

PBI: Representing Physicians and Dentists


Nine Employment Law Issues Every Physician and Dentist Should Know

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OVERVIEW

These employment issues may apply to physicians, but the focus is on non-physician employees of the practice.



Don't forget to ask me. . .

If a particular statute applies to your client's practice. Many statutes have minimum size (number of employee) thresholds.





Business Lawyers Serving Business People

Before the list. . .

Meaning of “At Will” Employment

“At will” means discharge for “good reason, bad reason or no reason at all” unless there is a contractual prohibition, statutory restriction or public policy exception.

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Meaning of “At Will” Employment

- All states (except Montana) are “at will” states
- “Right to work state” doesn’t apply!

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The list. . .


**Number 1
Background Checks**

- > EEOC discourages background checks
- > Many criticize the use of credit checks
- > Philadelphia (and other locales) has a “ban the box” ordinance prohibiting the use of the criminal history box in the first application
- > Pennsylvania has a statute that restricts the use of criminal background information
- > Calling prior employers and schools takes time

BUT

> **Do it anyway!**


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**Number 1
Criminal History Records Information Act**


- > 18 Pa. Cons. Stat. Ann. §§ 9101-9183 (West 2018)
- > Section 9125 governs the use of criminal records and states that felony and misdemeanor *convictions* may be *considered* by the employer only to the extent they relate to the applicant’s *suitability for employment in the position for which he or she has applied.*

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**Number 1
Criminal History Records Information Act**

The employer must notify the applicant that the criminal history is the reason for the rejection!

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**Number 2
Restrictive Covenants Are Enforceable**

- Non-compete; non-solicitation; inventions; confidentiality
- Must provide consideration at outset of employment – continued employment insufficient consideration in Pennsylvania (different in NJ)

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**Number 2
Restrictive Covenants Are Enforceable**

Can you live with a non-solicitation of patients and employees rather than a non-compete?

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Number 3
Misclassification or Mistreatment Under the FLSA

- **Independent Contractor v. Employee**
- **Exempt v. Non-exempt**
- **Intern v. Employee**
- **Failure to pay or properly calculate overtime**

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Number 4
Discrimination, Harassment and Retaliation Claims

- **Administrative prerequisite to filing a civil action under Title VII, EPA, ADEA, ADA, Civil Rights Act of 1991, Rehabilitation Act of 1973, GINA and the PHRA.**
- *In Pennsylvania, an employee has only 300 days to file an action with the PHRC or EEOC.*
- **When dismissed from the agency, there is usually only 90 days to file in federal court.**

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Number 4
Discrimination, Harassment and Retaliation Claims

- **EPA: No minimum**
- **Title VII: 15 employee minimum**
- **GINA: 15 employee minimum**
- **ADEA: 20 employee minimum**
- **PHRA: 4 employee minimum**

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Number 5
Retaliation and Whistleblowing

- Retaliation claims are stand alone claims and extremely common.
- Wide range of actions and retaliatory activities prohibited under *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006).
- Retaliation of investigation participants protected by *Crawford v. Metropolitan Gov't of Nashville*, 555 U.S. 271 (2009).

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Number 5
Retaliation and Whistleblowing

- Pennsylvania's Whistleblower Law, 43 Pa. Cons. Stat. Ann. §§ 1421-1428 (West 2018), applies to an entity that receives public funds. Could be a private company that receives public funds.
- Other statutes provide whistleblower protections, e.g., The Medical Care Availability and Reduction of Error Act, 40 Pa. Cons. Stat. Ann. § 1303.308(c) (West 2018) (MCARE); and federal Sarbanes-Oxley.

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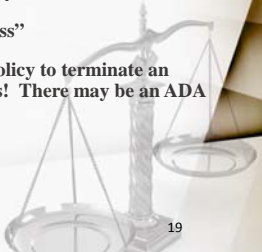
Number 6
FMLA and ADA

- FMLA applies to employers with 50 or more employees (but review the formula)
- Provide up to 12 weeks off (including intermittent leave) of unpaid leave for various reasons, including serious health conditions of employee or family members, and birth or adoption of a child. Additional requirements for members of the armed services.
- Employee must have been employed for 12 months and worked 1,250 hours to be eligible for FMLA.

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Number 6
FMLA and ADA


- ADA applies to employers with 15 or more employees.
- Protects employees with a disability and those perceived as having a disability.
- Requires “interactive process”
- Employers cannot have a policy to terminate an employee after FMLA expires! There may be an ADA consideration.



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Number 7
SEPARATION AGREEMENTS


- No obligation to provide severance unless you promised to do so.
- Most separation agreements provide consideration in exchange for a release.



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Number 7
ADEA/OWBPA Releases


- Age Discrimination in Employment Act; Older Workers Benefit Protection Act: 20 or more employees
- Releases (like those in separation agreements) have specific requirements.



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Number 7
ADEA/OWBPA Releases


- If single termination, must provide 21 day review period (waivable)
- If group termination, must provide 45 day review period (waivable) *plus exhibit about "the program"*
- For both, seven day revocation period (*not* waivable)

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Number 7
ADEA/OWBPA Releases


Other requirements:

- Must advise employee to consult with attorney
- Must provide consideration
- Must not have employee waive future rights

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~PAUSE~
Let's talk about Handbooks. . .


- Within the last five months, changes in how handbooks and policies are written
- NLRB provided "guidance" about policies, then changed it
- Need to have policies reviewed
- Policies are not contracts; contractual provisions need to be separated

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Number 8
Wage Payment and Collection Law

43 Pa. Cons. Stat. Ann. § 260.3

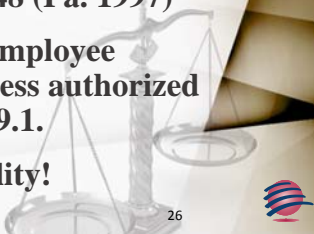
- **Must pay employees “wages” which includes more than base compensation**
- **25% liquidated damages**



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Number 8
Wage Payment and Collection Law


- **Mandatory attorneys’ fees. See *Oberneder v. Link Computer Corp.*, 696 A.2d 148 (Pa. 1997)**
- **Cannot set off employee compensation unless authorized by 34 Pa. Code § 9.1.**
- **Individual liability!**



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Number 9
INDIVIDUAL LIABILITY

- **Family and Medical Leave Act (“FMLA”)**
- **PA Whistleblower Act**
- **Fair Labor Standards Act (“FLSA”)**
- **Pennsylvania Human Relations Act (“PHRA”)**
- **ERISA**
- **COBRA**
- **Wage Payment and Collection Law (“WPCL”)**
- **Immigration Reform and Control Act (“IRCA”)**
- **Occupational Safety and Health Act (“OSHA”)**



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