

Reducing Risks for Employers

**Jim Lynch, Senior Assistant
(Hillsborough) County Attorney**

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Rusty Pelican, Rocky Point, Tampa, FL

Preview

- 1. Discrimination Issues**
- 2. Hiring Issues**
- 3. Termination Issues**
- 4. Pay and Fair Labor Standards Act (FLSA) Issues**
- 5. Investigation Issues**

1. Discrimination Issues

What actions, policies, positions or practices of an employer that you review appear illegal?

The protected classes – Fed, State, Local

Discrimination theories- disparate treatment, disparate impact, opposition, and retaliation

Practice Pointer 1

An employer should, by creating their own workplace rules, not only require employees to obey the discrimination laws above but also prohibit actions and behaviors that fall short of being violations of these laws but are still inconsistent with these laws.

Practice Pointer 1 cont'd

Why would an employer prohibit actions that do not amount to a full violation of federal or Florida discrimination laws?

To prevent the discriminatory activity that exposes an employer to liability under these laws **BEFORE** an actual cause of action arises.

Practice Pointer 2

Employers can and should require all employees, under threat of discipline, to report violations of law and their policies when they become aware of them. This prevents an employee from storing up such violations until they have other reasons for reporting them and shows employer good faith.

Practice Pointer 3

Employers can and should require all management to take action when notified of a reported discrimination violation. This action would be explained in the policy as investigate, document, and discipline, (when appropriate). No confidential reporting allowed.

Illegal Harassment

Illegal harassment is a subset of illegal discrimination.

The courts say that harassment is a symptom of or an indication of discrimination.

Illegal harassment may be based upon any of the classes protected by law.

Distinguish between legal and illegal harassment.

Illegal harassment is frequent, severe, and interferes with one's ability to perform work.

Employers prohibit forms of harassment that fall short of illegal harassment and avoid the problem before it creates potential liability for the employer.

2. Hiring Issues

What processes and policies are in place to help an employer reduce risks through the hiring process?

Has a job applicant committed actions which amount to a violation of law or increased risk of harm to individuals?

This is very relevant to the employer's risk of liability under theories of negligent hire and negligent retention.

Practice Pointer 4

Auditors should review questions on job applications and hiring policies to ensure they are properly worded to get correct info and avoid employer liability:

Mere arrests are irrelevant/disparate impact.

Beware of absolute bars, see Florida Statutes Section 112.011

Practice Pointer 5

The law does not prevent the employer asking if a job applicant has participated in actions that were violations of law or which increased risk of harm to others even when these actions have not resulted in criminal convictions or civil judgments.

Practice Pointer 5 cont'd

Even if untruthful applicant responses will:

Tell applicants that the employer does not want to hire an applicant who commits crimes or is negligent;

Provide the basis for termination if the employer later finds out that the employee applicant lied; and

Create a record that the employer asked these questions which can be shown to jury to defend a lawsuit for negligent hire or retention.

Hiring Issues

Some jobs such as those dealing with children or elderly require certain background checks by statute (see FS 110.1127 Employee security checks and FS Chapter 435 Employment screening).

FS 768.096 creates statutory presumption for employers against negligent hiring if certain levels of background checks are done by the employer.

Hiring Issues

Review job descriptions of the employer to determine if job descriptions have been broken down to “essential job functions” and “marginal job functions.

Ensure that all job qualifications are “job related” and not a discriminatory barrier to employment

Practice Pointer 6

The law does not require the employer to give an applicant's or employee's requested accommodation, just that they participate in an interactive process with the requester and offer a reasonable accommodation that enables them to perform the essential functions of their job and not impose an undue hardship on the employer.

ADA Issues

Auditors should review employer's procedures to see if the employer has a reasonable accommodation process and policy to reduce liability under the Americans with Disability Act.

Does this reasonable accommodation process provide for the proper analysis of requests for accommodation from both applicants and employees?

Does it have monitoring of the accommodation to ensure that it is and remains effective to eliminate any discriminatory barrier or enable the disabled applicant or employee to perform the essential functions of their job?

3. Termination Issues

An auditor should know if you are dealing with “employees” or “independent contractors.” Understand the distinction between the two and the implications for the employer if it tries to mischaracterize the relationship. You can use the IRS 20 points to make the determination.

Practice Pointer 7

The auditor should help an employer realize that the law will penalize an employer who has mischaracterized the real nature of the employment relationship. If an independent contractor is really an employee that worker may have a claim against the employer for past wages and benefits as well as FLSA Overtime liability.

Termination Issues

The employer's policies and practices should make clear which employees are "at will" and which require "just cause" to be terminated? In Florida, employees are assumed to be "at will" and subject to termination at any time for any reason that is not an illegal reason (such as for illegal discrimination reasons).

Termination Issues

Employees change from “at will” to “just cause” by:

- 1) contract
- 2) collective bargaining agreements
- 3) statutory protection such as a local or state law (civil service laws).
- 4) by actions inconsistent with “at will.”

Termination Issues

Does the employer have to follow some form of agreed upon procedure that is set forth in a collective bargaining agreement or a contract or a state or local civil service law?

Are these procedures being followed and understood by the workforce?

Termination Issues

Are there due process requirements for a pre-termination or pre-suspension hearing? Does it make sense to give an employee an opportunity to show management they are making a mistake?

There may be a requirement for a “name clearing hearing,” which arises when there is a “presence of stigmatizing information” in a personnel file as part of a termination even if it had not been disseminated to any particular employer, *Buxton v. City of Plant City*, 871 F.2d 1037, 1045-46 (11th Cir. 1989).

Practice Pointer 8

The law may require a name clearing hearing but even if it does not, it makes sense for an employer or a custodian of records to give the person who is being stigmatized by the information a simple opportunity to input their side into the record. This goes a long way to reduce liability for the organization which can not always arbitrate a good outcome when the facts are diametrically opposed.

4. Pay and Fair Labor Standards Act (FLSA) Issues

What are some areas that auditors should check when reviewing an organizations pay and compensation procedures?

Is the distinction between salaried (exempt from FLSA overtime) and hourly (subject to FLSA overtime when working over 40 hours per work week) accurate and clear to all?

Pay and FLSA Issues

Does the employer “suffer or permit” hourly employees to work more than 40 hours per work week without paying overtime?

“Suffers or permits” means that the employee is doing anything that benefits the employer; in some circumstances, even if the employee is just present, but not actively doing anything, the employer has “suffered or permitted” the employee to work.

Practice Pointer 9

The auditor should check “suffer or permit” situations such as if hourly employees are using their company email to check work from home before or after normal work hours or coming in early to make coffee, etc. Has the organization issued a “suffer and permit” letter forcing employees to get written approval to work any overtime or be disciplined and requiring all employees to identify any outstanding overtime claims?

Auditors should be aware that FLSA litigation is growing and private attorneys are aggressively seeking cases which are easy to claim and include attorney fees.

Practice Pointer 10

Furloughs cause problems for salaried employees not hourly employees. Private employers furlough salaried employees for full workweeks under the FLSA, whereas public-sector employers use 29 C.F.R. 541.710(b), which states, “deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis except in the workweek in which the furlough occurs and for which the employee’s pay is accordingly reduced.”

Thus, use a written notice to salaried public employees and their supervisors to treat salaried employees as hourly employees in any week they are subject to a furlough.

Practice Pointer 11

Auditors should help managers understand rules for an exempt employee by telling managers they control all time away from work for an exempt employee by granting or denying absences except for FMLA leave which is deductible hour by hour from a salaried employee's pay under 29 CFR 825.206 (c).

Practice Pointer 12

Auditors should help employers understand the need for an employer to initiate FMLA notice via 29 CFR 825.300 and counting all FMLA hours by using preliminary designation of FMLA leave 29 CFR 825.301. Also, are employers making logical written policy choices:

Employees should be forced to use all paid leave in conjunction with any FMLA leave by written employer policy 29 CFR 825.207, and

Employers should choose the rolling 12 month looking back period to count the 12 weeks FMLA leave entitlement pursuant to 29 CFR 825.200(b)(4).

Driving / Parking Issues

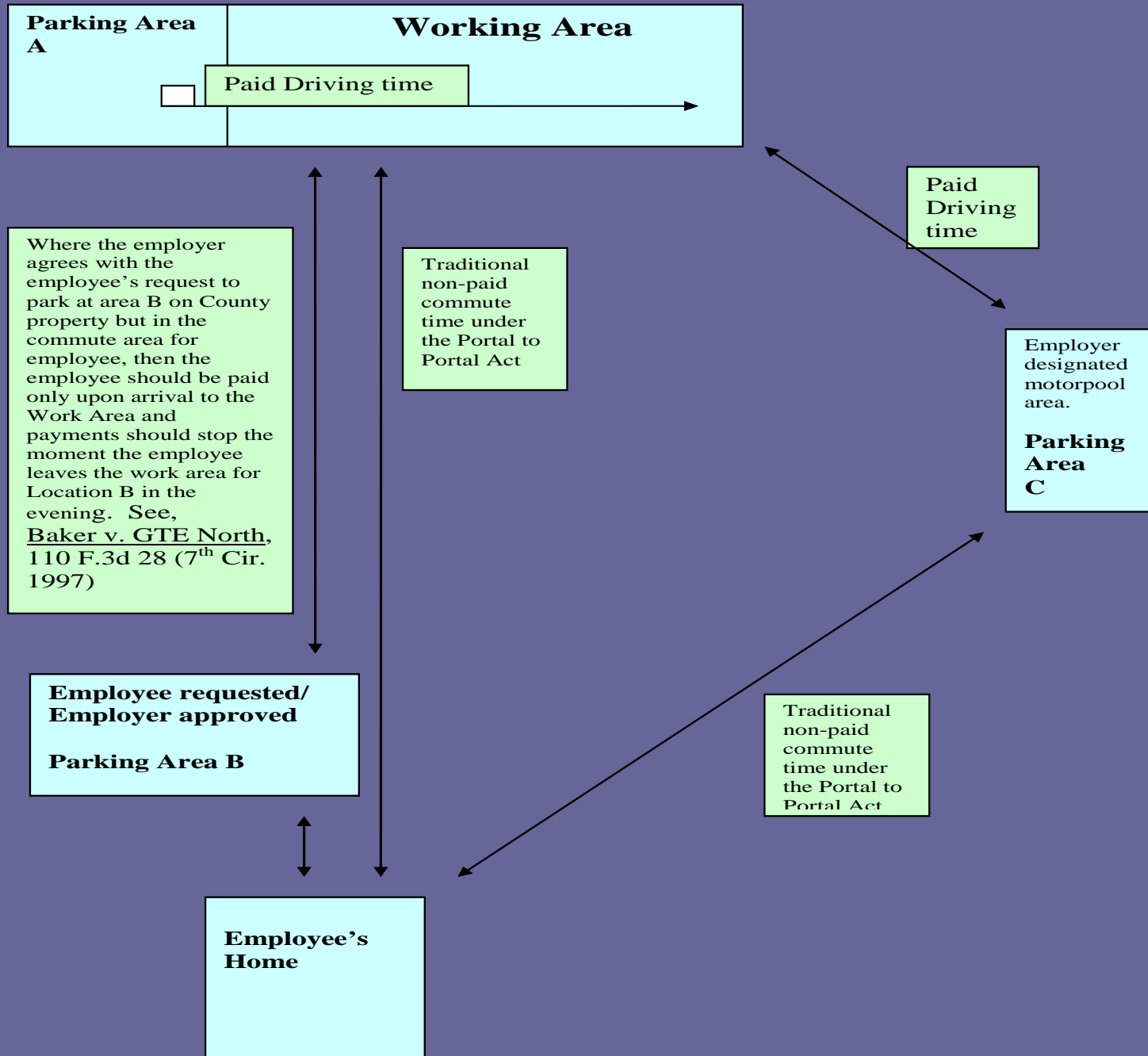
How does the employer reimburse employees who drive employer's vehicles and where are they being parked?

Employers should pay hourly employees whenever they drive an employer's vehicle unless they have a specific authorization such as the Employee Commuting Flexibility Act of 1996, which is an amendment to Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)).

Driving / Parking Issues

Hillsborough County Parking Problems

**Burton v. Hillsborough County, Fla., 181
Fed. Appx. 829 (2006), 11 Wage & Hour
Cas.2d (BNA) 848 (Unpublished)**



Practice Pointer 13

Auditors should check the pay practices applicable to all drivers of employer's vehicles paying attention to parking status to determine the extent of possible liability for FLSA claims related to driving and parking of employer's vehicles.

5. Investigation Issues

What policies and procedures are used by the employer to investigate claims of wrongdoing, fraud, whistleblower claims, misconduct, discrimination, harassment, retaliation, etc.?

An organization is at risk for not having an adequate investigative vehicle to promptly and objectively investigate allegations of various types for the employer.

5. Investigation Issues

The failure to properly investigate prevents an employer from taking necessary and proper action required by law.

Auditors should know the employer's position on investigation of anonymous allegations

5. Investigation Issues

What is the proper distribution of investigation function between an employer's professional investigator and the employer's managers?

Normally, the complexity of the allegations and the technical expertise to perform such investigations will impact on the answer to this issue.

Practice Pointer 14

Be aware of the problem with any investigation conditions set forth by the employer such as Garrity warnings which are derived under the case of Garrity v. New Jersey, 385 U.S. 493 (1967).

My Contact Info

James J Lynch, Senior Assistant Attorney

601 E. Kennedy Blvd, 27th Floor

PO Box 1110

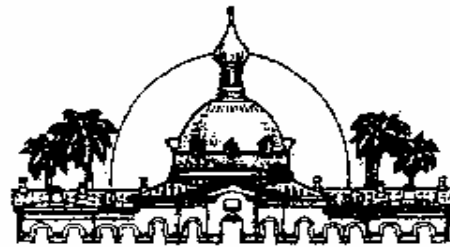
Tampa, FL 33601

813-277-1647 (desk)

813-277-1620 (fax)

LynchJ@hillsboroughcounty.org

My Business Card



HILLSBOROUGH COUNTY

OFFICE OF THE COUNTY ATTORNEY

James J. Lynch

Senior Assistant County Attorney

277-1647

601 E. Kennedy Blvd., 27th Floor

Ph. (813) 272-5670

P.O. Box 1110

Voice Mail (813) 224-8943

Tampa, FL 33601

Fax (813) 272-5758

e-mail LynchJ@hillsboroughcounty.org