will be adequate to support the restrictive covenant.
- Additional vacation or benefits.
- A legitimate salary increase.
- “Sham” consideration, however, will not support a restrictive covenant.
- A $10 gift card to Starbucks
- A meaningless salary adjustment

Is the Consideration Sufficient?

- What happens when an employee accepts a non-compete shortly after beginning work?
- The answer is State-specific, however, generally-speaking, a restrictive covenant signed almost immediately after the acceptance of employment will find its consideration in the offer of employment.
- The longer employers wait to obtain the restrictive covenant, the more difficult it will be to enforce without additional consideration.

Strategies for Bolstering Enforceability of Restrictive Covenants

- Understanding that outcomes rely heavily on State law, is there anything I can do to turn things in my company's favor?
- Yes! Choice of law provisions can be useful, assuming the chosen forum State has sufficient contact with the parties under that State's choice of law provisions.
- For example, in certain circumstances, an employer headquartered in Pennsylvania with operations in Ohio may add a choice of law provision in its employment agreement advising that the Ohio employees' agreements are to be interpreted according to Pennsylvania law.

Must Employers have Confidentiality Agreements to Protect All Proprietary Information?

No! Employers' "trade secrets" are protected under the Uniform Trade Secrets Act ("UTSA"), which has been adopted by nearly every state.

What is Considered a “trade secret” under the UTSA?

The Act defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

A Former Employee is Divulging Trade Secrets; What Can I Do About It?

Employers have several remedies available to counter employees sharing trade secrets:

- Injunctions
- Damages
- Punitive damages
- Recovery of attorneys' fees (in certain instances)

Determining Whether the Employee is Exempt

- Determining whether an employee is exempt under the Fair Labor Standards Act (FLSA) is the first step of any analysis regarding employees "working from home."
- A detailed analysis of FLSA exemptions is outside the scope of this presentation, but employers are well advised to re-examine their classifications and to be certain that employees' actual duties (as opposed to just their job descriptions) meet the qualifications for "exempt" status.

My Exempt Employee is Only Working Part of the Day from Home

- To preserve the employee's FLSA-exempt status, you must pay the employee for the full day.
- Should you implement a "work from home" policy, it is recommended that any policy advise that doing so is a privilege and not a right. If performance drops, employers can recall employees back to the office.
- As always, treating employees differently (e.g. those that actually work from home versus those who say they work from home) may raise discrimination issues to the extent one employee's ability to work from home is later rescinded.

Use of Log-In Times to Determine Hours Worked by Non-Exempt Employees Working From Home

- Use of log-in times is not a reliable means for calculating employees' actual working time.
- Employees, of course, must be paid for any conference calls or other time spent on the employer's behalf—even if the employee's primary duty is handled on the computer (e.g. data entry).

Calculating Time Spent for Breaks

- Certain states require that employees receive breaks after a certain number of hours of work.
- Maintaining records that these breaks have been taken is the employer's responsibility; the employee "promising" to take breaks in accordance with State law will not suffice.
- Employers cannot simply assume that employees will take a scheduled lunch break according to policy. In FLSA litigation, employees may well claim that they worked through their scheduled breaks and, accordingly, are entitled to overtime.

FLSA Litigation is Not Fun

- The burden is on the employer to provide records as to the actual amount of time worked by the affected employees.
- If records do not exist (as is often the case in mis-classification situations), the employee is entitled to, essentially, guess the number of hours they have worked and calculate the amount they believe they are entitled to.
- These calculations generally error on the “inclusive” side.
- Employees may be entitled to “double damages” if it is determined that the employer’s violation is “willful”
- Employees are entitled to recover “reasonable” attorneys’ fees, which can amount to tens of thousands of dollars—or more.

Strategies for Mitigating the Risk

- Employees should be given detailed instructions as to timekeeping procedures.
- A mechanism must be in place to capture all time worked, including time spent on phone calls.
- Overtime must be paid in accordance with Federal and State law.

Strategies for Mitigating the Risk

- Although highly encouraged, polices are not enough. The burden is on the employer to demonstrate that time is being properly captured.
- Employers should consider adding language to their handbooks encouraging employees to immediately report any pay discrepancies to Human Resources, at which time their complaints will be investigated and addressed .

WHAT KINDS OF LAYOFFS ARE MORE LIKELY TO RESULT IN LITIGATION
Reductions in Force v. Facility Shutdowns

- Facility shutdowns generally involve the cessation of operations at a facility and are more insulated from litigation as there is often no “selection” process as to which employees or job classifications are eliminated.
- Shutdowns do, however, carry some exposure to litigation based on disparate treatment, as oftentimes better performing employees are offered relocation packages while others are simply terminated.

My Company has a Clear Need to Downsize; How Can There be Exposure?

- Companies often look to higher-salaried employees as the first place to trim expenses. Many times, older employees (e.g. those over age 40) are the first to have their positions eliminated. Although courts have found salary is not a proxy for age, older workers sometimes bear the brunt of layoffs.
- Job classifications may have different mixes of employees. Cuts in production may affect some groups of employees in a disproportionate manner.

Preparing an Effective Release

- For valid consideration (e.g. severance), employees may release claims against the employer.
- To ensure an effective age discrimination release has been secured, employers should produce a chart illustrating the ages of employees eligible for the severance and the ages of those employees who are not eligible for the severance (e.g. who are being retained).
- Releases can be comprehensive, but should be written in an easily-understood manner.

Preparing an Effective Release

- Particularly in large RIFs, it is not uncommon for employers to change the scope of the affected workforce; expanding or contracting the scope of the RIF as business necessitates.
- Should this occur, it may be necessary to provide employees with a supplemental ADEA disclosures. Remember, the purpose of the disclosures is to ensure employees are making an educated decision with respect to the waiver of their ADEA rights (i.e., is there a disparate impact?).

WARN Considerations

- The WARN Act requires that employees, their bargaining representative (if any), and various government officials be notified in advance of either a plant shutdown or a mass layoff, as defined by the Statute.
- It is not uncommon for employers' needs to change once a WARN notice has been issued. Should the employer wish to keep the facility operating a while longer, there are mechanisms by which employees can be notified of the employer's intentions.
- Employers violating the notification requirements of the WARN Act may be required to provide pay and benefits through what would have been the proper notification period.

Layoffs in a Union Environment

- Beyond the requirements of the WARN Act, employers will be required to discuss the "effects" of a plant shutdown with the employees' bargaining representative.
- Issues such as transfers, relocation, benefits, and severance may be addressed by an affected union.
- Disregarding the union may result in an Unfair Labor Practice being filed with the National Labor Relations Board.

Mitigating Risk in Single/Small Group Layoff Situations

- Where employees are being laid off for reasons not related to performance, employers can mitigate their risk with respect to discrimination litigation by reviewing a proposed layoff list including:
- Race
- Age
- Gender
- Job Classification
- Preparing a list in advance helps employers self-identify instances in which employees may claim disparate treatment and provides an opportunity to consider a response.

Family Responsibility Discrimination

- Sex discrimination is not just about discriminating against women by for example, paying them less than men for doing the same job
- It includes discriminating against employees based on gender stereotypes including making certain assumptions because of family care giving responsibilities

- Family responsibility discrimination is one form of sex discrimination in which employees are treated adversely because of their care giving responsibilities (i.e., children, elderly parents or sick relatives).

Examples of Impermissible conduct include:

- Questioning job applicants about their plans to have children as a consideration for hiring them
- Terminating employees based on the fact that they are pregnant or have school age children
- Assigning employees to less desirable positions with lower pay because they are mothers

Some Tips

- Focus on applicant's qualifications for the job- don't ask questions about applicant's children, plans to start a family or other care giving responsibilities during interview or performance reviews
- Review your policies and practices to make sure that they do not discriminate against employees with care giving responsibilities
- Develop objective, job-related qualifications for positions and be consistent in their application

Quiz

1. John Doe takes medication for his epilepsy: Assuming epilepsy is an impairment which substantially limits a major life activity is Mr. Doe considered disabled if the medication controls his epilepsy?

2. X Company's policy requires that employees cannot take personal leave during the first two weeks of December. Julia Doe is on FMLA and has three personal leave days which she earned prior to her taking FMLA leave. Can she take her personal days concurrent with her FMLA leave?

3. Despite his employer's policy of requiring notice on day sick leave being taken, John Doe gives his employer notice of his need for FMLA leave two days after his absence starts. Can employer deny Mr. Doe's request?

4. Acme Co. posts job opening and interviews 2 candidates John and Harry for position as A/R Coordinator. Job requires individual to have frequent contact with billing department and sales staff but can be done remotely. John has experience as billing supervisor and has excellent communication skills. Harry needs to work from home 2 days per week to care for his ill father. While Harry has prior experience as A/R Coordinator for a different company, Acme hires John because it is concerned that Harry will be too distracted to do job. Permissible?

5. John Doe taken Company lap top home and sends emails to his attorney regarding a personal matter. Company has policy in handbook which states only that email and internet usage are not to be considered private. John signed for handbook but misplaced it. Can Company review John's email? Does it make a difference that email was sent from home?