

# What the Public Interest Lawyer Should Know about Employment Law

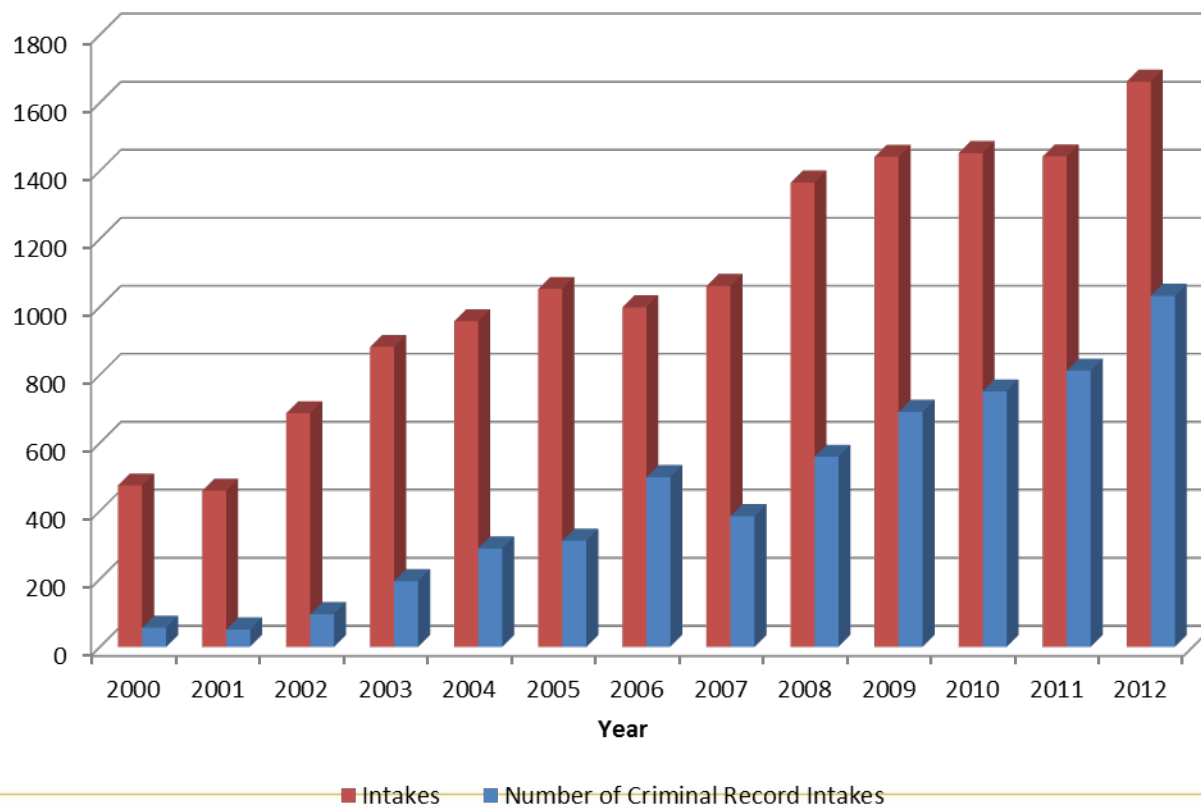
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# CLS's Employment Law Caseload

CLS Employment Unit Intakes 2000-2012



# What We Will Cover Today

- A legal aid employment practice (i.e., employment law for low income workers)
- Basic employment law concepts, including discrimination
- Family and Medical Leave Act
- Criminal records
- Questions



# **PART ONE:**

## **Planning a Legal Aid Employment Law Practice**

# Why Practice Employment Law?

- Give clients tools to better support themselves (i.e., remove barriers)
- Establish eligibility for income streams (i.e., disability insurance, pensions)
- Rectify abuse of low wage workers
- Recognize that a high percentage of our clients work or want to work.



# Targeting Cases: What CLS Does

- Barriers to employment – criminal records, child abuse records
- Job preservation cases – FMLA, criminal records
- Income streams – pensions, disability insurance
- Preserve ability to work – occupational licenses, patient abuse registries, non-competes
- Wage cases
- Cases involving immigrants or welfare-to-work
- Cases involving misclassification of independent contractors



# Targeting Cases: What We Don't Do

- Garden variety” discrimination cases
- At will or unionized worker terminations
- Duty of fair representation claims against unions
- Cases involving federal employees (obscure rules)
- Workers comp (private attorneys)



# **PART TWO:**

## **Basic Employment Law Concepts**



# Employment Law: The Basics

## **“Employment at Will”**

- The general rule is that the employer or the employee can terminate the relationship for any reason and at any time.
- This means that employers can hire and fire people for unfair reasons, or no reason at all.



# Employment at Will Does Not Apply to:

- Workers covered by union contracts;
- Civil service workers; and
- Workers with contracts (very rare)

In these cases, termination usually limited to cases where employer has “just cause,” and employee may be entitled to a hearing.



# Exceptions to Employment at Will

- Employment discrimination laws (federal, state or local).
- Other statutes, e.g. Family and Medical Leave Act.
- Retaliation for making an employment law or benefit claim.



# What is Employment Discrimination?

Discrimination on the basis of:

- Race or color;
- National origin or ancestry;
- Religion;
- Gender (including sexual harassment);
- Disability;
- Age; or
- Sexual orientation (in some jurisdictions) (no federal or state law prohibits it).



# What is NOT Employment Discrimination?

- Different treatment based on other reasons
- Personality conflicts



# Title VII of the Civil Rights Act of 1964

Applies to public and private employers with 15 or more employees

Specifically prohibits discrimination on basis of:

- **Race and Color;**
- **National Origin;**
- **Sex** (quid pro quo; hostile work environment)
- **Religion** (except employees of religious organizations)



# Age Discrimination in Employment Act of 1967 (ADEA)

- Prohibits discrimination on the basis of age against employees or applicants age 40 or older;
- Does not prevent age discrimination against employees under 40;
- Applies to employers with 20 or more employees



# Americans with Disabilities Act (ADA)

- Applies to all employers with 15 or more employees
- Prohibits public and private employers from discriminating against individuals with physical and mental disabilities.
- Must be chronic medical conditions that affect a person's ability to engage in major life activities. Includes alcoholism and former drug addiction.





# What is a “Reasonable Accommodation” of a Disability?

Employee is otherwise qualified for job but needs some adjustment from the employer in order to perform the work because of disability:

- Special equipment
- Reassignment of some job duties.
- Changes to work schedule.
- Transfer to a vacant job.



# What are Limits on Reasonable Accommodation?

- Accommodation is not required if it would be an undue burden on the employer.
- Whether an accommodation is required is decided on a case-by-case basis.
- An employer may offer a reasonable accommodation other than the one that the employee is requesting.



# PA Human Relations Act

Discrimination on the basis of:

- Race or color;
- National origin or ancestry;
- Religion;
- Gender (including sexual harassment);
- Disability; or
- Age; or

Covers organizations with 5 or more employees.



# **PART THREE:**

## **Family and Medical Leave Act: Helping Workers with Serious Health Conditions**

# Why Is the FMLA So Important to Our Clients?

- It saves clients' jobs! Often without protracted struggle.
- Consider whenever client fired for absenteeism.
- Demographics of FMLA use:
  - Lower income workers
  - Women more likely to use it



# FMLA-Protected Leave

- New child (birth, adoption, foster care)
- Serious health condition of son, daughter, spouse, parent
- Employee's own serious health condition renders him/her unable to perform essential functions of job
- Qualifying exigency because covered family member on or called to active duty with National Guard or Reserves
- Care for service member with serious illness or injury



# What Does the Worker Get?

- Job preservation (12 weeks in 12-month period; 26 weeks if caring for covered military members)
- Health insurance continues during leave.
- Reinstatement to same or equivalent job.
- All employee benefits must be reinstated.



# FMLA Eligibility: Three Parts

- “Employer” coverage
- “Employee” coverage
- “Serious health condition”





# Eligibility, Part 1: Is the “Employer” Covered?

**Any one** of these provides FMLA coverage.

- PUBLIC EMPLOYER (not federal)
- 50 OR MORE EMPLOYEES per workday for 20 calendar weeks in current or preceding year
- SECONDARY EMPLOYER jointly employing FMLA-covered employees.



# Eligibility, Part 2: Is the “Employee” Covered?

**All three** of the following are required.

- Employer employs at least 50 WORKERS WITHIN 75 MILES of worksite.
- Employee worked for employer AT LEAST 12 MONTHS (need not be consecutive, but before 7-year break in service).
- Employee worked AT LEAST 1250 HOURS in previous 12 months (ave: 25 hours/50 weeks)



## Eligibility Part 3 (medical leave only): “Serious Health Condition” (from reg)

Regulatory definition of SHC, with 7 different possibilities: 29 C.F.R. Sect. 825.113-115.

Mostly defined by health care treatment, although there must also be “incapacity.”



# What is “Leave”?

- Another way to look at it: PROTECTION FROM BEING FIRED FOR ABSENTEEISM.
- Can’t “count” as absenteeism under no-fault disciplinary policy. Sect. 825.220(c).
- “Leaves” can be very short periods of time.



# Is Leave Paid?

## SEPARATE ISSUES: Job Protection vs. Income

- FMLA provides job protection, not pay
- But worker can force employer to combine FMLA leave with paid leave (such as sick, vacation, personal)
- Conversely, FMLA can save job during workers' comp or while receiving STD/LTD.



# **PART FOUR:**

## **Employment Barriers Faced by People with Criminal Records**

# How Big an Employment Barrier is Having a Criminal Record?

HUGE!

- Employers have easy access to records.
- Vast increase in employer use of background checks since 9/11. 87% of employers.
- Record-based employment barriers are a major issue for low-income people.



# Cleaning a Criminal Record

Best thing we can do for a client.

- Expungements (most often arrests; some convictions)(courts)
- Pardons (only remedy for most convictions) (Board of Pardons and Governor)
- Fixing errors, in both public and commercial records





# What Can Be Expunged in PA?

- Arrests not leading to convictions;
- Some juvenile delinquency adjudications;
- Diversionary programs (ARD, Section 17);
- Convictions of summary offenses after 5 years;
- Some underaged drinking convictions;
- Convictions if you are 70 years old and no arrest in 10 years; or
- If you are dead. Really. I don't make this up.



# Pardons

- Get ready for a loooooooooooooooooooooong wait.
- Fill out a lengthy application and wait for Board of Pardons to grant you hearing.
- No set standards, but generally more than a decade for felonies and more than 5 years for misdemeanors.
- But people do get them! One of only 14 states.



# Employment Rejections and Title VII: Disparate Impact and Criminal Records

- Because people of color are disproportionately represented in the criminal justice system, employer policies that exclude people with records have a **disparate impact** on people of color.
- Such policies must be justified by **business necessity**.



# EEOC Enforcement Guidance

- EEOC had policy guidances on disparate impact of criminal records from 1980s-90s
- Important new enforcement guidance approved on April 25, 2012

[http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)



# Title VII: Arrests

- “An exclusion based on an arrest, in itself, is not job related and consistent with business necessity.” (Guidance, p. 12).
- An employer is supposed to evaluate the likelihood that the person engaged in the conduct for which s/he was arrested.
- Also, arrests may not be considered under PA law (43 P.S. Sect. 9125).



## Title VII: Business Necessity for Considering Convictions

EEOC policy says that an employer is to consider the following factors:

1. The nature and gravity of the offense/conduct;
2. The time that has passed since the offense and/or the sentence completion;
3. The nature of the job held or sought.

(Guidance, p. 15 - derived from Green v. Missouri Pac. R.R., 523 F.2d 1290 (8<sup>th</sup> Cir. 1975)).



# Fair Credit Reporting Act

Applies when commercial vendors prepare criminal background reports.

Creates obligations on both preparers and employers.

Does not apply to public criminal record sources.



# FCRA – Obligations on Preparers

- Generally, can't report arrests more than 7 years old.
- Use “reasonable procedures” to insure “maximum possible accuracy.”
- Special rule when public record information is reported for employment purposes (concurrent notice or strict procedures to be complete/up-to-date).





# Common Violations by Preparers

- 1) Inaccuracies
- 2) Mismatches
- 3) Prejudicial presentation of information
- 4) Not excluding expunged cases
- 5) Multiple reporting of single case



# FCRA – Obligations on Employers

- Clear written notice that report may be sought, and written authorization.
- If adverse action to be taken, the applicant must get a copy of report before action taken.
- Notify the applicant that the adverse action taken because of the report; provide rights to dispute.



# **A Quickie: Wages**

Fair Labor Standards Act –  
minimum wage and overtime

Wage Payment and Collection  
Law – wages that were  
promised