

Alaska Medical Group Management Association

A Practical Guide to Managing High Risk
Issues in the Workforce

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Scope

- Brief overview on three requested subjects:
 - (1) Sexual Harassment
 - (2) Disability Leave and Accommodation
 - (3) Non-Compete agreements
- Note: any one of these would ordinarily be covered in a 1-2 hour seminar

Focus



- Brief review and summary
- Given time constraints, emphasis will be on practical considerations
- Risk management focus
- Please hold questions until end



Sexual Harassment in the “Me Too” era: compliance tips and practical notes

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Types of Sexual Harassment claims

- Quid pro quo (rare): sexual favors demanded as term or condition of employment (e.g., “sleep with me to get the promotion you want”)
- Hostile work environment (more common): words or conduct make workplace offensive

Hostile Work Environment

- Offensive words or conduct sufficiently pervasive and severe to make the workplace unreasonably abusive
- All concepts are terms of art



Harassment: “severe or pervasive”

- One incident may be enough, especially if it involves physical contact or threats
- Typically, however, more than one incident is required

Harassment: “unreasonably abusive”

- Must be both subjectively and objectively unreasonable
- Subjective—employee found the words or conduct objectionable
- Objective—reasonable person with similar characteristics would find it offensive (reasonable victim standard)

Common causes and sources of claims

- Off color jokes (especially sent via e-mail)
- Pornography (in eye of beholder)
- Flirting that carries on too long or too far
- Comments or remarks
- Ogling

[these are merely some of the more common sparks giving rise to sexual harassment claims]



Other sources?

- “Pre-emptive strikes” from employee facing discipline or separation
- Good faith, if untimely, complaints following news articles or other publicity
- Training

Who can sexually harass your employees?

- Co-employees
- Supervisors
- Customers or vendors may also create actionable claims for which you will be liable



Affirmative Defense

- *Faragher/Ellerth* affirmative defense
- If employer has sexual harassment policy, and if no tangible adverse employment action was taken (no termination or no demotion, e.g.) employer may defeat claim by showing employee unreasonably failed to take advantage of policy to report and cure
- Make sure you have a policy

Same-sex sexual harassment?

- *Oncale v. Sundowner*: Yes, in theory
- This upcoming Term (October 2019-June 2020) the U.S. Supreme Court will also hear argument in two cases regarding whether Title VII protects gay rights (prohibits employment discrimination based on sexual orientation)

Preventative Tips

- Check your computer use and e-mail policies to be sure sexual harassment issues are addressed
- But carefully analyze use of filters that may deny access for legitimate purposes
- Check with your IT people on your server tape and hardware—how long are emails preserved and what measures do you have in place to store or retrieve data?

Fraternization policies



- Some employers are adopting fraternization policies to avoid sexual harassment claims
- There can be practical problems and privacy concerns with such policies
- OTOH, appropriately drafted and implemented, such policies may help reduce claims

Investigations

- Never credit or discredit any complaint—accept the complaint, thank the person, and investigate
- Consider interim non-adverse measures (administrative leave or separate employees involved)
- Collect evidence/interview witnesses
- Analyze evidence and witness statements
- Confer with counsel

Credibility

- Is the complaint detailed or vague?
- Consistency
- Any obvious implausible dates or facts?
- Corroboration (other witnesses)
- Did the person have time and opportunity to witness?
- Any known bias or “back-story”?
- Time between event and complaint

Determination

- Confidentiality (don't promise)
- Preserve evidence
- Reporting to complainant (explain what you can and cannot disclose, don't leave complainant wondering)

Settlements and Severances

- Recent state and federal legislative developments are essentially preventing confidentiality or non-disclosure provisions in sexual harassment cases and providing for other tax treatment
- Alaska has not yet adopted similar provisions
- Always have counsel review

“Me Too” era--bottom Line

- Basic tests and standards have never changed
- Public more aware by impact of social media, news, and overall publicity
- Awareness is a good thing





Disability Leave and Accommodations: common problems and fixes

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Scope

- Because of time constraints, we are assuming employee is disabled and/or is eligible for FMLA and there is a qualifying substantial serious health condition
- A comprehensive seminar would require 1.5 to 2 hours just to address all aspects of the ADAAA of 2008 and FMLA

Biggest problems with disability leave?

- Dialogue (no actual conversation occurs)
- Document (no documentation)
- Haste (people rush to a decision)

Biggest actual problems?

- Migraines, back aches, mental or emotional illnesses that cannot be objectively perceived
- Any leave-related issue that frequently occurs at intervals with no advance notice

Solutions

- All of these problems can be solved—or at least managed for risk—by staying true to three benchmarks:
 - (1) Dialogue (true dialogue)
 - (2) Document
 - (3) Patience (be patient)



Remember

- ADA and FMLA do not grant an employee any **greater** rights
- However, no adverse action should be taken **because** of a disability or FMLA leave
- Reasonable accommodation is required



“Interactive Dialogue”

- Technically, Employee should broach subject, but practically Employer should take the lead if Employer has notice or reason to believe there is a problem
- May request a fitness for duty examination to see if employee can perform essential functions of the job 29 CFR 825.312

Reasonable Accommodation

- Tip: If your supervisors are supervising, you should know or have reason to know of circumstances suggesting Employee may need or want reasonable accommodation
- Should evaluate **reasonable** accommodations with emphasis being on **reasonable**

Reasonable Accommodation

- Do not have to restructure workforce
- Do not have to create positions
- May transfer to a lower-paying position in certain circumstances
- Unpaid leave may constitute a reasonable accommodation
- **BOTTOM LINE**—discuss options with counsel first

Note

- May still discipline employee for violation of workplace rules
- Build “attendance” into job descriptions and have an attendance policy

Key Steps



- Identify the problem in advance. Be proactive.
- Supervisors supervise. Managers manage. Make sure they keep an eye out for obvious clues –attendance issues, tardiness, performance issues—that may signal some type of problem
- Dialogue with employee (ask questions)
- Document

Fitness for Duty Examination

- Job-related and consistent with business necessity
- Reasonable belief, based on objective evidence, that employee's ability to perform essential functions is impaired by medical condition or direct threat is posed

Fitness for Duty--limitations

- If the condition already known, ability to request may be limited (and don't overuse)
- However, may request FFD to better evaluate scope of situation (for example, may ask Employee to provide documentation from his or her health care provider explaining the effects of medication on the Employee's ability to perform the job).

Fitness for Duty Examination

- Send Employee to his or her doctor with HIPAA release, WH 380 (FMLA request for information), and a copy of the job duties/description.
- Ask Employee's doctor to advise regarding Employee's ability to perform essential functions, prognosis, and whether reasonable accommodation needed

Good Source with Examples

- EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations, No. 915.002 (July 27, 2000)
- Available on-line

Disability Leave and Accommodations

- Dialogue—true dialogue
- Document
- Explore options
- Document
- Be Patient
- Document
- Confer with counsel

Accommodation Issues

- Can you force employee to take prescription medicine (combative employee with mental illness)?
- Can you force employee to make life-changing or behavioral-changing decisions (morbid obesity and surgery or gym)?
- Is unpaid leave an accommodation and, if so, for how long?
- When is patience exhausted?

Options



- Be flexible
- Solicit Employee's input and try to get the Employee to "buy-in" to an option that is reasonable and acceptable to all

Bottom Line on ADA and FMLA

- You should have your HR managers and assistants attend training
- Never make snap decisions
- Dialogue
- Document



Non-Compete, Anti-Piracy, and related Agreements: practical safeguards

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Two Primary Types

- Employment Agreement (subject to certain tests, and increasingly struck down in other jurisdictions)
- Sale of Practice (courts will more readily enforce)

Scope defined by two elements

- Geographic restriction
- Time or temporal restriction (duration)

Basic Test



- Must be reasonable in scope, and reasonably related to a legitimate business expectation or interest
- Cannot operate as a restraint on trade

Justifications and factors

- Need time to train a replacement, and get replacement acquainted with patients, customers, or clients
- Are patients, customers, or clients exclusive?
- Is restraint necessary to protect business?
- Does restraint impose greater burden than is necessary to protect business?
- Public interest

Avoid cut and paste solutions

- Do you need a statewide restriction for a local medical clinic?
- Do you need a five year duration for an associate dentist?
- Times change and circumstances change—what may have been “reasonable” in context 5 or 10 years ago may no longer be reasonable

Evolving issues

- In some jurisdictions, medical care is carved out from non-competes under public policy rationale (Arizona is an example)
- Shortage of healthcare practitioners can make it difficult to enforce non-competes
- Cannot prohibit general advertising under FTC and First Amendment (commercial free speech)

Court modification of Non-Competes

- In Alaska, courts can essentially rewrite your non-compete to make it reasonable if they find the agreement was made in good faith
- There are no “black and white” or “failsafe” standards governing time or geographic scope.
- Evolving composition of judiciary

Other related concepts

- Anti-piracy (prevent patient, staff, or employee poaching)
- Works for Hire (copyright for software code for example)
- Trade Secrets (financial, business, or marketing plans)

Some common “fail-points”

- You cannot prohibit general advertising (commercial speech is protected speech)
- Patients or clients or customers are seldom “exclusive”
- Be careful of reverse claims for trade libel or defamation

Other Claims may provide relief

- Unfair Competition
- Misappropriation of Trade Secrets
- Computer Fraud and Abuse Act (for departing employee who pilfers information)

Non-competes—bottom line

- Never draft without counsel
- Periodically update or review
- Be reasonable



Some concluding risk management thoughts

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The “Six Cs [and a Big D]”©

- Be in Compliance
- Be Clear
- Be Consistent
- Be Current (stay updated on developments)
- Be Careful (confer, consult, and collaborate)
- Be Cautious (avoid rash or snap judgments)
- **DOCUMENT, DOCUMENT, DOCUMENT**

Tips for medical clinics and practices



- Embezzlement. Have your books audited and always be sure to check references for your bookkeepers.
- Office or equipment leases. Calendar all due dates.
- Insurance. Check with your broker about Commercial General Liability, Business Insurance, Malpractice, Workers' Comp, and other Insurance. Calendar all due dates.

Tips (continued)

- Schedule a HR audit or check-up every 12-18 months
- Schedule an in-house wage and hour audit every 12-18 months
- Compensable time and lunch hours (staff working at their desks during lunch)
- HR seminars by State (Anchorage Third Tuesday seminars)

Questions?

