

A CAPSULE OF LABOR & EMPLOYMENT LAW

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Presented for Pharmacy 543

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Your coverage depends on:



- Who you are
- What kind of employee you are
- What kind of firm you work for

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Who are YOU?

- Age
- Sex and Ethnicity
- Union and Religious Affiliation
- Disability
- Marital and Family Status

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What kind of employee are you?

- Part-time or Full-time
- Contract or Permanent
- Unionized or not
- Public or Private Sector
- Employee or Supervisor or Manager or Independent Contractor

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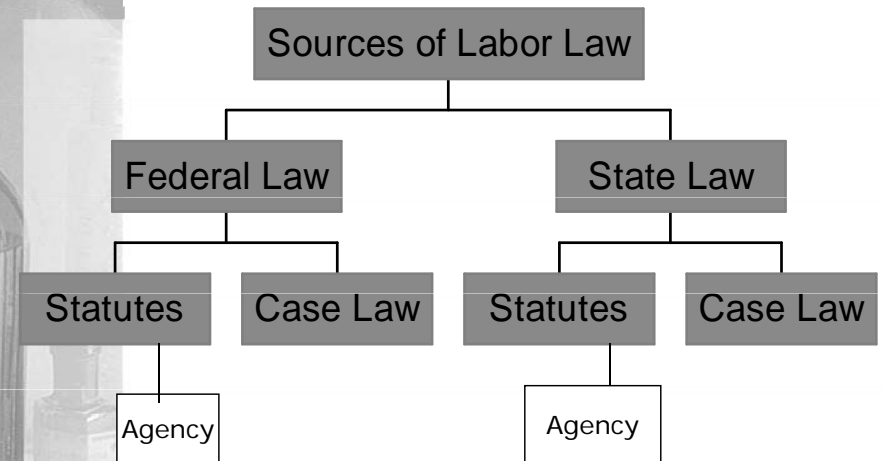
What kind of Pharmacy do you work for?

- Small (less than 15)
- Large
- Private or Public
- Hospital or Retail Concern

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Sources of Workplace Law



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Unless You're in the Public Sector

- Federal Constitution
 - Due Process
 - First Amendment
 - Equal Protection
- State Constitution
 - Privacy
 - Non-discrimination
- Public Sector Labor Law

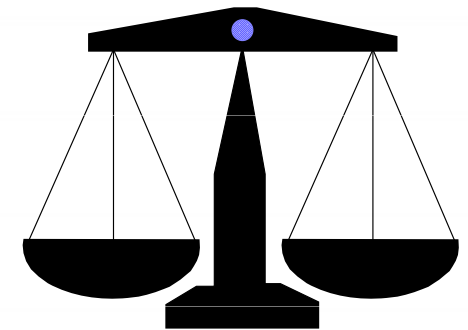


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Four Types of Workplace Laws

- Labor Management Relations (Unions)
- Discrimination Law
 - Title VII/ State
 - Disabilities
- Employee Protections
 - Workers' Comp
 - Health & Safety
- Wrongful Discharge, or Common Law Protections



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A vertical strip on the left side of the slide shows various pieces of laboratory glassware, including a large round-bottom flask, a smaller flask, and a beaker, all containing liquids of different colors.

Beginning a Job

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Applications and Interviews

- Must conform to all existing state and federal laws
- Privacy Concerns
- Generally, use Pre-employment Inquiry Guidelines
- Look carefully at job description
- Is it FLSA exempt as professional?

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ADA and Medical Exams

- Can inquire into ability to do the job only not medical condition
- No pre-employment physical
- After conditional offer of employment, may condition on exam if all entering employees take exam and results confidential
 - Medical records must be kept separately

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To Join or Not to Join. . .

That is the question – All about unions

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National Labor Relations Act

- Right to join or refrain from joining a union
- Neither Employer nor Union can discriminate based on your affiliation or beliefs
- Two major issues:
 - Organizing Campaign
 - Negotiating a Collective Bargaining Agreement



NLRA - Things to Remember

- Enforcement Agency: National Labor Relations Board
 - Seattle Office
 - “It’s Free!”
- 180 days to file complaint



Public Sector Unions

- Washington has numerous statutes
- Public Employment Relation Commission (PERC)
- Much like NLRA
- **CANNOT STRIKE**



Employment Law



The Erosion of At Will Employment

- About ½ of the workforce is “at will”
- About 150,000 employees fired every year without “just cause”
- At Will Rule: An employer can discharge employees for no cause, good cause or even morally wrong cause without fear of liability.

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Employment Law

- Regulated & Enforced by State Courts
- Contracts over one year must be written
- At will employment - Exceptions:
 - Employment manuals (contract)
 - Whistleblowing
 - Public Policy Exception (tort)
 - Discrimination prohibited by other laws

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Contract Exceptions

- Collective Bargaining Agreements
- Individually Negotiated Contracts
- Employee Handbooks
 - Disclaimer Exception
- Oral Statements of Job Tenure
- Covenant of Good Faith and Fair Dealing (rare)
- Additional Consideration
- Promissory Estoppel and Reliance (See's)

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Why Have Written Policies?

- Provide Information to Employees
- Required by law
 - FMLA, COBRA, various state laws
- Put Employer in Good Legal Position
 - At-will employment; clear and conspicuous disclaimer
 - Harassment policy with reporting procedure
 - Solicitation policies
 - Sarbanes-Oxley Policies
- Drive Consistent Practice and Minimize EEO Claims
- Union Avoidance

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Examples of Topics

- Equal Opportunity Statement
- Sexual Harassment
- Grievance Procedures
- Sick Leave/Medical Leave
- Benefits
- Privacy – Phone & E-mail
- Conflict of Interest
- IP and Tech Policies
- Work Rules
- Drug and Alcohol Use/Testing

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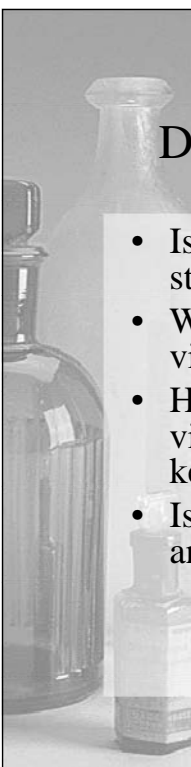


Tort Exceptions

- Discharge violates public policy
- But what policies?
 - Judicial Rules
 - Statutes
 - Agency Regulations
- Will expand or narrow with social changes that are reflected in law
- **IT IS NOT EQUAL TO JUST CAUSE**
 - It is not a requirement of fair, rational, equal treatment
 - Does cover probationary employees

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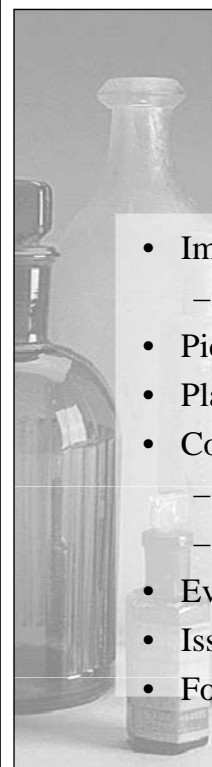


Discipline - Ask the following Questions

- Is there a written attendance, behavioral, performance standard that the employee violated?
- What is the agency's actual practice in respect to such violations?
- How would I treat my best employee if he or she violated this standard? (answered honestly, this is the key to assessing your motives!)
- Is the proposed action supported by policy, practice and appropriate documentation?

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Investigations - Basic Steps

- Immediate Actions
 - Treatment of accused and victim
- Pick Investigator – Inside or Outside?
- Plan Investigation
- Conduct Investigation – Timing Issues
 - Interviews
 - Documents
- Evaluate Evidence
- Issue Report
- Follow-up with Appropriate Action

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Benefits

- Fairness (if done well), Consistency and Calmness
- Legal Compliance
- Figure out what happened
 - True malfeasance = discipline/discharge
 - Misunderstand Rules More training
- Avoid/reduce Publicity
- Encourage Reporting

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Work Environment

- Employer must supply uniform
- No smoking indoors
- Drug testing, monitoring generally allowed
- Polygraphs generally can't be used but can use paper & pencil testing
- Courts recognize covenants not to compete and you have Duty of Loyalty to employer
 - Intellectual Property: Patents, Trade Secrets

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Credit Reports

- Use of such reports growing
- If ER uses third party to obtain report or investigate, must comply with Fair Credit Reporting Act
 - Broad definition of Credit Agency
 - Implications for legal practice
 - Must disclose to employee

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Laws Banning Discrimination in the Workplace

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No Discrimination Allowed

- Federal Laws
 - Title VII
 - Age Discrimination
 - Americans with Disabilities Act
 - Civil Rights Law
- State Laws
 - Law Against Discrimination
 - Seattle Human Rights Ordinance



Title VII of the 1964 Civil Rights Act

- Protects on the basis of race, color, sex, national origin, or religion
- Covers hiring, firing, wages, terms and conditions of employment
- Enforced by the Equal Employment Opportunity Commission (Seattle)
- 180/300 days to report



Harassment

- Unwelcome conduct
- Based on an individual's protected class status
- That is severe and pervasive enough to alter the terms and conditions of employment



What does harassment include?

- Non-sexual, gender-based harassment: e.g. frequent derogatory comments about women, even though not sexual in nature, could be unlawful sexual harassment
 - Also called gender hostility
- Harassment by a person of the same sex
- Complainant can be anyone affected by the harassing conduct and does not have to be the person to whom the harassing conduct is directed
- Race, Religion, Ethnicity



Conduct

- Verbal: epithets, jokes, slurs, stories, comments
- Written: graffiti, email, cartoons, posters, photographs, documents
- Physical contact
- Interference with freedom: blocking movement, even without contact
- Gestures: suggestive motions, simulating inappropriate acts, unwelcome gifts

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Employer Duties & Harassment

- Employer must establish, disseminate and enforce anti-harassment policy
- Employer should establish more than one avenue of reporting complaint
- Employer must take prompt, remedial action when it learns of a complaint
- “Prompt” means launching investigations within 24 to 48 hours
- Remedial measures cannot adversely affect the complainant

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Pregnancy & Title VII

- Cannot discriminate based on pregnancy
- Must be treated the same as any other disability at the workplace

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Issue: Boomers v. Gen X

- How do you accommodate both styles at the workplace?
- What about different learning and management style?
- What about a succession plan?
 - Older workers as natural sages and toxic handlers? Mentors? Should you assume that?
- Workforce management
 - Early retirement plans and incentives

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More

- Differing Compensation Pressures
 - Retirement/Health Care vs. Salary
- Stereotypes & Harassment
- Different Learning Styles Affects Training
 - Text vs. Multi-media
 - What does medical science tell us?



Yet More

- Differing Motives for Working
 - Need for fulfillment (older?)
 - Need for a living wage
- Conflict Resolution
 - Ex: Music played in cubicle (office)
- Planning Outside Social Activities



Americans With Disabilities Act

- Prohibits discrimination against Americans with disabilities
- Disability means an actual impairment, a record of an impairment, or a perception of having an impairment
 - must be otherwise qualified
- Duty to accommodate unless undue hardship or direct threat



ADA - Special Issues

- Drug & Alcohol: covers people people in rehab, alcoholics but not current drug users
- Contagious Diseases: HIV covered
- Medical Exams very restricted
 - generally not before
 - doesn't cover drug testing



Employee Requests for Accommodations

- Individual must advise of disability and seek accommodation
 - WA: need only inform of disability; that triggers duty to accommodate
- No magic formula
 - Needn't say "disability" or "reasonable accommodation"
 - Ex: "I need help with a medical condition."
- Need not be written

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Accommodation Examples

- Job re-structuring
- Modified Work Schedules
- Equipment acquisition/modification
 - Although not personal use items, e.g. wheelchairs
- Changing Exams, Training or Policies
- Providing Readers or Interpreters

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9/11 and Immigration

- All U.S. employers must verify citizenship status of new employees using Form I-9
- Note New Agency Alignment after creation of Dept. of Homeland Security
 - Bureau of Immigration and Customs Enforcement enforces IRCA

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Regulations Protecting Employees

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Family and Medical Leave Act

Coverage

- Covered Employers: 50 or more employees
- Employee must have worked for one year
 - exempts highly compensated employees



FMLA - Basic Provisions

- Entitled to 12 weeks unpaid leave during any 12 month period for:
 - child care: birth of child or adoption
 - medical leave: to care for spouse, child or self if “serious health condition”
- Intermittent Leave
- Must be restored to “same or equivalent position”; maintain medical insurance



FMLA - Enforcement

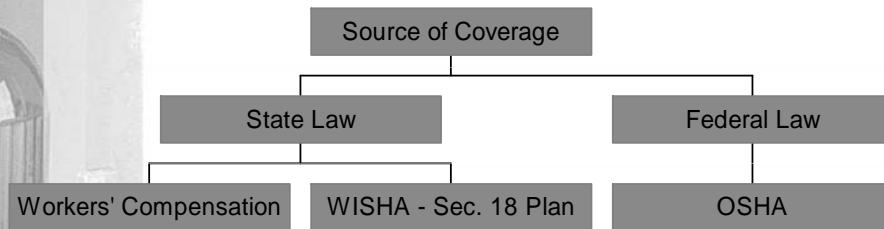
- Wage & Hour Division of the Dept. of Labor
- Two Years (or three if willful)



Wage and Hour Law

- Regulates Overtime and Wages
- Most if not all Pharmacists will be exempt as professional employees
 - Watch for regulatory changes which are desired by large retail chains

Health & Safety



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OSHA - Preventing Injuries

- **General Duty Clause:** Where there is no specific standard, Employer has a duty to maintain a workplace free of hazards
- **Specific Standards:** Employer has a duty to comply with specific standards

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OSHA Enforcement

- **Federal :** Occupational & Safety Health Administration within the Dept. of Labor
- **State:** Washington Dept. of Labor and Industries

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Worker's Compensation

- Provides medical expenses and earnings replacement
- Covers accidents or diseases that “arise out of or in the course of” employment
- Ties in to ADA: employee may also be disabled as result of injury

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Putting It All Together

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Workplace Audit

- Review and update all policies
- Does records management comply with ADA? FMLA? OSHA? Etc.
- Site visits
- Review Employee Handbooks
- Review Collective Bargaining Agreements

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Consider Training Programs

- Programs for Employees
 - Perform functions of job correctly
 - Explain policies
 - Eliminate stereotypes
- Programs for Supervisors
 - Be aware of law and policies
 - Be aware of obligation to report up the line
- Consider different learning styles

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Policies that Benefit Everyone

- Equipment, e.g. Larger Computer Screens
- Tele-commuting
- Flex-time
- Back up care for children, employees and their parents
 - Sandwich generation

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What should you do?

- Law changes constantly
- When in doubt, call your Human Resource Consultant or a lawyer
- Use State and Federal Resources
 - Web-based resources
 - Call-in lines
 - Agency help on-site
- Keep up with new developments in medicine/science and HR

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Using the Legal System

A quick overview

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What to do if you have a problem?

- Keep a log or a journal
 - what happened
 - who observed it
- Use internal grievance procedure
- Confronting the person? Work with your supervisor?
- Consult a lawyer or government agency
- Try to resolve problems at the lowest level of conflict

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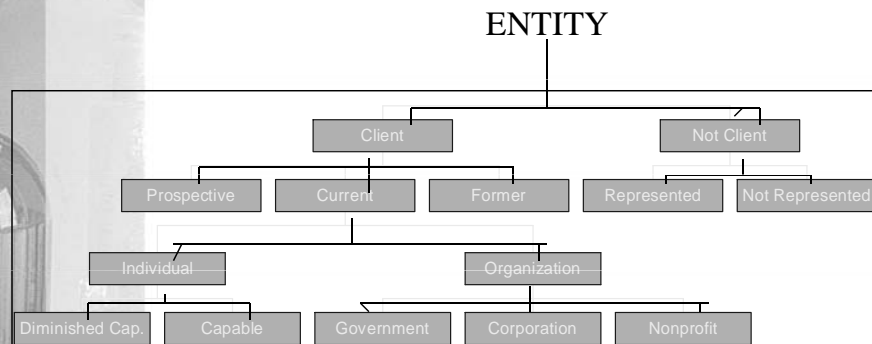
Controls on the Rationality of the Litigation Process

- Rules of Civil Procedure - Litigation
 - Motion to Dismiss
 - Summary Judgment/JAML
- Rules of Evidence - Litigation
 - Relevance vs. prejudice
 - Admissibility
- Burdens of Proof
- Allocation of duties between Judge and Jury
- Appeals

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Backdrop: Types of Client Interactions



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Ethics

The Lawyer Client Relationship – What You Have a Right to Expect

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Rule 1.1 Competence

- Washington: A Lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Not Waivable

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Rule 1.2 Scope of Representation

- (a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to sections (c), (d), and (e), and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.

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Rule 1.3 - Diligence

- Not Waivable
- Washington: A lawyer shall act with reasonable diligence and promptness in representing a client.



Rule 1.4 Communication

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.



Rules that Protect Clients

- Attorney-Client Privilege
- Rules relating to Fees – “Reasonable”
- Rules relating to Conflicts of Interest
- Rules relating to non-represented parties and witnesses
- Prohibition on counseling illegality
- Duty to report certain illegal behavior



QUESTIONS?