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BOUSQUET HOLSTEIN PLLC

Employment Law Overview and Best Practices for Hiring and Firing

Presented by:
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Bousquet Holstein PLLC





BOUSQUET HOLSTEIN PLLC

Introduction

We will cover:

- New York State and federal laws that impact employers in hiring and firing, as well as other important areas; and
- Best practices for hiring and firing of employees.





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Laws prohibiting discrimination:

- Article 15 of the NY Executive Law (the "Human Rights Law")
- Article 23-A of the NY Correction Law
- NY Military Law
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Equal Pay Act
- Uniform Services Employment and Re-Employment Rights Act of 1964
- Genetic Information Non-Discrimination Act



Article 15 of the NY Executive Law (the “Human Rights Law”)

- Applies to employers with 4 or more employees.
- Prohibits employers from discriminating based on race, creed, color, national origin, sex, age, disability, marital status, domestic violence victim status, or sexual orientation.

NY Corrections Law

- Applies to employers with 10 or more employees.
- Prohibits discrimination based on an individual's conviction records, except in certain instances.
- The law outlines permissible factors for employers to consider relative to conviction record.
- An individual's arrest record is not protected.

NY Military Law

Prohibits discrimination by public and private employers against individuals who are subject to military duty under state law and prohibits persons doing business in the state from refusing to employ such persons because they are subject to military duty.



Title VII of the Civil Rights Act of 1964.

- Applies to employers of 15 or more employees.
- Prohibits discrimination by employers against an individual on the basis of the individual's race, color, religion, sex (including pregnancy), and national origin.





Age Discrimination in Employment Act (“ADEA”)

- Applies to employers of 20 or more employees.
- Prohibits an employer from discriminating against employees or applicants age forty (40) or older.





Americans with Disabilities Act (“ADA”)

- Applies to employers of 15 or more employees.
- Prohibits an employer from discriminating against a qualified individual with a disability because of such disability in regard to job application procedures, hiring, advancement, discharge, compensation, training, and “other terms, conditions and privileges of employment.”
- Discrimination includes failure to make reasonable accommodations.



Equal Pay Act.

- Requires that women and men receive “equal pay for equal work.”
- An employer may not “discriminate between employees on the basis of sex” in paying wages for work that requires “equal skill, effort and responsibility.”
- Lilly Ledbetter Fair Pay Act of 2009

Uniform Services Employment and Re-Employment Rights Act of 1964 (“USERRA”)

- Prohibits discrimination against individuals because of their past, current, or future military obligations.
- Extends to discrimination in hiring, promotion, re-employment, termination, and benefits.
- If returning from duty, protected period from termination.

Genetic Information Non-Discrimination Act

Applies to all private employers, and makes it an unlawful employment practice to discriminate against any employee on the basis of his or her genetic information.



State and Federal Anti-Retaliation Laws

Virtually every state federal anti-discrimination statute contains an anti-retaliation provision.





Additional Laws to Know

- Fair Labor Standards Act
- National Labor Relations Act





Fair Labor Standards Act (“FLSA”)

- Governs the payment of minimum wages and overtime wages.
- Classification of employees is important.
 - Exempt vs. non-exempt



National Labor Relations Act

- Governs the relationship between employers and employees represented by a union.
- The NLRA prohibits discrimination against an employee for participating in union activities.
- Some activities of non-union employees are protected under the NLRA.
 - All employees have the right to engage in protected concerted activity.

Protected Concerted Activities

- “Concerted Activity” is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.
- Examples:
 - Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other.
 - An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.
- Employee complaints are heard by the National Labor Relations Board.

Best Practices for Hiring

Application of the legal principles contained in the various state and federal employment laws to the practice of hiring employees.

Best Practices for Hiring

All questions in applications or in interviews should be related to the job and tailored to meet the employer's objective of answering:

Are you qualified to perform the job for which you are applying?

Example Improper Questions for Interviews

- Improper questions because of potential discrimination based on age.
 - "When did you graduate from high school?"
 - "How old are your children?"
 - "How far away from retirement are you?"
 - "How many years do you think you'll give this job?"

Example Improper Questions for Interviews

- Improper questions because of potential discrimination based on disability.
 - "Are you taking any prescribed drugs?"
 - "Have you ever been treated by a psychiatrist or psychologist?"
 - "Have you ever been hospitalized?"



Example Improper Questions for Interviews

- Improper questions because of potential discrimination based on gender.
 - “Are you living with someone?”
 - “Who will take care of your children while you work?”
 - “Do you have children?”
 - “Are you planning on having a family?”





Example Improper Questions for Interviews

- Improper questions because of potential discrimination based on religion.
 - “What is your religion?”
 - “Can you work on Saturdays or Sundays?”
 - Comments regarding the religious affiliation of an applicant’s school.





Example Improper Questions for Interviews

- Improper questions because of potential discrimination based on national origin.
 - “Were your parents born in this country?”
 - “How or where did you learn to speak Spanish?”
 - “That sounds like an Irish name. Is that your background?”





Good Questions for Interviews

Consider using the following questions to reveal information about the candidate.

1. "Tell me about yourself."
2. "Can you work overtime? Weekends? Makeshifts?"
(If required by the position).





Good Questions for Interviews

3. "Are you available to travel?"
4. "This job requires routinely lifting 40 pounds. Can you do that with or without reasonable accommodation?"





Good Questions for Interviews

5. "Do you have any limitations that would keep you from performing an essential function of this job with or without reasonable accommodation?"
6. "In what ways has your education prepared you for this job?"





Good Questions for Interviews

- 7. "Why did you leave your previous job?"
- 8. "Based on what I've told you about this position and our company, do you think you'll be able to fit in?"





Additional Rules to Know

- **Drug and Alcohol Testing**
 - Random drug and alcohol testing of potential and existing employees is permitted in New York.
- **Polygraphs**
 - Federal and state law imposes significant restrictions on private employers using lie detectors for pre-employment screening.
 - NY law bans voice stress tests in employment.





Question and Answer

- May you ask an interviewee:
 - "How many days were you off sick last year?"





Question and Answer

- May you ask an interviewee:
 - “Other than vacation, how many Mondays or Fridays were you absent last year?”





Question and Answer

- May you ask an interviewee:
 - “Have you ever been addicted to illegal drugs or alcohol?”





Question and Answer

- May you ask an interviewee:
 - “Have you ever taken illegal drugs?”





Question and Answer

- May you ask an interviewee:
 - “Are you on illegal drugs today?”





Question and Answer

- May you ask an interviewee:
 - “Are you taking Ritalin?”





Question and Answer

- May you ask an interviewee:
 - “Do you drink more than a six-pack of beer a day?”





Question and Answer

- May you ask an interviewee:
 - “Do you drink socially?”





Best Practices for Terminations

- **Pre-Termination Concerns:**
 - Review your employee handbook
 - Follow your policies and procedures
 - Consult with HR/Supervisor





Best Practices for Terminations

- **Pre-Termination Concerns:**
 - Review the subject employee's file.
 - Performance reviews, conversations, warnings, and discipline should be documented.





Best Practices for Terminations

- **Pre-Termination Concerns:**
 - Consult with legal counsel
 - This is especially important if the person is in a protected class





Best Practices for Terminations

- **Termination meetings.**
 - Useful in avoiding surprise complaints against your business
 - Exit interviews





Best Practices for Terminations

- **Consider severance pay coupled with a waiver of employment claims.**
 - Waivers, however, can be complicated and should be written with legal counsel.





Best Practices for Terminations

- **What claims can be waived?**
 - Most employment-related causes of action can be waived by contract.
- *Exceptions:*
 - *Future claims*
 - *Workers' Compensation*
 - *Unemployment benefits*
 - *Complaints to the EEOC*





Best Practices for Terminations

- **Writing enforceable waivers:**
 - Include consideration
 - The employee must act "knowingly and voluntarily"
 - Special issues for releasing protected age claims





Best Practices for Terminations

- **Writing enforceable waivers:**
 - Include consideration
 - The employee must act "knowingly and voluntarily"
 - Remember to address tax issues





Best Practices for Terminations

- **Additional recommendations on waivers:**
 - Broad writing
 - Dismissal of underlying claim
 - Confidentiality
 - Non-Disparagement





Best Practices for Terminations

- **Additional recommendations on waivers:**
 - No admission of wrong doing
 - Assistance/cooperation clauses
 - Attorneys' fees
 - Restrict future employment
 - Return company property





Best Practices for Terminations

- **Additional recommendations on waivers:**
 - Tax indemnification issues
 - Choice of law and forum for litigation





Questions.

Firm Profile

Bousquet Holstein PLLC, formerly known as Green & Seifter, Attorneys, is a versatile law firm of more than thirty attorneys representing clients across many industries. The firm's clientele is comprised of businesses and individual clients for whom we provide legal advice and counsel on a broad range of matters covering thirty practice areas.

Our attorneys are counselors, strategists, and advocates whose goal is to develop a long-term relationship with each of our clients - one that is based on the trust that develops when a law firm understands the client's business and objectives, anticipates the client's needs, and provides prompt, high-quality, and consistently valuable service. An in-depth understanding of the economics of business transactions is one of the firm's defining characteristics. We enthusiastically address the challenges presented by new projects and have embraced new areas of the law as we anticipate our clients' needs for us to master emerging legal trends.

We are organized in practice groups - flexible collections of attorneys and other professionals who bring different facets of expertise to the particular area of practice. This interdisciplinary team approach allows us to achieve creative and complete solutions for our clients. Our professional staff does not fit into any preconceived mold. We have an extraordinarily talented group of individuals, each of whom has a passion for his or her work and for the connections made with our clients. In addition to a strong commitment to our practice, our professionals believe that it is their responsibility to contribute to our community and make it a better place for all to live. The commitments we have collectively and individually made to our community are an integral part of who we are.

Bousquet Holstein Practice Areas

Agriculture
Alternative Dispute Resolution
Appellate Advocacy
Banking and Financial Institutions
Bankruptcy
Brownfields
Business Transactions
Economic Development Incentives
Elder Law & Special Needs Planning
Employee Benefits & ERISA
Employment and Discrimination
Energy
Environmental, Land Use, and Zoning
Estate Planning & Administration
Equipment Leasing and Financing
Government Relations
Health Care
Immigration & Naturalization
Intellectual Property
Litigation
Matrimonial
Mergers and Acquisitions
Municipal Representation
Not-For-Profit Organizations
Professional Practices
Real Estate
Tax Planning and Advocacy
Telecommunications
Trusts
Venture Capital and Private Placement



Bousquet Holstein Employment and Labor Practice

In recent years, there has been an explosion of employment-related lawsuits. This trend is the result of several factors, including the growing awareness by employers and employees alike of their rights and responsibilities in the workplace, and the proliferation and development of new case law and statutes on discrimination and other employment topics. The complex and dynamic nature of this area of law increases the need for our clients to act with adequate knowledge and direction.

The Employment and Discrimination Practice Group provides representation to employers, large and small, and to employees. Our attorneys make it a priority to become familiar with our clients' businesses. We emphasize addressing employment and discrimination issues before they become problems and we advise our clients in all areas of human relations practices to satisfy an employer's business objectives while improving employee productivity and morale.

We have assisted our clients in the preparation of employment contracts, employee handbooks, and employment policies on sexual harassment, drug testing and employment references. Clients implementing these policies often consult us to ensure that they follow all relevant federal and state laws and regulations, minimize the potential for liability, and maintain employee morale. Our goals are always the same: to ensure compliance with all relevant laws, to limit exposure to liability, and to maintain a positive workplace atmosphere in which employees are treated fairly.

Our attorneys maintain expertise in several distinct areas, such as Title VII of the Civil Rights Act, the Age and Discrimination in Employment Act, the Americans with Disabilities Act, Wage and Hour Law, the Family Medical Leave Act, and many other employment laws and regulations.

In some cases, the deterioration of an employment relationship cannot be avoided. In these cases, the Employment and Discrimination Practice Group assists employers and employees in the separation process. Our counsel is often sought to ensure that employers follow appropriate procedures when severing the employment relationship, which regularly includes the negotiation and preparation of severance and release agreements.

We represent clients in all forms of adversarial proceedings and have provided representation before various federal and state agencies such as the New York State Division of Human Rights, the Department of Labor, the Unemployment Insurance Appeal Board and the Equal Employment Opportunity Commission. In every stage of these proceedings, from investigation and settlement conferences to hearings and appeals, our involvement has been highly effective.

Our Litigation experience includes federal and state court litigation of breach of employment contracts, age discrimination, sex discrimination, race discrimination, national origin discrimination, whistle-blower and retaliation, violation of non-compete agreements, and other employment-related claims.

We continually monitor developments in this dynamic area of law. By keeping clients aware of changes in the law, assisting in the development of sound employment policies and practices, and advocating on our clients' behalf, we reduce our clients' potential for liability and foster a more productive and satisfied workforce.



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Member

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Practice

John is a member of the firm and serves on its Board of Managers. John practices in the areas of litigation, employment and discrimination, business transactions, appellate law, and professional practices.

John represents employers, executives and other professionals in federal and state court litigation over business and commercial matters, and over claims such as breach of employment contracts, shareholder disputes, retaliation, and discrimination, non-compete agreements, sexual harassment, and a variety of other business, labor and employment-related legal claims. He has provided representation before various federal and state agencies, including the New York State Division of Human Rights, the Department of Labor, the Unemployment Insurance Appeal Board and the Equal Employment Opportunity Commission. John advises employers preparing and implementing employment policies regarding sexual harassment, drug testing, and employment termination and employment references. He has also been successful in representing employees in discrimination, harassment and retaliation matters.

John has written articles and lectured on various legal topics, including contract law, business transactions, sexual harassment, discrimination, employment at will and temporary employees. He develops programs for employers to use in educating their employees on sensitive employment matters, such as sexual harassment.

Practice Areas

Appellate
Business Transactions
Employment and Discrimination
Litigation
Professional Practices

Education

J.D., Syracuse University
College of Law, *magna cum laude*, 1987

B.A., Le Moyne College, *cum laude*, 1984

Admissions

- New York
- United States District Court, Northern, Western, and Eastern Districts
- New York State District Courts
- United States Court of Appeals, Second Circuit



BOUSQUET HOLSTEIN PLLC

Recent Experience

- Settled lawsuit on behalf of employee claiming sexual harassment and retaliation for \$300,000.
- Obtained dismissals of employment discrimination claims before the New York State Division of Human Rights and the Equal Opportunity Commission;
- Resolved lawsuits in New York State Supreme Court and in the United States District Court on behalf of clients suing their former employers;
- Implemented drug testing, sexual harassment, and other employment policies for employers;
- Represented professionals in licensing matters before the Office of Professional Discipline;
- Represented shareholders in disputes with other shareholders;

Professional and Community Involvement

- New York State Bar Association
- Onondaga County Bar Association
- Syracuse Symphony Orchestra, Board of Directors
- RLS Career Center, Former President
- Landmark Theatre, Syracuse, Former Counsel

Recent Publications and Presentations

September 2012

- The Continuing Complexity of Employer Responsibilities – 2012 Employee Benefits and Labor & Employment Update

September 2012

- Governor Cuomo Expands the Right of Employers to Make Deductions from Employee Wages

May 2012

- Good News and Bad News for Employers Facing Harassment and Retaliation Charges

January 2012

- Important New Year's Resolution – NYS Mandated Labor Notification

December 2011

- Tax Credits Granted to Employers Hiring Veterans

April 2011

- New Regulations for Disabled Individuals to Obtain Protection Under the ADA

February 2011

- New Wage Theft Prevention Act Toughens Penalties for Employers

January 2011

- NYS Dept. of Labor – Wage Order Issued Containing Changes

September 2010

- Protecting Your Assets: Practical Advice for Avoiding Employee Theft of Proprietary Information

June 2010

- How Unpaid Interns Can Cost You Plenty

April 2010

- New Challenges for Transportation Employers - Whistleblower Protection for Trucking Employees

March 2010

- Employment & Discrimination Law Update

March 2009

- Employer Liability for Pay Discrimination Expanded by President Obama, Employment & Discrimination Update

January 2009

- ADA Amended to Expand Coverage to Millions More Disabled Americans, Central New York Business Journal, Employee Benefits & Human Resources Special Report
- Genetic Information Discrimination Act Creates New Challenges for Employers, Employment & Discrimination Update

June 2008

- Recent Developments in Employment Discrimination Law

September 2007

- Keeping Employment Liability at Bay