

STAY OUT OF COURT!

**BASICS OF EMPLOYMENT LAW FOR
NEW JERSEY DENTISTS**

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About the Presenter:



Ann Kiernan, Esq. (www.kiernanlaw.net) focuses her practice on preventive law for employers. As part of her commitment to helping management create fair and respectful workplaces and prevent costly employee lawsuits, Ann presents in-person workshops and online classes on managing within the law, corporate compliance, legal pitfalls in e-mail and internet use, harassment prevention, wage and hour issues, the ADA, FMLA, legal and effective hiring, and workplace violence prevention for employers large and small.

She has litigated claims of wrongful discharge, discrimination, harassment, and retaliation before state and federal trial and appellate courts, and is a frequent author and speaker. Ann received her undergraduate and law degrees from Rutgers University, and is a member of the Society for Human Resource Management

VALUES

Employer Policy

New laws

- NJ Law Against Discrimination (1945)
- Civil Rights Act, Title VII (1964)
- Age Discrimination in Employment Act (1967)
- EEOC Sexual Harassment regulations (1978)
- NJ Conscientious Employee Protection Act (1986)
- Americans with Disabilities Act (1990)
- NJ Family Leave Act (1993)
- Family and Medical Leave Act (1993)
- NJ Family Leave Insurance (2009)

Old law

- master/servant at-will relationship

ABD's of Employment Law

- Always be consistent
- Have a legitimate **business** reason
- Document events

Employment at Will & Its Limits

Master-servant relationship is at-will employment

- servant has the right to quit
- employer has right to terminate or take any adverse action at any time, with or without cause

Examples of adverse actions:

- demoting employees
- taking away perceived good job assignments
- assigning unpleasant tasks
- assigning overtime work
- denying promotions
- deciding how to distribute employee rewards
- denying or limiting pay increases
- instituting corrective actions
- terminating employment

Right to take adverse action at-will is limited by courts.

Cannot take adverse action at-will if to do so would violate:

- public policy (upholds other laws)
- contract (employer policies, documents)
- covenant of good faith and fair dealing (implied contracts)

Three Rules for Preventing Wrongful Action

1. Respect “whistle-blowers”.
2. Keep your promises.
3. Be fair.

What is Discrimination?

Illegal discrimination is adverse treatment based on protected characteristics:

- Sex/gender/gender identity or expression
- Age
- Race/color
- National origin/ancestry
- Religion
- Citizenship
- Veteran/military status
- Marital, domestic partnership, or civil union status
- Pregnancy
- Disability
- Sexual orientation
- Atypical cellular or blood trait
- Genetic information

Key Question: How was this person treated compared to someone with different characteristics?

Three Rules for Preventing Discrimination

1. Don't make assumptions.
2. Follow the ABD's
 - Always be consistent
 - Have a legitimate business reason
 - Document events

Types of Harassment

Our values

- encourage respect for people

Employer harassment policy

- can set higher standard than law
- employee may be terminated for behavior that violates policy, even if behavior does not violate law
- supervisors usually held to a higher standard
- behavior that is not illegal harassment may be evidence of discrimination if done by a supervisor

Quid pro quo (“this for that”)

- from a supervisor
- job favors for sexual favors, express or implied threats
- can be implied by repeated propositions
- must show job impact: denied annual pay increase, laid off, forced to quit
- employer **automatically liable**

Retaliation

- from supervisor, peer, subordinate or outsiders for refusing sexual advances, for complaining about harassment, or assisting in a claim
- takes many forms: demotion, poor appraisals, bad job assignments, termination, threats or violence

Sexual favoritism

- where a manager and employee have a consensual relationship, and
- the employee receives opportunities or benefits, and
- a more qualified person was denied such opportunities or benefits

Hostile environment

Illegal Hostile Environment Overview

Four factors must be met to show illegal hostile environment.

1. Discriminatory or sexual behavior
2. Unwelcome by the victim
3. Severe, interfering with work
4. The employer knew or should have known and did nothing

Conduct that meets factors 1 and 2 above may violate employer policy.

Conduct is illegal only if all 4 factors above are met.

Preventing Harassment

The Platinum Rule:

Treat others the way **they** want to be treated!

**Harassment, discrimination and retaliation are
illegal and violate office policy...**

Intent is irrelevant!

Listen to the complaint

- do not give advice
- do not make conclusions

If the behavior would violate law or policy, investigate

- even if requested to keep complaint confidential
- listen to both sides
- interview co-workers
- warn all of confidentiality and no retaliation policies
- get legal assistance if legal violation uncovered

Take prompt and effective corrective action, if policy or legal
violation found

- any level of corrective action is appropriate (informal
counseling, verbal, written, or final warning, suspension or
termination) if it is reasonably calculated to end the
harassment

Document

Follow up with victim

- ensure harassment is not repeated
- prevent retaliation

Restrictive Covenants

Under NJ law, valid if they:

- protect legitimate interests of employer
 - patient loyalty
 - special techniques or methods
- impose no “undue hardship” on employee
 - right to earn a living in field
 - limited in time (1-3 years)
 - limited in geography
 - only services in competition with former employer
- do not injure the public interest
 - patient not a mere commodity
 - patient right to treatment by provider of choice
 - public interest in availability of dental services

Types:

Non-Competition

Non-Solicitation

- patients
- employees

Non-Disclosure

- patient information
- techniques
- trade secrets
- financial information

NJ Family Leave Insurance

- Provides up to six weeks paid leave to care for a newborn, newly adopted child or seriously ill family member. (parent, spouse, domestic partner, civil union partner, child)
- For continuous, non-intermittent leave:
 - Six weeks over 12 months (prior 365 days)
- For intermittent leave:
 - 42 days every 12 months
- Serious Health Condition:
 - Prior and “reasonable” notice of leave EXCEPT emergency or unforeseen leave
 - Medical certification
 - Reasonable effort to schedule the leave so as not to “unduly disrupt” operations of employer
 - If medically necessary, intermittent leave (1 day minimum) allowed
 - Where possible, must provide employer with regular schedule of intermittent leave
 - Prior 15 days’ notice of intermittent leave EXCEPT emergency or unforeseen
- Birth/Adoption of Child:
 - Prior 30 days’ notice EXCEPT if unforeseeable
 - If 30 days not provided, employee loses two weeks of leave
 - NO intermittent leave, without employer consent
- Employer may require employee to first use up to 2 weeks of paid sick leave, vacation time or other leave at full pay
- No job restoration required, no job protection UNLESS covered by:
 - FMLA or NJFLA
 - ADA or NJLAD
 - Some other law
- Employer must post notice of FLI rights and give copy of notice to employees
 - At the time of hiring;
 - Whenever the employer receives notification that the employee is taking leave; AND
 - When employee asks for the notice

TERMINATION CHECKLIST

No one can prevent a disgruntled ex-employee from suing. However, you can minimize both the likelihood of a lawsuit and the risk of losing the case if you understand the legal issues involved and handle the termination as fairly as possible.

1. Deciding to Terminate

Here are things you should consider before firing an employee. Of course, not every item will apply to all situations. Make sure you consult with legal counsel if issues arise.

1. Do you have legitimate, non-discriminatory reasons for the termination? No. _____
Yes _____

If no, stop here. You should not fire anyone.

If yes, what is (are) the reason(s)? _____

2. Does your documentation support your reason for termination?

- a. If your reason is performance-based, are there counseling documents, written warnings, a performance improvement plan, and a critical performance evaluation.? No. _____
Yes _____

If the file contains nothing but glowing performance appraisals, or there are contradictory documents in the file, re-think your decision! On the other hand, if the personnel file contains extensive counseling documents, warnings and opportunities to improve, the employee should not be surprised by termination.

- b. If your reason is misconduct, are there warnings, probationary notices, investigation notes, and witness statements, including the employee's side of the story? No _____
Yes _____

You cannot terminate for misconduct without investigating the facts, which always includes speaking to the employee. You should be prepared to support your charge of bad conduct with corroborative proof.

- c. If your office has a progressive discipline policy, have you followed all the required steps, and is there documentation of each step? No _____ Yes _____.

If not, are you sure that this case deserves to be an exception from your usual policy?
No _____ Yes _____

A good progressive discipline policy forces supervisors to construct a paper trail from oral warning through written warning, probation, suspension, and, finally, termination.

d. If there is a job description, does it fully and accurately describe all essential and other job functions and duties? No _____ Yes _____

Does it describe what the employee really did on the job? No _____ Yes _____

If you are firing someone for poor performance of a task not covered by the job description, watch out!

e. Are there any implied, oral, or written contracts with the employee? No _____ Yes _____

If so, have all conditions been met? No _____ Yes _____.

If you think there may be a contract, consider getting legal advice now, as part of your termination planning.

3. Does the termination comply with your employee handbook or other established policies and procedures? No _____ Yes _____

If not, why should an exception be made in this case? _____.

4. Have you treated other employees differently under the same or similar circumstances? No _____ Yes _____

a. If possible, review the records of other employees you have discharged, and the records of other employees who had similar misconduct or performance problems. Are any of them still employed? No _____ Yes _____

b. If so, can you document the legitimate, non-discriminatory reasons for the different treatment? No _____ Yes _____.

If not, you should consider alternatives to discharge, such as demotion or suspension.

5. Has the employee ever complained about discrimination, harassment, or failure to accommodate a disability? No _____ Yes _____

If so, have the complaints been fully investigated and properly addressed? No _____ Yes _____

Make sure the termination is not retaliation for having raised a grievance or claim, even if the employee's complaint was unfounded.

6. Has the employee ever claimed that directives or instructions violate local, state or federal law? No _____ Yes _____

If so, have the complaints been fully investigated and properly addressed? No _____
Yes _____

Is there any other reason to think the employee might be a “whistle-blower”? No _____
Yes _____

If there are whistle-blowing issues, pre-termination legal advice is essential!

7. Review the protected characteristic status of the employee (age, race, religion, sex, pregnancy, national origin, citizenship, veteran or military status, religion, disability, sexual orientation, gender identity). Can you rule out any discriminatory motives? No _____ Yes _____

If no, seek legal advice now!

a. In some cases, you should consider timing, as well. For instance, despite the best of business reasons and supporting documentation, if you terminate an employee the week after she announces her pregnancy, it may be impossible to convince a jury that pregnancy had nothing to do with it. Are there any timing issues in this case? No _____ Yes _____.

8. Where appropriate, have you considered alternatives to termination, such as demotion, transfer, change of supervisor or relocation? No _____ Yes _____

If not, why not? _____.

If so, why is termination the only appropriate action? _____.

9. Step back and apply your own values and ideas of fairness. Given your answers to Questions 1-8, is the decision to terminate a fair one? No _____ Yes _____

While it is not illegal to make a foolish, unfair or arbitrary decision, a jury may well decide that your actions were retaliatory or discriminatory, rather than merely stupid, mean or irrational. If it looks bad, it IS bad!

Required Posters

New Jersey Law:

The following required posters from the NJ Department of Labor and Workforce Development are distributed in the Employer Poster Packet, available at <http://lwd.dol.state.nj.us/labor/employer/content/employerpocketforms.html>:

- | | |
|--------------------------|---------------------------------------|
| Wage & Hour Law Abstract | CEPA (whistleblower protection) |
| Payment of Wages | Family Leave Insurance |
| UI & DI Law | Child Labor Laws (if minors employed) |

In addition, employers also are required to post information made available by the NJ Division on Civil Rights, available from: <http://www.nj.gov/oag/dcr/posters.html>. (Employment and public accommodations posters are required for all dental offices, and, if more than 50 employees, the family leave poster, as well.)

All New Jersey employers must post a Workers' Compensation notice, available through your insurance carrier.

Federal law:

Federal law mandates the posting of notices on:

Minimum Wage	It's The Law (OSHA)
Uniformed Services Employment & Reemployment Rights Act	Equal Employment Opportunity (15 or more employees)
Employee Polygraph Protection	Family/Medical Leave Act (50 or more employees)

The Equal Employment Opportunity poster is available from the Equal Employment Opportunity Commission at: <http://www1.eeoc.gov/employers/poster.cfm>. The other federal posters are available from the U.S. Department of Labor at: <http://www.dol.gov/oasam/programs/osdbu/sbrefa/poster/matrix.htm>.

Useful Employment Websites

www.fairmeasures.com	Fair Measures Corp. provides employment law training for managers. Good summaries of the law; 600+ FAQs on discrimination, privacy, harassment, etc.
http://www.legalworkplace.com/	Alexander Hamilton Institute site contains FAQs on all areas of employment and HR, many free reports in .pdf format
http://www.nj.gov/njbusiness/starting/	Step by Step Guide to starting a new business in New Jersey
http://www.njleg.state.nj.us/	NJ Legislature Home Page. Legislative office addresses, committee assignments, status of bills, and more.
http://www.nj.gov/oag/dcr/index.html	Division on Civil Rights Home Page. Info on the laws enforced.
www.eeoc.gov	Equal Employment Opportunity Commission—responsible for enforcement of federal discrimination laws
http://lwd.state.nj.us/labor/forms_pdfs/employer/B-426_2010_EmployrHndbk.pdf	NJ employer handbook on unemployment and disability
http://lwd.state.nj.us/labor/index.shtml	NJ Department of Labor
http://lawlibrary.rutgers.edu/search.shtml	NJ state court opinions
http://lawlibrary.rutgers.edu/fed/search.html	Opinions of United States District Court for New Jersey
http://www.findlaw.com/casecode/courts/3rd.html	Opinions of US Court of Appeals for Third Circuit (NJ, PA, DE and VI)
http://scholar.google.com/	Google Scholar: Free federal and state court opinions
http://www.osha.gov/	Occupational Safety and Health Administration. Info on bloodborne pathogens, ergonomics, and more