

THE LAW AT WORK

EMPLOYMENT LAW FOR MANAGERS

**UNIVERSITY OF PENNSYLVANIA
THE WHARTON SCHOOL
LGST 208-401/MGMT 247-401 FALL 2017**

Location: F65 JMHH

Wednesday: 3:00 P.M. – 6:00 P.M.

Professor: Deborah Weinstein, Esquire

Jon M. Huntsman Hall, Legal Studies and Business Ethics Department

Office hours: Wednesday, 2:00-3:00 P.M., after class or by appointment,

JMHH, 6th Floor, Room 618, or at

The Weinstein Firm, 1515 Market Street, Suite 1200, Philadelphia, PA 19102

dweinstein@weinsteinfirm.com [students, please use this email address]

Telephone: 215-636-0616 (office); 215-498-6338 (mobile)

Description

This course is based on the principle that knowledge and understanding of employment law facilitate (1) promotion of a workforce with a high degree of commitment to reaching business goals, (2) the development of practical business solutions to problems arising in the workplace and (3) effective human resources policies and procedures that comply with applicable laws. This course provides future business owners, entrepreneurs, executives, managers and students interested in going to law school or intending to enter the workforce with an introduction to the law of the workplace. The course examines the various employment laws with which businesses must comply and the legal rights and responsibilities of employees and employers. Balancing employer legal compliance and equal employment opportunity imperatives and other governmental regulation with dynamics conducive to a successful enterprise is a significant theme throughout the course. Emphasis is on laws concerning equal employment opportunity with respect to discrimination and harassment because of sex, race, national origin, religion, sexual orientation, gender identity, age, disability, pregnancy, veterans' status and other characteristics protected by laws; work-related security, safety and privacy, employment-at-will, drug testing, social media and electronic communications; worker misclassification; hiring; politics and work; affirmative action; and the legal and regulatory environment regarding immigration, wage and hour, leaves of absence, hiring, the non-employee workforce, labor/management relations and collective bargaining.

Assigned Readings

Course materials will be posted on Canvas throughout the semester. Readings are court opinions, laws and regulations, articles from various media and outlines of particular topics in employment law for managers. **Many of the readings listed on the Syllabus will not be assigned.** There is no textbook for the course.

Exams and Grading

Class participation (including attendance) counts for 15% of your grade. There will be one midterm examination counting 30% and a final examination counting 30% of your grade. In addition, you will be responsible for a presentation to the class, either individually or as a group assignment, concerning a court opinion that addresses an employment law issue (counting 25% of your grade). A list of opinions from which you may choose will be distributed in class.

Class Preparation

The readings listed on the syllabus are subject to change. **MANY of the readings listed will NOT be assigned.** Final assignments will be announced prior to the class for which they are assigned. Final reading assignments for each class are mandatory. Any handout provided before class must be read before class because the discussion will focus on this material. Class preparation is crucial to meaningful class participation and successful completion of the course.

Topical Assignments

The assignments listed for each date are also subject to change as a result of course pacing, schedule changes or developments in the law. Some topics may not be covered and others may be added due to ongoing developments in the law.

COURSE SYLLABUS¹

Session #1 Aug. 30 Introduction: The New American Workplace

Course Introduction and Expectations, Employment at Will Rule, Sources of Employment Law, Employee/Employer Relationships & The Changing Legal Landscape - 2017.

READING²: *Woodson v. AMF Leisureland Ctrs., Inc.*, 842 F.2d 699 (3d Cir. 1988)

(bartender fired for refusing to serve visibly intoxicated patron); “You Have a New Right to Complain about Your Job on Facebook,” *Slate*, Jan. 3, 2012 (NLRB ruling on firing employees for online complaints); “Is Medical Marijuana Use Becoming a Protected Class Under State Laws?” *The Legal Intelligencer*, June 22, 2017; “Why I Was Fired by Google,” by James Damore, *Wall Street Journal*, Aug. 12, 2017; “Why the First Amendment Won’t Protect Charlottesville White Supremacists from Being Fired,” *MarketWatch*, Aug. 17, 2017.

Session #2 Sept. 6 Who is Working Here?

Employee? Independent Contractor? Consultant? Intern? Volunteer? Temp? Why Does It Matter? Is a Job-By Any Other Name Still a Job? Enter the Gig Economy—What Now?

READING: “Independent Contractor or Employee,” IRS Pub. 1779, Rev. 3-2012; “Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding,” Form SS-8, Rev. Aug. 2011; *Universal Am-Can Ltd. v. WCAB*, 563 Pa. 480 (2000)(are truckers employees or contractors?); *Kirleis v. Dickie McCamey & Chilcote, PC*, No. 09-4498 (3d Cir. July 15, 2010)(are shareholders protected employees by discrimination laws?); Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, U.S. Dept. of Labor, Wage and Hour Div., April 2012; “NBCUniversal Agrees to Pay Out \$6.4 Million to Settle Unpaid Internship Claims,” *Hollywood Reporter*, Oct. 23, 2014; *Uber Technologies, Inc. v. Barbara Berwick*, Case No. 11-46739 (Cal. Labor Com. Order, June 4, 2015); “Gigs With Benefits” by James Surowiecki, *The New Yorker*, July 6, 2015 (are Uber drivers employees or independent contractors?).

¹ Readings for each session will be selected from the materials listed herein.

² For Session #1, the **only court opinion** reading assignment is *Woodson v. AMF Leisureland Ctrs., Inc.*, http://scholar.google.com/scholar_case?case=5345229437303352235&q=%22woodson+v.+amf+leisureland%22&hl=en&as_sdt=2003.

Session #3 Sept. 13

Help Wanted: Filling that Job

Recruiting, Advertising, Interview Questions Applications, References, Credit and Criminal Background Checks, Discriminatory Hiring, Use of Social Media, Salary History, Medical Exams and Drug Testing.

READING: *EEOC v. Consolidated Service Systems*, 989 F.2d 233 (7th Cir. 1993)(recruiting by word-of-mouth); Section 704(b) of Title VII (nondiscrimination in job advertising); “Prohibited Employment Policies/Practices,” EEOC, Dec. 31, 2010; “Employer Immunity from Liability for Disclosure of Employee Information” 42 Pa.C.S. § 8340.1 (2006)(PA job reference immunity law); “Amendments to Philadelphia’s Ban the Box Law,” by Tim McCarthy, Upon Further Review, May 26, 2016; Americans With Disabilities Act, Sections 102-04 (pre-employment medical inquiries and drug tests); “A Summary of Your Rights Under the Fair Credit Reporting Act,” 2013; “Notice to Users of Consumer Reports: Obligations of Users Under the FCRA,” 2013; NYC Int 1253 (City of New York Code prohibiting employers from inquiring about applicants’ salary history).³

Session #4 Sept. 20 **Civil Rights in Employment**

Introduction to Equal Employment Opportunity Law: Protected Classes, What the Law Prohibits and Requires; Procedure/Jurisdiction, Proving Discrimination, Management’s Defenses (Business Necessity, BFOQ, RFOA), Disparate Treatment and Impact, Retaliation, Civil Rights Act of 1964 as amended; Age Discrimination in Employment Act.

READING: Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §§2000e *et seq.*; “EEO is the Law” Poster⁴; Mandatory Supplement to Poster⁵; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972)(burden-shifting method of proof for disparate treatment case based on circumstantial evidence); 42 U. S. C. §§2000e–2(m) & 5(g)(2)(B); *Hodczak v. Latrobe Specialty Steel Company*, No. 11-1085 (3d Cir., Nov. 17, 2011)(workers’ explicit emails, not age, led to discharge); *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994)(evidence of pretext for national origin discrimination).

³ <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2813507&GUID=938399E5-6608-42F5-9C83-9D2665D9496F&Options=ID%7cText%7c&Search=1253-A>

⁴ http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.

⁵ https://www.dol.gov/ofccp/regs/compliance/posters/pdf/ofccp_eeo_supplement_final_jrf_qa_508c.pdf

Session #5 Sept. 27 Civil Rights in Employment (Continued)

READING; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)(testing's disparate impact discrimination on Black employees); *Dothard v. Rawlinson*, 433 U.S. 321 (1977)(business necessity defense for height/weight standards); *Brian Reid v. Google, Inc.*, 235 P.3d 988, 50 Cal.4th 512 (Cal. 2010)(stray remarks, alleged discriminatory comments made by non-decision makers and coworkers, as admissible evidence); Proposed H.R. 3721, Protecting Older Workers Against Discrimination Act (to amend ADEA to clarify standards of proof), "Pittsburgh Glass Works Ordered to Pay in Age Discrimination Case," Pittsburgh Post-Gazette, Jan. 28. 2016.

Session #6 Oct. 4 Other Discrimination & Duty to Accommodate

READING: *Bergen Commercial Bank v. Sisler*, 723 A.2d 944 (N.J. 1999)(discrimination because of young age); "Got Religion? Accommodating Religion in the Workplace," Deborah Weinstein, Philadelphia Lawyer Magazine, Fall 2003; *TWA v. Hardison*, 432 U.S. 63 (1977)(accommodating religion); *EEOC v. Abercrombie & Fitch Stores*, 135 S.Ct. 2008 (2015)(no knowledge requirement for Title VII religious accommodation claim); "Wal-Mart Manager Sues Employer Alleging Religious Bias," The Legal Intelligencer, Aug. 4, 2016; Section 2000e-3 of Title VII, Retaliation, Participation and Opposition Clause; *Sutton v. United Air Lines*, 527 U.S. 471 (1999)(ADA disability determination made *without regard to* mitigating measures); 2008 Amendments to the Americans With Disabilities Act (overruling *Sutton*); "GAP Unlawfully Fired Employee With Disability, EEOC Charges," EEOC Press Release, Nov. 19, 2010 (alleging manager with kidney disease terminated despite excellent performance); "Is Medical Marijuana Use Becoming a Protected Class Under State Laws?" The Legal Intelligencer, June 22, 2017;

Session #7 Oct. 11

Being a Jerk is Not Unlawful Harassment: What Is?

READING: *Gretchen Carlson v. Roger Ailes*, Complaint, July 6, 2016⁶(sexual harassment case against then Chair and CEO of Fox News); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)(employer defenses to harassment claims); "Communication is Critical to Avoiding Sexual Harassment," Deborah Weinstein, Philadelphia Business Journal, April 22, 2005; Sample anti-harassment policy; Investigation into harassment complaints; EEOC Guidance "Vicarious Employer Liability For Unlawful Harassment

⁶ <http://smithmullin.com/wp-content/uploads/2016/07/Carlson-Complaint.pdf>

By Supervisors,”; “It’s Complicated: Mixing Romance and Work,” Deborah Weinstein, Philadelphia Lawyer Magazine, Winter 2011; *Vance v. Ball State University*, 133 S.Ct. 2434 (2013)(legal definition of supervisor); *Daniel v. T & M Protection Resources*, 2017 U.S. App. Lexis 7218 (2d Cir. 2017)(one vile slur can constitute hostile work environment). “Raymond James Gets Hit with a Sexual Harassment Complaint,” Tampa Business Journal, Aug. 17, 2016; “Blue Collar Workplace Does Not Excuse Sexual Harassment,” Legal Intelligencer, Dec. 14, 2016; “Uber Fires 20 Amid Investigations into Workplace Culture,” New York Times, June 6, 2017.

Midterm Take-Home Examination Handed Out During October 11 Class

Session #8 Oct. 18

Part I: Beyond Equality: Affirmative Action and Reverse Discrimination

Substantial differences between affirmative action in education and in employment laws, myths and misconceptions about what the law requires, unintended consequences.

READING: *Taxman v. Board of Ed. of Tnshp of Piscataway*, 91 F.3d 1547 (3d Cir. 1996)(diversity is not required by any employment law); “Desperately Seeking Diversity,” Deborah Weinstein, Philadelphia Lawyer Magazine, Summer 2003; Executive Order 11246; *Ricci v. DeStefano*, 120 S. Ct. 2658 (2009) (prohibiting New Haven from setting aside firefighters’ test results where all earning promotions were Caucasian); “In Focus: Employee Memo Questioning Google Diversity Efforts Sparks Furor,” SHRM, Aug. 7, 2017; “Google’s Ideological Echo Chamber,” by James Damore (memo written by now fired Google employee).⁸

Part II: Equal Pay for Equal Work, Gender and Gender Identity Related Issues

READING: *Lilly Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007)(cumulative effects of long-term pay discrimination); “What You Should Know About the EEOC’s Proposal to Collect Pay Data,” July 14, 2016 ⁹; Lilly Ledbetter Fair Pay Restoration Act of 2009; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)(gender stereotyping is sex discrimination); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104 (9th Cir. 2006)(requiring female employees to wear makeup); *Schroer v. Billington*, 577

⁷ <http://www.eeoc.gov/policy/docs/harassment.html>

⁸ <https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf>

⁹ https://www.eeoc.gov/eeoc/newsroom/wysk/proposal_pay_data.cfm

F.Supp.2d 293 (D.D.C. 2008)(discrimination laws prohibit transgender discrimination: sex includes gender identity); Proposed Employment Non-Discrimination Act (ENDA)(to prohibit employment discrimination based on sexual orientation and gender identity);¹⁰ “Fluid Identity Discrimination,” by Leora Eisenstadt, American Business Law Journal, Dec. 2015;¹¹ “The State of Sexual Orientation Discrimination Under Title VII,” by Elizabeth Livingston, The Legal Intelligencer, June 27, 2017.¹²

Midterm Examination Due During October 19 Class

Session #9 Oct. 25 *Immigration Laws and Employment: The Times, Are They A Changin?*

Stepped-up Enforcement, Unauthorized Workers, Non-immigrant Status, Temporary Visas, Green Cards, Citizenship, I-9s, E-Verify and Social Security No Match Letters, EB-5.
Guest Lecturer: Shaun Staller, Esquire, Immigration Attorney, Greenberg Trauig
Readings to be announced.

Session #10 Nov. 1 *What If Following Management and Customer Preferences Would Cause a Disparate Impact on a Protected Class?*

READING: *Playboy Bunny & Hooters*; “Man Sues ‘The Apprentice’ and Trump over Alleged Age Discrimination,” UPI, Jan. 1, 2007; “The Look of Abercrombie & Fitch,” cbsnews.com; “Abercrombie & Fitch Employees Allege Promotions Based on Looks,” Dallas Morning News, Aug. 27, 2008; *Wilson v. Southwest Airlines*, 517 F. Supp. 292 (N.D. Tex. 1981)(Love Airlines); “Casting Calls May Violate Federal Law,” L.A. Times, Nov. 30, 2006; *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385 (5th Cir.1971)(customer preference only where it affects company’s ability to perform primary necessary function or service, not tangential aspects); *Bradley v. Pizzaco of Nebraska, Inc. d/b/a/ Domino’s Pizza*, 7 F3d 795 (8th Cir. 1993)(requiring male employees to be clean shaven may be discriminatory).l

Session #11 Nov. 8 *The Wired World at Work*

Employee Privacy, Employer Security, Surveillance and Monitoring (phone, email and Internet Use), Facebook, Blogging, Texting; Employer’s Social Media Policies

¹⁰ <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act>

¹¹ http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2683581

¹² <http://griesinglaw.com/wp-content/uploads/2017/07/Legal-Diversity-Article-Livingston.pdf>

READING: “The eWorkplace: Privacy, Access & Security in the Era of the Cloud, Social Media, and BYOD; “NLRB Memo ‘Unlikes’ Social Media Policies,” Corporate Counsel, July 24, 2013; “Don’t Want Your Boss Implanting a Microchip into Your Body? A PA Lawmaker Wants to Help with That,” Philadelphia Magazine, Aug. 8, 2017; Employee Subdermal Microchip Protection Act (employee protections bill prohibiting mandatory chipping introduced by PA Rep. Tina Davis).

Guest Lecturer: Margaret DiBianca, Esquire, Labor and Employment Law Attorney, Young, Conway, Stargatt & Taylor LLP

*Session #12 Nov. 15 **The Organized Workforce: Unions in America***

Overview of Collective Bargaining and Unionized Employees

READING: “How the National Labor Relations Act Affects Non-Union Employees,” Deborah Weinstein and Robert J. Haurin, The Legal Intelligencer, July 17, 2009; “An Employer’s Guide to Real Political Activity at Work,” Deborah Weinstein and Robert J. Haurin, Philadelphia Business Journal, October 24, 2008. “Updated Report from Lafe S. Solomon, NLRB Acting General Counsel, Concerning Recent Social Media Cases,” May 30, 2012; NLRB Office of the General Counsel, Memorandum GC 15-04, Report of the General Counsel Concerning Recent Employer Rule Cases, March 18, 2015 (NLRB Guidance”); “You Have a New Right to Complain about Your Job on Facebook,” Slate, Jan. 3, 2012 (NLRB ruling on firing employees for online complaints).

Guest Lecturer: Robert J. Haurin, Esquire, Labor and Employment Law Attorney, Nachmias Morris & Alt, PC

Wednesday, November 22—NO CLASS—THANKSGIVING HOLIDAY!

*Session #13 Nov. 29 **More Laws Regulating Employers/Protecting Workers***
Part I Fair Labor Standards Act (FLSA) and Pay Issues

READING: Department of Labor (DOL) FLSA Summary; DOL Fair Pay Fact Sheet #17A: Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees; DOL Fair Pay Fact Sheet #17M: Financial Services Industry Employees and Part 541 Exemptions; *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005)(when does work begin and end?); “Is Wage Theft the New Civil Rights Issue for Workers?” The Legal Intelligencer, Sept. 26, 2014; Final Rule-Overtime: Defining and Delimiting

the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act, May 18, 2016:¹³

Session #14 Dec. 6 Even More Laws Regulating Employers/Protecting Workers: Being Human While Working

Part II Time-Off, Leaves of Absence, Pregnancy Discrimination and Accommodation

READING: DOL Fact Sheet #28: The Family and Medical Leave Act; “Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities,” EEOC Notice No. 915.002, May 23, 2007; *UAW v. Johnson Controls*, 499 U.S. 187 (1991)(pregnancy discrimination); EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, June 25, 2015¹⁴; *Young v. United Parcel Service*, 135 S.Ct. 1338 (2015)(employer’s duty to accommodate pregnant workers).

¹³ <https://www.dol.gov/whd/overtime/final2016/>

¹⁴ https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm