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INTRODUCTION

The purpose of this outline is to provide a broad overview of employment law and is not intended to be an exclusive listing of all legal rights potentially available to an employee. Each employment-related dispute is unique and the specific rights of any employee must be determined on a case-by-case basis. To ensure a complete consideration of your rights, contact a lawyer experienced in employment law.

PRINCIPLE NUMBER ONE: WE ARE AT AN "AT-WILL" EMPLOYMENT WORLD.

Most everywhere in the United States, employees can be hired, fired, demoted, promoted, reassigned, etc. at the complete discretion of employers.

Pennsylvania is no exception. Our state Supreme Court has ruled:

> "Generally, an employer may discharge an employee with or without cause, at pleasure, unless restrained by some contract." *Henry v. Pittsburgh & Lake Erie Railroad Co.*, 21 A. 157 (1891).
>
> "Absent a statutory or contractual provision to the contrary, the law has taken for granted the power of either party to terminate an employment relationship for any or no reason." *Geary v. U.S. Steel Corp.*, 319 A.2d 174, (1974).

Thus, unless you have a collective bargaining agreement through your union which only permits terminations for cause, or unless you have an individual contract with your employer specifically restricting them to terminating you for cause only, you are an "at-will" employee and can usually be terminated at any time for any reason.

-Consolation Prize "A": If your employer terminates your employment without cause, you will be entitled to unemployment compensation benefits. If you quit your job for compelling and necessitous reasons, you will be entitled to unemployment compensation benefits.

-Consolation Prize "B": If you decide you no longer wish to work for your employer, you can pick up and leave on a moment's notice. This would not be advisable if you work in a position that is essential to the public health and safety, such as a nurse or firefighter.

-Consolation Prize "C": There are several, although not many, exceptions to the employment "at-will" rule. They will be discussed below.

PRINCIPLE NUMBER TWO: THERE ARE SEVERAL EXCEPTIONS TO THE EMPLOYMENT "AT-WILL" RULE UNDER BOTH STATE AND FEDERAL LAW.

After decades of struggle, employees have secured certain rights that trump the employment "at-will" general rule. These rights are found under both state and federal law. What this means is that employers cannot get away with anything, just most things.

A. STATE LAW EXCEPTIONS FROM EMPLOYMENT "AT-WILL"

1. Wrongful Termination

Pennsylvania courts have created a public policy exception to the employment at-will rule for terminations that violate public policy. This cause of action, "Wrongful Termination", allows a claim against the employer if the employee has been retaliated against **for engaging in conduct actually required by law or for refusing to engage in conduct actually prohibited by law**. *See Perry v. Tioga County*, 649 A.2d 186, 189 n.8 (Pa. Commw. 1994); *Smith v. Calgon Carbon Corp.*, 917 F.2d 1338, 1344 (3d Cir. 1990).

Examples can be found in *Godwin v. Visiting Nurse Ass'n Home Health Serv.*, 831 F. Supp. 449 (E.D. Pa. 1993) (wrongful discharge claim sustained where terminated employee refused to falsify Medicare reimbursement claims); *Hanson v. Gichner Sys. Group, Inc.*, 831 F. Supp. 403 (M.D. Pa. 1993) (where terminated employee refused to lie to federal investigators); *Brown v. Hammond*, 810 F. Supp. 644 (E.D. Pa. 1993) (where terminated employee refused to bill time at attorney's hourly rate); *McNulty v. Borden, Inc.*, 474 F. Supp. 1111 (E.D. Pa. 1979) (refusal to participate in an allegedly illegal price-fixing scheme).

Additionally, a cause of action for wrongful termination may be sustained **where the discharge of an at-will employee would threaten "clear mandates of public policy."** *Krajsa v. Keypunch Inc.*, 622 A.2d 355, 358 (Pa. Super. 1993); *Spriegel v. Kensey Nash Corp.*, 28 Pa. D. & C.4th 326 (Chester Cty 1995).

Courts have found violations of a clear mandate of public policy where an employer discharged an employee for making an unemployment compensation claim during a period where he was not working (*Highhouse v. Avery Transp.*, 660 A.2d at 1377 (Pa. Super. 1995)); for serving on a jury (*Reuther v. Fowler & Williams Inc.*, 386 A.2d 119 (1978)); for filing a workers' compensation claim (*Rettinger v. Am. Can Co.*, 574 F. Supp. 306 (M.D. Pa. 1983)); for reporting illegal acts regarding motor vehicle code violations (*Shaw v. Russel Trucking Lines, Inc.*, 542 F. Supp. 776 (W.D. Pa. 1982)); in order to prevent pension benefits from vesting (*Mudd v. Hoffman Homes for Youth, Inc.*, 543 A.2d 1092 (Pa. Super. 1988)); for reporting a lawyer's violation of the Code of Conduct (*Paralegal v. Lawyer*, 783 F. Supp. 230 (E.D. Pa. 1992)); for complaining about occupational hazards to a state agency. *Kilpatrick v. Delaware Soc'y for Prevention of Cruelty of Animals*, 632 F. Supp. 542 (E.D. Pa. 1986).

2. Whistleblower Action

The Pennsylvania General Assembly has decided to protect certain employees if they have reported improprieties on the job. The Whistleblower Law, Act of December 12, 1986, P.L. 1559, §§ 1-8, codified at 43 P.S. §§ 1421-1428 provides:

§ 1423. Protection of employees

> (a) PERSONS NOT TO BE DISCHARGED. -- No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee or a person acting on behalf of the employee makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.
>
> (b) DISCRIMINATION PROHIBITED. -- No employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested by an appropriate authority to participate in an investigation, hearing, or inquiry held by an appropriate authority or in a court action.

Key definitions of the Whistleblower Law:

"Employee." A person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, for a public body.

"Public body." All of the following:
(1) A State officer, agency, department, division, bureau, board, commission, council, authority or other body in the executive branch of State government.

(2) A county, city, township, regional governing body, council, school district, special district or municipal corporation, or a board, department, commission, council or agency.

(3) Any other body which is created by Commonwealth or political subdivision authority or which is funded in any amount by or through Commonwealth or political subdivision authority or a member or employee of that body.

"Waste." An employer's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from Commonwealth or political subdivision sources.

"Wrongdoing." A violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.

3. Other State Law Protections

a. ***Wage Payment and Collection Law***

The Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*, provides a statutory remedy when earned wages and fringe benefits are due but unpaid. The parties' contract determines whether or not wages are due.

The law provides that an employee must be paid "as provided in a written contract of employment or, if not so specified, within the standard time lapse customary in the trade or within 15 days from the end of such pay period." 43 P.S. § 260.3.

In addition to the wages, including commissions, bonuses, incentives and other forms of compensation due and owing, plaintiffs are entitled to liquidated damages in an amount equal to 25% of the wages, including commissions, bonuses, incentives and other forms of compensation, due and owing in accordance with 43 P.S. § 260.10. Liquidated damages under Pennsylvania law are payable when the failure to pay the wages was not in "good faith."

"Wages" include "all earnings of an employee . . . [and] also . . . fringe benefits or wage supplements whether payable by the employer from his funds or from amounts withheld from the employees' pay by the employer." "Fringe benefits" include "separation, vacation, holiday or guaranteed pay." 43 P.S. § 260.2a.

The Pennsylvania Department of Labor and Industry, Bureau of Labor Standards, is authorized to enforce the law on an employee's behalf.

b. ***Reasonable Care Must Be Exercised in Employee Drug Testing***

The Pennsylvania Supreme Court has ruled that if a third party conducts an employee drug test on behalf of an employer, the third party/drug testing company owes a duty of reasonable care to the employee. *See Sharpe v. St. Luke's Hosp.*, 821 A.2d 1215 (Pa. 2003) (hospital must exercise reasonable care in the collection and handling of the urine specimen, despite the absence of a contract between hospital and employee).

c. ***Access to Personnel File***

The Personnel Files Act of Nov. 26, 1978, P.L. 1212, 43 P.S. §§ 1321-1324, provides that an employee shall be permitted reasonable access to his complete or her personnel records.

The Pennsylvania Department of Labor and Industry, Bureau of Labor Standards, is authorized to enforce the law on an employee's behalf and upon a petition, to make and enforce such orders as the bureau shall deem appropriate to which order will provide access to said records and the opportunity for an employee to place a counter statement in his or her file in the event an alleged error is determined by an employee in the personnel file.

d. ***Rights of Ex-Offenders***

The Criminal History Record Information Act, 18 Pa.C.S. § 9101 *et seq*., limits the use of criminal records by employers when making employment decisions. In part, the Act provides:

> Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied; The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information. 18 Pa.C.S. § 9125; *Campbell v. Acme Mkts.*, 18 Phila. 524, (Philadelphia County 1989).

e. ***Anti-Discrimination Law***

The Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq*. ("PHRA"), prohibits workplace discrimination because of race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap." 43 P.S. § 955(a).

Generally, claims under the PHRA are analyzed in accordance with it federal counterpart, Title VII of the Civil Rights Act of 1964, as amended. *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir. 1996).

To bring a lawsuit under the PHRA, a plaintiff must first file a charge of discrimination with the Pennsylvania Human Relations Commission within 180 days of the discriminatory conduct. 43 P.S. § 959(h).

Pennsylvania Human Relations Commission
www.phrc.state.pa.us
110 North 8th Street, Suite 501
Philadelphia, PA 19107
(215) 560-2496 TTY: (215) 560-3599

B. FEDERAL LAW EXCEPTIONS FROM EMPLOYMENT "AT-WILL"

1. Anti-Discrimination Provisions

a. ***Race, Sex, National Origin and Religious Discrimination***

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*. ("Title VII") makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

b. ***Age Discrimination***

Under the Age Discrimination in Employment Act of 1967 ("ADEA") (codified at 29 U.S.C. § 621 *et seq*.), "it shall be unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).

c. ***Disability Discrimination***

The Americans with Disabilities Act ("ADA") provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedure, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

2. Critical Points Regarding Anti-Discrimination Laws

a. ***Must Exhaust Administrative Remedies Before Bringing Lawsuit***

Before an individual files a lawsuit for violations of Title VII, the ADEA or the ADA, the individual must file a charge of discrimination with the U.S. Equal Employment Opportunity Commission. This administrative charge must be filed within 300 days of the alleged discriminatory conduct. 42 U.S.C. § 2000e-5(3).

U.S. Equal Employment Opportunity Commission
http://www.eeoc.gov/field/philadelphia/index.cfm
Philadelphia District Office
801 Market Street, Suite 1300
Philadelphia, PA 19107
1-866-408-8075; TTY: 1-800-669-6820

b. ***Unlawful For Employer To Retaliate After Discrimination Complaint Filed***

Section 704(a) of Title VII (race/sex/religious/national origin discrimination), 42 U.S.C. § 2000e-3(a), makes it "an unlawful employment practice" for "an employer" to "discriminate" against an employee "because he [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]." Retaliation against an employee who makes a claim of age discrimination or disability discrimination is also unlawful. *See* 29 U.S.C. § 623(d) (ADEA anti-retaliation provision); 42 U.S.C. § 12203(b) (ADA anti-retaliation provision).

c. ***Hostile Work Environment is Discrimination***

An employee may also establish a violation of Title VII by proving that race or sex discrimination has created a hostile or abusive working environment. The U.S. Supreme Court

has ruled that such harassment is actionable only if it is "so severe or pervasive as to alter the conditions of the victim's employment and create an abusive working environment." In determining whether an environment is sufficiently hostile or abusive, the alleged incidents of harassment should be objectively judged from the perspective of a reasonable person in the employee's position, considering all the circumstances, "including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001).

d. ***"Quid Pro Quo" Sexual Harassment is Unlawful***

It is a violation of Title VII for an employer to condition the receipt of a job benefit on an employee's acquiescence to the employer's request to enter into a sexual relationship. It is also a violation of Title VII for a supervisor to use an employee's rejection of his advances as a basis for causing the employee to suffer a tangible job detriment. *B.T. Jones v. Flagship Int'l*, 793 F.2d 714, 721 (5th Cir. 1986).

e. ***Independent Contractors Are Not Protected***

The protections of Title VII, the ADEA or the ADA extend only to those who are "employees." *E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32, 35 (3d Cir. 1983).

f. ***Appointment of Counsel Possible in Title VII Cases***

Congress' special concern with eradicating the scourge of employment discrimination was so profound it added a special provision for the appointment of counsel to represent civil rights plaintiffs. *See* 42 U.S.C. § 2000e-5(f)(1).

g. ***Federal Anti-Discrimination Laws Do Not Apply to Small Employers***

The protections of Title VII and the ADA are only applicable to employers with fifteen (15) or more employees for each workday in each of 20 or more calendar weeks in the current or preceding calendar years. 42 U.S.C. § 2000e(b) (Title VII); 42 U.S.C. § 12111(5)(A) (ADA).

For cases arising under the ADEA, the threshold is twenty (20) or more. 29 U.S.C. § 630(b).

For claims where the employer is too small under federal anti-discrimination laws, the PHRA (state anti-discrimination law) may apply. The threshold for age, sex, race, disability, national origin, or religious claims under the PHRA is four (4) or more employees. 43 P.S. § 954.

3. Family and Medical Leave Act of 1993

Under the federal Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601 *et seq*., eligible employees are entitled to twelve weeks unpaid leave during any 12-month period for

certain family reasons and any serious health condition that makes the employee unable to perform. 29 U.S.C. § 2612(a)(1). The FMLA also entitles employees to reinstatement to their former position or an equivalent one with the same benefits, pay, and other terms upon the completion of the leave. 29 U.S.C. § 2614(a). Employers may not deny or interfere with an employee's rights guaranteed by the FMLA and are prohibited from discharging or discriminating against any eligible employee who exercises those rights. 29 U.S.C. § 2615(a)(1) and (a)(2).

A "serious health condition" is defined as an "illness, injury, impairment, or physical or mental condition" that involves: either (1) inpatient care; or (2) continuing treatment by a healthcare provider. 29 C.F.R. § 825.114(a).

The FMLA defines eligible employees as those who have been employed for at least 12 months by the employer and for at least 1,250 hours during the previous 12-month period. 29 U.S.C. § 2611(2)(A).

4. "COBRA" - Right to Continued Group Health Insurance

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") requires employers to provide employees with the option of electing continuation coverage under the same terms of the employer's health plan after some qualifying event (such as termination of employment) which would otherwise end the employee's health insurance coverage. 29 U.S.C. § 1161. The continuation period must last for at least eighteen months. 29 U.S.C. § 1162(2)(A)(i).

COBRA requires employers to provide notice to the covered employees informing them that continued health care coverage under their current plan is an option. 29 U.S.C. § 1165(1)(B). The covered employee or qualified beneficiary has no right to employer subsidization of his health insurance; instead, should he choose to participate in the previous plan, he must pay his own insurance premiums at a cost not to exceed 102 percent of the employer's cost. 29 U.S.C. § 1162(3)

5. Right to Bargain Collectively and to Seek Mutual Aid or Protection

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, guarantees employees the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection.

Section 8 makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in their exercise of their § 7 rights. The test is whether the employer's conduct has a reasonable tendency to coerce; actual coercion is not necessary. 29 U.S.C. § 158(a)(1).

To be protected under Section 7, employee's activity must be with or on behalf of other employees, and not solely on behalf of himself. *Pacific Electricord Co. v NLRB*, 361 F.2d (9th Cir. 1966).

To file a claim under the NLRA, employees must lodge a complaint with the National Labor Relations Board within six (6) months of the illegal employer conduct. Do not file in federal court.

National Labor Relations Board
http://www.nlrb.gov/region/philadelphia
One Independence Mall
Seventh Floor
615 Chestnut Street
Philadelphia, PA 19106-4404
(215) 597-7601 TTY: (215) 580-2005

6. Equal Pay Act

The Equal Pay Act of 1963 provides in pertinent part that "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees of the opposite sex . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or a differential based on any other factor other than sex . . . ." 29 U.S.C. § 206(d).

7. Fair Labor Standards Act

The Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*., requires employers to pay its employees premium pay for hours worked in excess of 40 in a given week. Section 207 of the FLSA provides in pertinent part:

> Maximum hours
> No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce . . . for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified at a rate of not less than one and one-half times the regular rate at which he is employed.

The FLSA exempts from its overtime requirements any employee employed in a bona fide executive, administrative, or professional capacity. 29 U.S.C. § 213(a)(1). In order for an employer to be exempt from the FLSA's overtime requirements under either the executive, administrative, or professional exemption, the employee must be paid on a salary basis.

PRINCIPLE NUMBER THREE: AVOID COMMON PITFALLS

Employers generally have more resources than employees and therefore can take advantage of their superior access to skilled counsel. Employees should be wary of the common pitfalls often FATAL to their case. Some examples include:

1. Beware of Statutes of Limitation – Most laws protecting employees have strict statutes of limitations. Thus, you must take action relatively swiftly in order to preserve your claim. Confer will skilled counsel as soon as you are made aware of possible violation.

2. Employers Will Try to Force Employees Into Arbitration - Most laws protecting employees allow for a jury trial. Employers are generally afraid of jury verdicts. Therefore, employers often make it a condition of employment that you agree to bring any claims against them into private arbitration where there are no jury trials. Do not agree unless it is necessary.

3. Take Notes of Workplace Events and Conversation; Do Not Tape Record – It can be very helpful to memorialize events and conversations at work. Key evidence will not be forgotten. Feel free to do so while at home in the evenings. Tape-recording conversations at work is risky and could subject you to prosecution under the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.C.S. § 5701 *et seq*.

4. Come To the Court With Clean Hands – Your case will be significantly strengthened if you arrive at the courthouse with nothing of which to be ashamed. If your supervisors or co-workers act unprofessionally in violating your rights, remain professional and dignified. Retaliation or other unprofessional conduct on your part will compromise your claim.

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