

# EMPLOYMENT LAW 101

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## The laws:

- Title VII
- Equal Pay Act
- Age Discrimination in Employment Act
- Americans with Disabilities Act
- Texas Commission on Human Rights Act
- Family and Medical Leave Act (over 50 employees)
- Pregnancy Discrimination Act

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## The laws (cont.):

- National Labor Relations Act
- Fair Labor Standards Act
- Equal Pay Act
- Workers' Compensation Retaliation
- Fair Credit Reporting Act
- Local laws and ordinances

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**Protected categories:**

- Race
- Color
- Gender
- Age (40 or over)
- National origin
- Sexual orientation
- Citizenship
- Union status
- Veteran / military status
- Religion
- Pregnancy
- Disability
- Genetic information
- Marital status
- Workers' comp history

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**Personnel actions covered:**

- Recruiting
- Hiring
- Training
- Promotion
- Discipline
- Compensation
- Discharge
- Work environment
- References

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**Facts that contribute to discrimination claims:**

- Theory of the greater goodie
- Comments
- Non-verbal communication
- Exclusion of others

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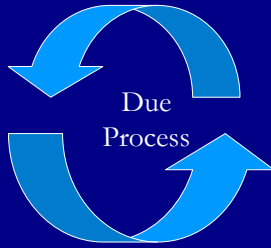
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## Another contributing factor.... With one exception



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## What is discrimination?

- Prima facie case, typically an employee in a protected group is treated less favorably than employees outside that group based on his or her membership in that protected group.
- Employers must have "legitimate, non-discriminatory reasons" for their decisions.
- Stated reason is pretext for discrimination

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## Comparators

Situations must be "nearly identical"  
*Dodge v. Hertz Corp.* (5th Cir. 2005)



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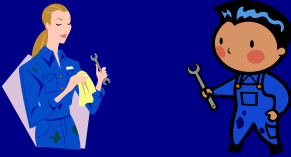
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## Comparators (cont.)

- TCHRA
- "Similarly situated"
- Circumstances comparable in all material respects



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## Liability for hostile work environment by supervisor

- Tangible employment action - Strict liability
- No tangible employment action - Can avoid liability if:
  - Employer exercised reasonable care to prevent and correct behavior.
  - Employee unreasonably failed to take advantage of the protective or corrective opportunities offered by the employer.

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## Liability for hostile work environment by co-workers

- Employer is liable if it knew or should have known about the harassment and failed to take prompt remedial action.
- If you know or you had enough facts that you should have known, the "employer" knows.

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# RETALIATION

## PROTECTED ACTIVITY

Opposition  
Participation

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## Employment references

- Source of many retaliation complaints
- Company policy
- "Informal" references
- Confidentiality / privacy concerns

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## The PDA

- Pregnancy discrimination
  - Transfer to less desirable job may be ultimate employment action
- EEOC v. SBC* (N.D. Tex., 2005)



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## Reductions in Force

- One person rifs
- Consideration of selection criteria
- Checking for consistency
- Following policy
- Adverse impact

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## Sabine Pilot

- Adverse action
- Refusal to perform an illegal act

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## Wage Claims

- Unemployment insurance
  - Good reason to quit
  - Work related misconduct
- Wage claim
  - Unpaid wages
  - Bonuses
  - Commissions
- Texas Open Records Act

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## FLSA claims

- Still multiplying
- Correct classification is key
- Capturing all hours worked is key
- Care in reclassification conversations
- Damages are exponential

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## FLSA

- Partial day deductions from PTO bank
- Yes, so long as PTO time available  
DOL Opinion Letter



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## Why Should Employers Care?

- Wage and hour issues are based on outdated and arcane laws that are difficult to apply
- Violations often give rise to class claims
- Amounts at risk can be substantial

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## Scope of Discussion

- General Requirements of wage laws
- Work time issues at the start and end of the work day
- Time recording issues that complicate class claims
- Steps an employer can take to minimize the risks

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## Hours Worked—Generally

- Work includes activities that are
  - Primarily intended for the benefit of the employer; and
  - Suffered or permitted by the employer
- “Suffered or permitted” means the employer knew or should have known about the activity
- Work includes activities that involve physical and mental exertion, but exertion is not required

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## Hours Worked—Portal to Portal

- Adopted in response to Supreme Court's Decision in *Anderson v. Mt. Clemens Pottery*
- Aimed at limiting liability for certain activities:
  - Walking, riding, and traveling to and from actual place of work
  - Certain clothes changing activities
  - Other activities preliminary or postliminary to principal work activities

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## Hours Worked— Impact of *Alvarez*

- Supreme Court addressed work time issues in *IBP v. Alvarez* in 2005
- Embraced Department of Labor's "continuous workday" rule
- Found activities that are integral and indispensable to principal activities are themselves principal activities for starting the workday
- In contract, preliminary and postliminary activities are not work and do not start the workday

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## The *De Minimis* Doctrine

- A few seconds or minutes may be disregarded depending on the realities of the workplace
- Depends on factors such as:
  - Administrative difficulty of recording the time
  - Aggregate amount of compensable time involved
  - Regularity of the additional work

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## Issues at the Start and End of the Work Day

- Potential work at home
- Commuting and travel time
- Security screening
- Clothes changing and equipment donning and doffing
- Waiting and walking time
- Pass-down time and employee discussions
- Computers, equipment, and tools

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## Clothes and Equipment: Donning and Doffing

- Is the clothing or equipment optional or required by law, employer rules, or the nature of the work?
- Is the clothing or equipment integral and indispensable to a principal activity?
- Are employees required to change at work?
- Are the changing activities excluded from hours worked by Section 203(o)?
- Is the employer paying for this time on a formula basis?

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## Walking and Waiting Time

- Employees are working if they are “engaged” to wait
- Employees may not be working if they are “waiting” to be engaged
- Key issues:
  - Are employees completely relieved from duty and free to use the time for their own purposes?
  - Do the activities fall within the continuous workday?

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## On Duty

- Waiting time while on duty is included in compensable time
  - Especially if unpredictable
  - Should be of such short duration (or otherwise restricted) so that employees cannot use the time for their own purposes
  - Even if employees are not performing work (i.e. playing cards, smoking, drinking coffee, reading, watching television)

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## Off Duty

- Periods where employee is completely relieved of duty and are long enough to allow him to use the time effectively for his own purposes
  - Duration of the time off
  - Other restrictions on employees (geographical, response time)

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## On Call

- If employee is required to remain on the premises or so close to the premises that they cannot use time effectively, then time must be compensated
  - Time is not spent primarily for benefit of the employer
  - Employee is engaged to be waiting rather than waiting to be engaged

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## Rest Periods

- Not required by FLSA
- If granted, breaks of short duration (5-20 minutes) must be compensated
- Cannot offset against other types of work time such as paid waiting or on-call time
- Break 30 minutes or longer does not have to be compensated if employee is completely relieved from duty

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## Meal Periods

- Not required by FLSA
- Not work time
- Bona fide meal periods ordinarily 30 minutes
  - Shorter time period may suffice under special circumstances
- Employee must be completely relieved from duty for duration of the break
  - Employer need not permit to leave the premises
- “completely relieved from duty” standard in the regulations may be yielding to “predominant benefit” test

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## Computers, Equipment, and Tools

- Time spent setting up, laying out, turning on, preparing, testing, putting away, rolling up, and turning off computers, equipment, or tools generally counts as work time
- These activities will typically start or continue the workday for purposes of the continuous workday rule
- Key issue: Are employees using the restroom, getting coffee, and visiting with friends before or after these work activities occur

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## Comp Time

- Banking overtime hours for use at a later time
- May not be used in the private sector
- In public sector, employers may use comp time in lieu of overtime so long as
  - Agreement in place between employer and employee
  - Comp time accrues at a rate of 1.5 hours for every hour of overtime worked
  - Time limit on how much can accrue

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## What Can an Employer Do To Minimize the Risks?

- Structure jobs to minimize issues
- Adopt appropriate policies
- Establish an ongoing educational campaign
- Have employees verify time entries
- Have employees participate in any corrections
- Randomly check and verify records
- Promptly investigate and resolve claims
- Discipline employees and managers
- Obtain an opinion

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## MURPHY'S LAWS OF THE WORKPLACE



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The longer the title,  
the less important the job.

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Important letters that contain no errors will develop errors in the mail.

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If you are good, you will be assigned all the work.



If you are really good, you will get out of it.

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If it wasn't for the last minute, nothing would get done.



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When you don't know what to do, walk fast and look worried.

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## Questions?

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