KNOWING YOUR RIGHTS

A GUIDE FOR WORKING PEOPLE IN NEW YORK

Lina Stillman, Esq.

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PREFACE

This book was written with workers in mind. It is my hope to make the subject of Employment Law, if not interesting, at the very least beneficial for anyone who needs a quick guide to understanding his or her rights in the workplace.

DEDICATION

This book is affectionately dedicated to my mother, Deyanira, and to my wife Challie, whose interest in this, as in all my ventures, was never less than my own.

DISCLAIMER

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TESTIMONIALS

"Lina Stillman has been my lawyer from 2015-Present. She is the most reliable attorney anyone can have! And has been the one I go to for my Employment Authorization Renewals. She is always on top of things very knowledgeable, trustworthy and caring also quick to respond to any questions via texts and she always returns calls if anything. It's even better we can communicate in English and Spanish as well!"

– Guadalupe R.

****

"I am so thankful that I was able to find Lina. I been requesting her help since 2012. She is very attentive and ready to help any time of the day. She answers all my questions with honesty, she is in any doubt the best. I give her my highest recommendation and gratitude. I know I will be coming back to her, she is the only person I will call if I should need her services."

– Alejandra G.

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"Lina Stillman is about as good as lawyers get. She is patient and unsurpassed in her knowledge of employment law. He responded to my inquiry extremely quickly and answered all my questions when no one else would. She provided clear, easy-to-implement options to my situation. I would highly recommend her."

– Ryan B.

****

"Lina Stillman has been wonderful to work with. Diligent, quick with responses and very intuitive as to the needs of my case. She has really helped to guide me with a great strategy and has taken that extra time and care to be by my side through this difficult and often frustrating situation with my employer. I have greatly valued all of knowledge and pursuit of justice in my case. Thanks!"

– Henry E.

****

"Lina Stillman is a great employment law attorney. She definitely helped me quickly when I had legal problems with my former employer. She made the process easy to understand which I really appreciated. She took the time to explain each step in the process to me. She will always be the lawyer I refer to any of my friends that need employment law help."

– Robert M.

****

"Lina was a great lawyer was always there when I needed her was quick to respond to emails and text messages Was very knowledgeable on the case we hired her for also she's a very cool person Will recommend her to anyone looking for a good lawyer."

– Jairo O.

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"Lina S. represented me on a difficult case and against adverse circumstances from beginning to end. A very unfair job dismissal and insufficient proof of evident wrongdoing! My Lawyer got some compensation ultimately, against a very tough employer."

– Donovan G.

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About The Author

Lina has dedicated her entire legal career to the practice of labor and employment law and to help employees exclusively. She has experience in all areas of employment law including strategy, tactics, state law, and complaints before the EEOC, the NLRB and all of the government agencies involved in employment law in New York. She is passionate about fighting for the rights of underserved populations and specially the working class. Her mission is made evident by her practice's motto: "We are the law firm for the working people." In order to provide clients with the best service possible, she offers a wide range of employment advice, training, investigations,

and litigation on the subjects of discrimination, sexual harassment, hostile work environment, unpaid overtime, and minimum wage.

What Do You Want Your Readers To Gain From Reading This Book?

This book is for anyone who has a job and a boss and needs some quick advice on the fundamentals of employment law. After reading this book, they are going to be able to know, before accepting a job, what their rights are and that they are empowered against employers who always have the upper hand. They are going to know, if they have been hired as a contractor, whether or not they should be classified as an employee. They are going to know how to protect themselves and what to do in case they have a wage dispute or if they feel that they are being discriminated against because of race, age, national origin, or any other protected characteristic.

CHAPTER 1

LAWS THAT PROTECT EMPLOYEES

The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) is a federal law and as such, it applies to all of the states in the United States. The Fair Labor Standards Act (FLSA) prescribes standards for wages and overtime pay, which affect most private and public employment. It requires employers to pay covered employees who are not otherwise exempt at least the federal minimum wage and overtime pay of one-and-one-half-times the regular rate of pay. For nonagricultural operations, it

restricts the hours that children under age 16 can work and forbids the employment of children under age 18 in certain jobs deemed too dangerous.

In general, the FLSA currently provides that nonexempt employees must be paid for all hours worked at a rate of at least $7.25 per hour. The FLSA also provides that nonexempt employees must be paid overtime pay at a rate one and a half times their regular rate of pay after working 40 hours in any given week. As of the writing of this book, the minimum established in New York City is $15.00 per hour.

The Department of Labor issued a final rule on Sep. 24, 2019 increasing the salary-level threshold for white-collar exemptions to $684 a week from $455 a week. The final rule is effective January 1, 2020 and is estimated to extend overtime protections to more than one million workers who are not currently eligible under federal law. Unless exempt, employees covered by the Fair Labor Standards Act must receive at least time and one-half their regular pay rate for all hours worked over 40 in a workweek.

Meeting the salary threshold doesn't automatically make an employee exempt from overtime pay; the

employee's job duties also must primarily involve executive, administrative, or professional duties as defined by the regulations.

What Does Exempt/Nonexempt Mean?

The overtime and minimum wage provisions provided by the FLSA are applicable only to employees classified as nonexempt. Employees classified as nonexempt are eligible to enjoy the protections provided by the FLSA. Employees classified as exempt do not qualify for the minimum wage or overtime provisions of the FLSA. They are excluded from the FLSA provision.

How Do I Know If I Am Exempt Or Nonexempt?

In order to be exempt, the employee's job duties and salary must meet all of the FLSA requirements.

In New York, effective January 1, 2020, the salary threshold increased as follows:

- All New York City exempt employees must be paid at least $1,125.00/week, regardless of the size of their employer.
- Nassau, Suffolk and Westchester county exempt employees must be paid at least $975/week.

- Exempt employees in the rest of New York State must be paid at least $832/week.

What Are The Rest Of The Upcoming Changes?

- The salary level part of the test that is used to determine if an employee is exempt or non-exempt is changing from $455 per week to $684 or more per week, or $35,568 or more annually.
- The total annual compensation requirement for "highly-compensated employees" is changing from $100,000 per year to $107,432 per year.
- Employers will be able to use non-discretionary bonuses and incentive payments, including commissions, paid at least annually to satisfy up to 10% of the standard salary level.
- The special salary levels for workers in U.S. territories and the motion picture industry have been revised.

CHAPTER 2

UNDER WHAT CIRCUMSTANCES IS DISCRIMINATION UNLAWFUL?

Discrimination is unlawful, if you are a member of a group protected by Title VII. You have to be a member of a protected category. In order to understand what discrimination under Title VII is, you have to understand what the causes of action are. You have to be qualified for the position that you have, be treated differently, and suffer an adverse employment action from your employer.

To establish a cause of action for disparate treatment based upon circumstantial proof, the charging party must show:

1. That he was a member of a group protected by Title VII;
2. That he was qualified for his position, or for a position for which he was applying;
3. That he suffered an adverse employment action; and
4. That applicants or employees, who were not a member of his protected group, were treated differently by the employer.

Once the above elements have been established, a prima facie case (or an inference of) discrimination exists. It is then up to the employer to present evidence of a legitimate reason for the adverse employment action. This is a burden of production, and not a burden of proof.

At all times, the burden of proof remains upon the charging employee. If the employer satisfies its burden of production and shows that the adverse employment action was based on a legitimate, non-discriminatory reason, the charging employee must then show that the employer's stated non-discriminatory reason for the employment action

was a mere pretext. To prove disparate treatment under Title VII, the employee must show that the employer acted with discriminatory purpose.

The ultimate question in a disparate treatment case is not whether the employee established a prima facie case or demonstrated pretext, but whether the employee can prove by a preponderance of the evidence that the employer intentionally discriminated against him. A showing of pretext by the employee, without, more will not support a finding of discrimination or a judgment.

Likewise, a simple finding that the employer did not rely on its proffered reason for the adverse employment action will not suffice to establish Title VII liability without a further showing that the employer relied upon the employee's membership in a protected group in making its decision. What all of this means is that a mere showing of pretext by the employee is not sufficient to obtain summary judgment. Instead, the employer is still entitled to a jury trial on the ultimate issue of whether or not there was intentional discrimination.

Misconduct

If you are fired for misconduct you can make out a prima facie case for a discriminatory discharge if you show that:

1. You are member of a protected class;
2. You were qualified for the job from which you were fired; and
3. That the misconduct for which you were discharged was nearly identical to that engaged in by an employee outside the protected class whom the employer retained.

As with other disparate treatment cases, once an employee has established a prima facie case of a discriminatory discharge, the burden of production shifts to the employer to produce evidence of a valid, non-discriminatory reason for the discharge. As was stated earlier, this is a burden of production and not a burden of proof. At all times, the ultimate burden of proof that the employer discriminated against the employee remains with the employee. Assuming the employer carries its burden of production, the presumption of a discriminatory discharge raised by the prima facie case is rebutted. The employee must

then establish, by a preponderance of the evidence, that the employer's stated non-discriminatory reason for his discharge was a mere pretext. Otherwise, summary judgment may be appropriate for the employer.

Remedies

Several remedies are available under Title VII. Available remedies are:

1. Injunctive relief;
2. Reinstatement;
3. Back pay;
4. Front pay;
5. Compensatory damages;
6. Punitive damages; and
7. Attorney's fees.

Compensatory damages and punitive damages are only available in cases of disparate treatment where intentional discrimination is shown. The only remedies available in disparate impact cases are injunctive relief, reinstatement, back pay, front pay, and attorney's fees. Where reinstatement is ordered, front pay is not available. To recover attorney's fees, the employee must prevail.

Statutory Caps

Statutory caps limits exist for combined awards of front pay, punitive damages, and compensatory damages. The caps are based upon the number of employees employed by the employer against whom the charge of discrimination has been made.

Separate corporate entities or employers may be combined for the purpose of determining which of the above caps is appropriate. Some of the factors to be considered are:

1. Common ownership;
2. Common control;
3. Shared facilities;
4. Shared employees;
5. Shared managers; and
6. Central control of labor relations

Sexual Harassment

While specifically not mentioned in Title VII, sexual harassment can constitute sexual discrimination and violates Title VII. In the employment context, sexual harassment refers to unwelcome sexual advances imposed upon an

employee by someone of authority. Such unwanted sexual advances may come in the form of sexual jokes, repeated offensive comments or looks, intentional body contact, indecent propositions, or forced sexual relations.

Historically, sexual harassment claims were brought by way of a state cause of action for the intentional infliction of emotional distress or some related tort. This changed, however, in 1986 with the Supreme Court's decision in Meritor Savings Bank v. Vinson, where in the U. S. Supreme Court held that sexual harassment claims could be brought under Title VII as a form of discrimination based on sex. In its decision, the Court adopted earlier EEOC guidelines which had placed sexual harassment within the various types of activity prohibited in the workplace.

Those types of activity included "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." The EEOC guidelines provided that prohibited forms of sexual misconduct could constitute "sexual harassment, whether or not it is directly limited to the grant or denial of an economic quid pro quo where such conduct has the purpose or effect of unreasonably interfering with an

individual's work performance or creating an intimidating, hostile, or offensive work environment.

In the Supreme Court's view, the issue was whether or not the alleged misconduct was "unwelcome." Thus, if an improper and welcomed sexual advance was made, and the victim voluntarily responded to it and engaged in some sexual conduct, the employer could still be liable for the unwelcome initial conduct. In other words, the employee's voluntary participation in the ultimate or sexual relationship did not bar a cause of action so long as the initial conduct had been unwelcome.

Sexual harassment claims typically fall into one of two categories;

1. quid pro quo; or
2. hostile work environment.

Quid pro quo harassment occurs when an employee or prospective employee is forced to choose between an employment detriment and submitting to sexual demands. To establish a prima facie case of quid pro quo sexual harassment, you must show:

1. That you are a member of a protected class;
2. That you are the subject of unwelcome sexual harassment in the form of sexual advances or a request for sexual favors;
3. That the unwelcome harassment or advance was based on sex;
4. That submission to the unwelcome advance was an express or implied condition for receiving job benefits or that the refusal to submit to a supervisor's sexual demands resulted in a tangible job detriment; and
5. That the employer was responsible for the supervisor's conduct.

Hostile work environment occurs when unwelcome conduct of a sexual nature unreasonably interferes with an employee's work performance or creates an intimidating work environment, regardless of whether the conduct is directly tied to a job benefit or detriment. In order to establish a prima facie case, an employee must prove:

1. That you belong to a protected group;
2. That you were the subject of unwelcome sexual harassment;

3. That the harassment was based on sex;
4. That the harassment was sufficiently pervasive to affect a term, condition, or privilege of employment; and
5. That the employer knew, or should have known, about the harassment and failed to take prompt, corrective action.

Questions to be asked in sexual harassment claims are:

1. Was the verbal or physical conduct of a sexual nature;
2. If so, was it unwelcome; and
3. Was there a quid pro quo for the sexual conduct and/or a hostile work environment?

The EEOC guidelines prohibit conduct constituting:

1. Sexual advances;
2. Request for sexual favors;
3. Any verbal conduct of a sexual nature;
4. Any physical conduct of a sexual nature;
5. Written or visual sexual conduct; and
6. Vulgar, crude, and sexist language.

In determining whether or not the alleged misconduct was so pervasive as to create a hostile work environment a two-tiered standard is applied.

- First, whether or not the alleged misconduct would have been offensive to the average reasonable woman; and
- Second, whether the alleged misconduct was, in fact, offensive to the charging party

Title VII prohibits sexual discrimination and sexual harassment. The EEOC has provided guidance for identifying conduct that may be considered discriminatory or harassment. If an employee is able to prove discrimination, they may be entitled to lost salary, punitive damages, and attorney's fees. It would be advisable for employers to review their policies and practices to see that they do not run afoul of the EEOC and Title VII.

What Protections Does The Americans With Disabilities Act (ADA) Afford Employees?

The Americans with Disabilities Act (ADA) is the most comprehensive federal civil-rights statute protecting the rights of people with disabilities. It affects access to employment, state and local government programs and services, access to places of public accommodation such as businesses, transportation, and non-profit service providers, and telecommunications.

The scope of the ADA in addressing the barriers to participation by people with disabilities in the mainstream of society is very broad. The ADA's civil rights protections are parallel to those that have previously been established by the federal government for women and racial, ethnic, and religious minorities.

The ADA is solely about equal opportunity, from its preamble to its final provision. Like other civil rights laws, the ADA prohibits discrimination and mandates that Americans be accorded equality in pursuing jobs, goods, services, and other opportunities. However, the ADA makes clear that equal treatment is not synonymous with identical treatment. The ADA is a mandate for equality. Any person who is discriminated against by an employer because of a real disability or because the employer regards the person as being disabled, whether they are or not, should be entitled to the law's protection. The focus of the Act was on eliminating employers' practices that make people unnecessarily different.

Are There Federal LGBTQ Protections In The Workplace As Well?

Five years after the Supreme Court declared a fundamental right for same-sex couples to marry, the Supreme Court produced another landmark for the gay rights movement by ruling that federal anti-bias law covers millions of gay, lesbian and transgender workers.

On June 15, 2020, the Supreme Court ruled that the 1964 Civil Rights Act protects gay, lesbian, and transgender employees from discrimination based on sex. This decision was a huge victory for the LGBT Community. The ruling was remarkable in many respects. Nearly half the states had no legal protection for LGBTQ employees. Now, the federal law protects employees in the United States from firing and other adverse employment decisions made on the basis of their sexual orientation or gender identity.

Do Independent Contractors Have The Same Rights As An Employee?

Independent contractors are not employees and therefore are not covered under most federal employment statutes. They are not protected from employment discrimination by Title VII, nor are they entitled to leave under

the Family Medical Leave Act. Employers are not required to pay independent contractors overtime under the Fair Labor Standards Act or provide accommodations for a contractor's disabilities under the Americans with Disabilities Act. An employer is also not responsible for an independent contractor's unemployment or worker's compensation benefits and is not required to provide an independent contractor with a pension or other employment benefits. Plus, an employer does not have to pay employment taxes for an independent contractor.

Your employer cannot simply call you an independent contractor to avoid federal and state legal requirements. If the characteristics of your job resemble those of an employee, then your employer must treat you as an employee. An independent contractor's job is characterized by independence. You might be an independent contractor if:

- You are paid by the project instead of receiving an hourly, weekly, or monthly wage;
- You provide your own tools, equipment, or materials;
- You are free to perform services or work for other clients;

- You are free to work off-site and are not required to work during established hours;
- You are free to subcontract out some of the work to others; and
- You are free to complete the project at your own discretion and are not given specific instructions by the employer.

As you can see, there are many reasons why employers prefer independent contractors to employees. Therefore, it is not surprising that some employees are incorrectly classified as independent contractors. Courts and federal agencies use multiple tests to determine whether an independent contractor is actually an employee, and the standards differ depending on the employment rights sought. Examples of workers who are often misclassified include truck drivers, construction workers, bicycle messengers, and high-tech engineers.

As an independent contractor, you have the right to ask a state or federal agency to review your employment status. If you think you might be an employee and are having a problem with your employer concerning your

wages or working hours, contact an attorney. If you are experiencing discrimination and want to know whether you are an employee under the Americans with Disabilities Act or Title VII, contact an attorney.

CHAPTER 3

WHO IS COVERED BY STATE OVERTIME AND MINIMUM WAGE REQUIREMENTS?

There are certain requirements that the law has for who gets paid overtime and who doesn't get paid overtime. Professional, administrative, and executive employees don't get overtime pay but that does not mean that they are not covered under the law. Instead, in New York, we use a test for people who hire administrative and executive employees. Their minimum salary should be 75 times the state minimum wage in order for them to be exempt, meaning that you don't

have to pay them per hour or pay them overtime. For the professional exemption, in New York, employers would be required to meet the FLSA's minimum salary requirement, which is at least $455 per week.

In New York, if you have more than 10 employees, there is a different executive salary requirement. If you are in NASSAU, Suffolk, or Westchester County, it is a different salary requirement than any other counties in New York. There has to be a distinction for every single category of people who are covered by exemptions. There is a salary-based test and not everyone qualifies for minimum wage or overtime.

Below is an overview of exemption tests under New York law:

Professional Exemption:

For the professional exemption, there is no minimum salary requirement under state law, but the federal Fair Labor Standards Act (FLSA) has a minimum. In this case, most New York employers would be required to meet the FLSA's minimum salary requirement for the professional exemption (in addition to meeting the federal and state duties tests).

Employees who work in:	Minimum salary for administrative and executive exemptions (12/31/18 to 12/30/2019)
NYC (large employers with at least one employee working in the city and more than 10 across all worksites at any time in the current or previous calendar year)	$1,125.00
NYC (small employers with at least one employee working in the city and less than 10 across all worksites)	$1,012.50
Nassau, Suffolk, Westchester Counties	$900.00
Other NY counties	$832.00

Salary-Basis Test

New York generally follows federal rules for the salary-basis test. To qualify for the state and federal exemption, an employee must receive their full salary for any week in which they perform any work. Salary reductions aren't permitted due to variations in the quality or quantity of the employee's work.

For exempt employees, salary deductions are limited to the following circumstances:

- One or more full day absences for personal reasons other than sickness or disability;
- Absences of one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- To offset jury or witness fees, or for military pay;
- For penalties imposed in good faith for infractions of safety rules of major significance;
- For unpaid disciplinary suspensions of one or more full days imposed in good faith for serious misconduct, such as sexual harassment, workplace violence, drug or

alcohol use, or for violations of state or federal laws. The suspension must be imposed pursuant to a written policy applicable to all employees;

- In the employee's first or last week of employment if the employee does not work the full week; or
- For unpaid leave taken by the employee under the Family and Medical Leave Act.

Under federal and state rules, deductions from exempt employees' salaries for any other reason are prohibited.

Administrative Exemption:

To qualify for the administrative exemption under New York law:

- The employee's primary duty must involve performing office or non-manual work directly related to management policies or the employer's general operations;
- The employee must regularly exercise discretion and independent judgment; and

The employee must:

- Regularly and directly assist the employer or an employee employed in a bona fide executive or administrative capacity; or
- Perform, under only general supervision, specialized or technical work requiring special training, experience, or knowledge.

Professional Exemption:

To qualify for the professional exemption under New York law, the employee's primary duty must consist of performing work that requires advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study.

The employee's work must:

- Require the consistent exercise of discretion and judgment;
- Be predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work); and

- Be of such a character that the output produced cannot be standardized in relation to a given period of time.

Executive Exemption

To qualify for the executive exemption under New York law the:

- Employee's primary duty must consist of the managing a customarily recognized department or subdivision of the enterprise;
- Employee must customarily and regularly direct the work of two or more other employees;
- Employee must have the authority to hire or fire other employees, or their suggestions and recommendations will be given particular weight; and
- Employee must customarily and regularly exercise discretionary powers.

When Is Overtime Pay Due?

Anytime you work in excess of 40 hours in a workweek, overtime is due. There are some rules that apply in New York. For example, when you are a live-in nanny or a live-in housekeeper, overtime does not start

until 44 hours. For everyone else, it is 40 hours. Employers are required to pay employees one and a half times the employee's regular rate of pay for all additional hours.

CHAPTER 4

STEPS TO TAKE IF YOU ARE FACING UNPAID OVERTIME OR WAGES

People can start protecting themselves from wage theft on the very first day of their job. I always tell people to keep a log of the days that they work, the hours that they work, and when they took their breaks. Then, keep a digital copy, so that you can prove that the log was a continuously updated record of your work and not something that you made up after the fact. Keep all your pay stubs, take pictures of anything related, and back up your files. Take pictures of the schedule. This can make or break your case. This type of

information is always helpful when your boss tries to skip out on paying you. Hang on to your employment contract. Keep all your pay stubs. Take pictures of all your work-related documents and back up your files.

Photos of the jobsite are useful, if your employer claims they have never heard of you, which happens a lot. It is important that workers keep an active record from day one because once you have information on the employer, it is much easier to pursue any legal process. I also advise my clients and all workers to keep screenshots or clippings of any job ad that they have responded to.

Write down the full names of people you deal with, the company they work for, the addresses, where you get picked up, and the sites where you work. Text messages can be very important sources of evidence. Not only do they prove that you were in communication with employers, but very often there are details about how much you were promised in wages. If you think you are being short changed, you can try to work it out with your boss. Unfortunately, wage theft is just part of the business model for some employers.

What Evidence Does An Employee Need To Prove Overtime Or Unpaid Wages?

Employers Are Required to Keep Accurate Wage and Hour Records, not Employees!

Of course, most people don't keep records of the hours they work or the wages they're paid; they rely on their employer or its payroll service to carry out that function and assume they will be properly paid. That is precisely the reason both federal and New York State law require employers to keep accurate records of hours worked and wages paid.

Where an employer doesn't keep the records required by law, the employee's burden of proof is lightened. In such a case, an employee can establish the number of weekly hours worked based simply on his own testimony or affidavit indicating his recollection of the estimated hours worked. Case law tells us that even where an employer keeps time records, an employee's testimony alone can suffice to raise questions regarding the accuracy and/or authenticity of those records.

Time Shaving And Electronic Timekeeping

Many companies are now using devices such as electronic swipe cards, terminal entries, or machines which recognize the unique shape of the hand or a fingerprint to record employees' work time. While these machines may accurately record an employee's time entries, the initial data is only kept for a brief period of time by the device and uploaded to a computer for payroll processing purposes where it can be manipulated, edited or even deleted.

Many experts on compensation say that the illegal doctoring of hourly employees' time records is far more prevalent than most Americans believe. The practice, commonly called "shaving time", is easily done and hard to detect – a simple matter of computer keystrokes – and has spurred a growing number of lawsuits and settlements against a wide range of businesses.

An employee who hasn't been properly paid for all hours worked may believe she faces an uphill battle without time records to prove her claims. However, it's important to know that it is the employer, not the

employee, who has the obligation to keep an accurate record of employees' time and wages.

Where the employer hasn't maintained those records, an employee may prevail if she can offer testimony that will present sufficient evidence for the jury to make a reasonable inference as to the number of hours worked. And where the records that have been kept by the employer are not accurate, courts will consider evidence and testimony concerning the employer's timekeeping practices as well as that concerning the employee's work hours.

CHAPTER 5

WHAT IS ILLEGAL HARASSMENT AT WORKPLACE AND WHAT IS NOT?

Contrary to popular belief, it is not illegal for a supervisor to harass an employee simply because he or she doesn't like their work or doesn't like the employee as an individual. Harassment is only illegal if it is based on some protected characteristic of the employee, such as his or her age, race, national origin, sex, religion, or disability. If the harassment is based on any of those, then it is illegal. Additionally, in New York City, if the harassment is severe or pervasive, it is illegal.

Courts have held that the government does not have to make an American workplace pristine, but they do have to ensure that it is not hostile and abusive to an employee because that employee is a member of a protected class. If there is isolated or occasional general use of racial or ethnic slurs, those are offensive, but they don't violate the law. On the other hand, incidents of harassment toward you, if you're a member of a protected class, violate the law.

Behavior which offends a highly sensitive employee, but which would not offend a reasonable person in the same situation, would not violate the law. Likewise, behavior that might offend a reasonable person, but that clearly did not offend the employee, will not create a right for damages. Some courts define a reasonable person as an average employee in same the protected category as the employee, for example, a reasonable female employee or a reasonable Hispanic employee; other courts consider the reaction of a generic reasonable person. In determining whether the employee was offended personally, a court or jury will consider whether the employee willingly participated in the conduct, and whether he or she used reasonably available avenues of complaint to protest the conduct.

What You Can Do If You Experience Harassment At Work

If you are facing harassment at work, you have rights, protections and options.

Communicate: If you feel that directly addressing the harassment is safe, you can tell the person who is doing something you find inappropriate, intimidating, hostile or abusive to stop, either in the moment or in a follow-up conversation so it is clear the conduct is unwanted.

Record: Whether you experience a single incident or recurring harassment, write down the details each time it occurs. Include the date and time, who harassed you, where it took place, who – if anyone – witnessed it, and what was said and/or done. Be sure to keep a copy of the information outside of your workplace.

Report internally: Read your employer's policy on harassment and follow it to report an incident. If your employer does not have a policy, consider reporting harassment to a trusted supervisor or human resources specialist. If the first person you report it to doesn't act, report it to someone else. Save all communications and take notes

on all conversations. You can also report harassment to your union representative, if you have one.

Report externally: Contact the Equal Employment Opportunity Commission (EEOC) or your local EEOC field office to learn about your rights, resources and/or to file a charge. You can submit a charge of harassment online or in person within 180 days of when the harassment occurs (and you don't need a lawyer to do so). Some states have laws that extend this to 300 days; you can check to see if your state has an extended timeline. Once you have filed a charge, a notice will be sent to your employer, and the EEOC will determine how to proceed. Possibilities include mediation with your employer or an investigation by the EEOC. You can check the status of your claim via the EEOC Public Portal.

Contact a lawyer: If you are interested in finding a lawyer, you can refer to the National Employment Lawyers Association (NELA) Exchange Find-A-Lawyer database, the American Association of University Women's list of legal aid organizations, or contact the TIME'S UP Legal Defense Fund.

Request improved internal policies: If you feel comfortable doing so, you can request that your

employer implement climate surveys and staff trainings on sexual harassment, bystander intervention, and diversity and inclusion.

What Are The Responsibilities Of Management And HR When It Comes To Workplace Harassment?

In New York, management has the responsibility to keep the workplace harassment free. For example, if you're an employer, you have to have every single one of your employees take a course on how to avoid sexual harassment, and you have to report this to the state. If you are a federal employer, you have to have access to ramps for disabled people and keep an environment free of harassment for those in the protected categories. If you are disabled, they must accommodate you, if you ask for accommodations. They must accommodate your religious beliefs. For example, if you observe the Sabbath and you ask for Friday afternoons off, they must accommodate you, if possible.

CHAPTER 6

WHAT TYPE OF EVIDENCE DOES MY EMPLOYER NEED TO START AN INTERNAL INVESTIGATION?

The aim of every investigation is to determine certain basic facts: what happened, who the alleged harasser(s) were, where and when the incident took place, how the complainant's work was affected, whether anyone else witnessed the incident, whether the incident was isolated or part of a continuing practice, what the reaction of the complainant was, how the complainant has been affected, whether the complainant has talked to anyone else about the

incident and whether there is any documentation of the incident. The adequacy of an investigation will be judged on the facts and circumstances of each situation.

Normally, harassment policies advise the complainant to either contact a supervisor or a designated official in the Human Resources Department. It is critical that supervisors and managers have instructions with respect to reporting to the Human Resources Department any complaints they receive so that a decision can be made about the appropriate person to investigate the complaint. Having the wrong person investigate can discourage harassment victims from reporting meritorious claims and cause the employer to make decisions based on faulty or incomplete information. Ideally, the investigator should be a person who has the respect of employees and who has an understanding of the issues under investigation. Perhaps most importantly, the investigator must be willing and able to devote the time necessary to the investigation. The investigator must not appear to advocate for either the complainant or the alleged harasser.

Interview with the Complainant: the initial interview with the complainant should establish as to each alleged incident of harassment:

1. When and where the incident occurred;
2. What was said or done by both parties;
3. Whether there were any witnesses;
4. The effects of the incident;
5. Whether there are any documents containing information about the alleged incident; and
6. Whether the complainant has knowledge of any other person who has been similarly harassed.

Under normal circumstances the complainant should be asked to put this information in writing or should be requested to sign the interview prepared by the interviewer. This is necessary in order to make sure that the proper information is being investigated and that the complainant stands by the allegations down the line.

The complainant should be assured at the outset that he or she will be protected from any unlawful retaliation and that during the course of the investigation the employer will limit the disclosure of the information to

those with a need to know. However, the complainant must understand that it will be necessary to discuss the information with the alleged harasser(s) and others. Only in rare circumstances will it be possible to investigate the charge of harassment without identifying the complainant to the alleged harasser. However, it may be possible to avoid disclosure to third party potential witnesses. If the complainant is reluctant to divulge names and details or sign a statement, the adequacy of the investigation will obviously be limited, as the employer can only go forward on the basis of what the complainant provides.

Interview with the Alleged Harasser: whether the alleged harasser is interviewed prior to other witnesses will be dependent on the factual circumstances. In some instances it may be helpful to interview other witnesses prior to talking to the alleged harasser.

The alleged harasser should be informed of the purpose of the investigation, assured that no conclusion has been made regarding the investigation, and told that the investigation will be conducted as confidentially as possible. The alleged harasser should be told the allegations of harassment in enough detail to allow him or her to respond

fully to the claim(s). Further, the alleged harasser should be made aware that he or she must avoid any appearance of reprisal against the complainant and that any reprisal could serve as an independent basis for discipline. If the alleged harasser believes there is a motive for the complainant making the claim(s) to lie, then facts supporting that belief should be explored as should any claim that the harassment was not unwelcome.

Additional Interviews: all persons with knowledge of the facts including those identified by the complainant and the alleged harasser should be investigated. In many cases it may be necessary to re-interview the complainant after talking to witnesses and particularly after talking to the alleged harasser. In serious cases, signed written statements should also be obtained from the significant witnesses. In addition, the alleged harasser should be provided with an opportunity to respond to adverse statements made by witnesses.

Concluding the Investigation: in reaching a conclusion of the investigation, the investigator should evaluate whether the facts given are based on first-hand

knowledge, hearsay, rumors or gossip and should assess the parties' motivations to lie or embellish.

Documenting the investigation will enhance the credibility of the investigation, particularly if it is documented as it progresses with signed statements from the witnesses interviewed. Employers should remember that a written record will be discoverable when litigation follows. Having written statements will be of great value should a disciplined harasser later challenge the action and will give a basis for establishing that the employer in fact had an appropriate basis for taking such a disciplinary action. Likewise, if no action is taken as a result of the investigation, the various statements should be helpful in supporting that there was insufficient evidence to support discipline.

The sexual harassment investigative file should not be kept in the personnel file. However, if there is discipline imposed, a copy of the discipline should be placed in the alleged harasser's file. A copy of the investigative report can be kept in corporate counsel's office or filed separately by the human resources manager.

Taking Prompt Remedial Action: when the investigation has been completed, a conclusion should be reached, and some specific action should occur. First and foremost, the results of the investigation should be communicated promptly to the complainant as well as the alleged harasser. The employer should always be mindful of potential liability for defamation when specific harassment allegations are disseminated, and such information should never be disseminated beyond those persons with a direct need to know.

There may be many situations in which it cannot be determined whether sexual harassment has occurred or not because there is no information available except for the complainant's accusations and the harasser's denial. In this type of case the complainant should be assured that although no finding could be made, the employer intends to enforce its sexual harassment policy and protect employees from harassment as well as from retaliation for participating in any investigation and that any future harassment should be reported promptly. It is very important in these situations to check back with the complainant on a periodic basis to make sure that no retaliation occurs and that no other instances of harassment

have occurred. The alleged harasser should be advised that although no determination could be made as to the truth of the claim, all employees are expected to comply with the company's policy against harassment and retaliation. Further, the employer should remind the alleged harasser that retaliation will not be tolerated.

The employer should also consider a transfer or reassignment of work to prevent future contact between the complainant and the alleged harasser. This is a touchy subject and can best be handled by offering both the complainant and the alleged harasser an opportunity to make a voluntary move. Employers should be careful, however, about involuntarily moving a complainant when that move would result in less favorable terms and conditions of employment. Remedial measures should not adversely affect the complainant. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.

If at the conclusion of the investigation it is determined that harassment has occurred, the employer must take prompt remedial action. This will include some type of disciplinary action against the alleged harasser and advising the complainant of the action taken. Remedial action is generally considered to be adequate if it is "reasonably calculated to prevent further harassment". It is not sufficient to simply end the current harassment. It is also necessary to discipline the harasser.

The remedial action taken need not be the most severe sanction available. Most courts are satisfied as long as the action is reasonably calculated to prevent further harassment. Discipline may range from an oral warning to termination of employment. Several factors to be considered in determining the appropriate discipline are: the severity of the conduct; discipline imposed for previous cases of sexual harassment; discipline imposed for violations of other company policies; and the harasser's disciplinary and employment history.

Generally, a written reprimand is preferable since it creates a record of the employer’s action and can be seen as a more concrete evidence of the employer’s desire to deter the

conduct. For incidents of sexual harassment that warrant stronger discipline than a mere warning, short of discharge, a suspension or demotion may be an appropriate remedy. Particularly, demoting a supervisor from a supervisory position to an hourly position may be appropriate. Denying a salary increase, bonus or otherwise imposing a monetary penalty may also serve as appropriate disciplinary measures.

The employer is, of course, obliged to respond to any repeat conduct; and whether the employer's next response is reasonable may very well depend on whether the employer progressively stiffens its discipline or vainly hopes that no response, or the same responses as before, will be effective. Repeat conduct may show the unreasonableness of prior responses. On the other hand, an employer is not liable, although a perpetrator persists, so long as each response was reasonable. An employer is not required to terminate a perpetrator except where termination is the only response that would be reasonably calculated to end the harassment.

An internal investigation should protect the reputation of both complainant and the alleged harasser. The allegations and information obtained should be discussed only with the involved parties; each person interviewed should be

admonished not to discuss the matter with others; and should be informed of the risk of defamation if the incident is discussed outside the investigation. However, emphasizing the need for confidentiality should not result in intimidating the complainant or the supporting witnesses. A qualified privilege usually protects company investigators and witnesses who make defamatory statements in good faith and for a proper purpose to one who has a legitimate interest in or duty to receive the information. However, statements not made for good cause but made maliciously or recklessly abuse the privilege and will result in the loss of the privilege.

In the wake of the recent media coverage of sexual harassment, an employer must realize that it cannot stick its head in the sand with respect to harassment complaints. Employers should strive to ensure that employees understand its policies and procedures, as well as its commitment to preventing and correcting inappropriate conduct in the workplace.

CHAPTER 7

HOW PUBLIC WILL A CLAIM OF SEXUAL HARASSMENT BY A CO-WORKER OR A MANAGER BE?

It can be intimidating to face sexual harassment at work. But for many, reporting that discrimination can be just as stressful.

Resolving Sexual Harassment Privately

Many employees don't want to file a formal complaint or lawsuit because they can be visible to the public or they fear their co-workers will find out.

Internal Sexual Harassment Complaint

If a claim of sexual harassment is handled internally by an employer there are no laws that govern what is disclosed within the confines of an organization. However, if a claimant is promised confidentiality in lieu of either withdrawing their claim or resolving the issue without EEOC involvement question could arise as to whether this type of arrangement could be construed as illegally interfering with an employee's legal rights. Further, questions could also be raised as to whether this type of conduct qualifies as a form of retaliation.

The Confidentiality of EEOC Complaints

To begin the process of filing a formal claim alleging sexual harassment, the claimant will file a formal complaint with the Equal Opportunity Employment Commission (EEOC) information regarding the claimant, the allegations and those who are alleged to have violated the law are provided to the agency. Given that the complaint and charging process requires a level of investigation and the ability for the respondent to provide their version of the facts, the respondent will be informed

that a claim has been filed, basic information about claimant and the allegations. By law, the respondent must be notified within 10 days of a claim being filed against them. However, during the process, the EEOC is required to not offer details concerning the claim to the public. But many employees don't want to file a formal complaint or lawsuit because they can be visible to the public. The EEOC's informal investigation and negotiation processes protects employee privacy while still bringing the force of gender discrimination attorneys and EEOC investigators to bear in negotiating on your behalf.

When these negotiations work, they can result in confidential settlement agreements rather than a publicly accessible judgment. These settlement agreements can be tailored to your needs, whether that's removing the harasser, giving you a different but comparable assignment, or paying for you to separate from the company entirely. It also protects you from having to testify in front of a judge or public jury about potentially private and sensitive experiences.

Allegations surrounding sexual harassment can be a sensitive topic for both the alleged victim and the

accused. In either case, the parties involved will want to keep the details of the claim confidential. The laws and regulations concerning sexual harassment do not provide the parties involved with privacy protections

Will The Alleged Harasser Be Placed On Any Sort Of Leave?

Whether or not an alleged harasser will be put on leave depends on the company's internal policies. There is no law that requires it, but it is a commonly accepted practice.

CHAPTER 8

HOW IS A WORKPLACE DISCRIMINATION CHARGE FILED?

If you want to file a claim with the Equal Employment Opportunity Commission, then you have to go through them to get the right to sue letter, which you cannot show in federal court, unless the EEOC has given you permission to do so. There is a very simple portal that you use for the EEOC (https://publicportal.eeoc.gov/Portal/Login.aspx) and in it, they will tell you if you are allowed to file there or not.

One of the determining factors is the number of employees that your employer had. If it is less than 50, you can't file with the EEOC, you have to go to state court or the Division of Human Rights. You also have to be mindful of the statute of limitations for EEOC; it is 180 days after the discrimination happened.

What Steps Should I Take If I Feel My Rights Are Being Violated In The Workplace?

First, Talk to Your Employer

Many employers have extensive training in the rights of workers. The first thing that you should do once you think that your workplace rights have been violated (such as discrimination) is to talk to your employer about the situation. Under most circumstances, an open and honest conversation can resolve difficulties and avoid the need for any legal action. Almost all companies want to stay within the bounds of the law and will work to avoid legal troubles.

However, there are still occasions when an employer can be truly antagonistic and uncaring about the rights of workers. Many people find that talking to their employer can be a difficult and stressful task. To make

things easier, here are a few tips that you can keep in mind when tackling this problem:

- **Be informed about your rights.** When you go to talk to your employer about the workplace rights you feel have been violated, it is best to know what those rights are exactly. This will give you confidence going into the meeting. Learn more about state-specific laws on our employment law legal answers page.
- **Keep the facts simple.** Treat this meeting with your employer like a business meeting -- take notes beforehand, write a brief summary of what violation occurred, and have a suggestion for how to resolve the situation. Many people find it useful to have a friend or a detached reader look over these facts and make suggestions about how best to approach the problem and which facts to include.
- **Remain detached during the meeting**. Yes, the events leading up to this meeting were most likely very stressful and upsetting but bringing those emotions to the meeting won't help your cause. If you can practice your presentation before hand, perhaps with a friend,

this will help you get your emotions out the first time, so you don't bring them with you to the meeting.

- **Figure out what to do next.** This is one of the most important steps to remember -- before you leave your employer's office, decide on the course of action that is to happen. Is the company going to look into the situation? Is your manager going to talk with your co-workers? What is going to change if problems are discovered? Before the meeting ends, make sure there is a plan for what's going to happen next.
- **Follow up.** Just like with any important meeting, be sure to follow up after your discussion with your employer. If you and your employer decided that your manager would investigate the problem, make sure that the investigation occurred. Try to schedule another meeting to see what progress has been made.

Second, Be Sure to Keep Your Own Records

Even if you have presented your employer with all the documents you think are relevant to the workplace rights issue, be sure to keep copies of everything for your own records. In addition, take notes of important conversations

that you have regarding the situation. If you can't take notes during the conversation, jot them down immediately after and remember to include important details such as the date, time, place and names of people who took part in the conversation. Also, gather any documents that you think may be relevant such as e-mails, employee handbooks, letters, company policy statements and others.

However, you need to be careful that you only retain documents that you have valid access to. There have been cases of workplace discrimination that have been compromised in the past because a person copied documents that were confidential, even though they related to the discrimination claim.

Also, if any of your co-workers saw or heard anything relating to your workplace rights situation, ask them to write down what they heard in signed and dated statements. These could include everything from water-cooler gossip to talk of open age discrimination in the company.

Third -- Deadlines, Deadlines, Deadlines!

When you have taken the above measures in talking openly with your employer and you still feel that nothing has been done to address your workplace rights, it may be time to consider taking legal action. The rights of workers are a very serious matter and the law may come down hard on employers who violate them, but there are still deadlines you must meet. The law in every state sets a statute of limitation for various types of legal actions which gives the amount of time in which a person has to bring a lawsuit or else give up the claim. These time periods can range from weeks to years, and which time period applies to your case in will depend both on your location as well as the rights that were violated and to what degree.

Have an Employment Attorney Evaluate Your Labor Claim

If you believe your rights as an employee have been violated, you may want to consult with an employment law attorney about your situation. The lawyer will be able to help you determine the strength of your legal claim, as well as point out any deadlines that may be approaching.

How Do Internal Complaint Procedures Work? Should I Trust Human Resources?

Characteristics Of A Good Internal Complaint Process:

- **Fair –** This means that both the person complaining (the complainant) and the person being complained about (the respondent) should have the opportunity to present their version of events, provide supporting information and respond to any potential negative decisions. In addition, the person investigating and/or making decisions about the complaint should be impartial; that is, he or she should not favor the complainant or the respondent or prejudge the complaint in any way.
- **Confidential –** This means that information about a complaint is only provided to those people who need to know about it, in order for the complaint to be actioned properly.
- **Transparent –** The complaint process and the possible outcomes of the complaint should be clearly explained and those involved should be kept informed of the progress of the complaint and the reasons for any decisions.

- **Accessible –** The complaint process should be easy to access and understand, and everyone should be able to participate equally. For example, an employee may require a language interpreter to understand and participate or a person with a disability may need information provided in a specific format.
- **Efficient –** The complaint process should be conducted without undue delay. As time passes, information relevant to the complaint may deteriorate or be lost, which will impact on the fairness of the process. In addition, unresolved complaints can have a negative and ongoing impact on a workplace.

A good complaint process will also include provisions to:

- Protect employees from being victimized because they have made a complaint
- Protect employees from vexatious and malicious complaints
- Ensure appropriate confidential records are kept about complaints and that this information is stored and managed appropriately.

CHAPTER 9

WHEN DOES EEOC GET INVOLVED? AND WHAT HAPPENS NEXT?

EEOC is vested with the authority to investigate any charges of discrimination brought against employers, who are generally subject to EEOC laws if they have at least 15 employees (in the case of age discrimination that rises to 20). Many labor unions and employment agencies fall under its jurisdiction as well.

The laws enforced by the EEOC apply to all types of work situations, processes, and functions. This includes the

hiring and termination of employees, harassment among the staff or management, job training, promotions, wages, and benefits.

If new events take place after you file your charge that you believe are discriminatory, the EEOC can add these new events to your charge and investigate them. This is called "amending" a charge. In some cases, the EEOC may decide it is better for you to file a new charge of discrimination.

If new events are added to your charge or a new charge is filed, the EEOC will send a copy of the new or amended charge to the employer and investigate the new events along with the rest. Keep in mind that the strict deadlines for filing a charge also apply when you want to amend a charge. The fact that you filed an earlier charge may not extend the deadline. For this reason, you should contact the investigator assigned to your case immediately if you think other discriminatory events have taken place.

Requesting a Notice of Right to Sue

You may request a Notice of Right To Sue by contacting the EEOC office handling your charge. You should submit the request in writing.

If you filed your charge under Title VII (discrimination based on race, color, religion, sex and national origin), or under the Americans with Disabilities Act (ADA) based on disability, you must have a Notice of Right To Sue from EEOC before you can file a lawsuit in federal court. Generally, you must allow EEOC 180 days to resolve your charge. Although, in some cases, EEOC may agree to issue a Notice of Right To Sue before the 180 days.

If you filed your charge under the Age Discrimination in Employment Act (discrimination based on age 40 and above), you do not need a Notice of Right to Sue from EEOC. You may file a lawsuit in federal court 60 days after your charge was filed with EEOC.

If you filed your charge under the Equal Pay Act (wage discrimination based on sex), you do not need a Notice of Right To Sue from EEOC. You may file a lawsuit

in federal court within two years from the day you received the last discriminatory paycheck.

Am I Protected From Workplace Retaliation If I File A Complaint Or A Lawsuit?

The anti-discrimination laws give you a limited amount of time to file a charge of discrimination. In general, you need to file a charge within 180 calendar days from the day the discrimination took place. The 180-calendar day filing deadline is extended to 300 calendar days if a state or local agency enforces a law that prohibits employment discrimination on the same basis.

VARIATION IN TIME LIMITS

Age Discrimination Claims

For age discrimination, the filing deadline is only extended to 300 days if there is a state law prohibiting age discrimination in employment and a state agency or authority enforcing that law. The deadline is not extended if only a local law prohibits age discrimination.

Ongoing Discrimination

In harassment cases, you must file your charge within 180 or 300 days of the last incident of harassment, although the EEOC will look at all incidents of harassment when investigating your charge, even if the earlier incidents happened more than 180/300 days earlier.

More Than One Discriminatory Event

Also, if more than one discriminatory event took place, the deadline usually applies to each event. For example, let's say you were demoted and then fired a year later. You believe the employer based its decision to demote and fire you on your race, and you file a charge the day after your discharge. In this case, only your claim of discriminatory discharge is timely. In other words, you must have filed a charge challenging the demotion within 180/300 days from the day you were demoted. If you didn't, the EEOC would only investigate your discharge. There is one exception to this general rule and that is if you are alleging ongoing harassment (see above).

Equal Pay Act

If you plan to file a charge alleging a violation of the Equal Pay Act (which prohibits sex discrimination in wages and benefits), different deadlines apply. Under the Equal Pay Act, you don't need to file a charge of discrimination with EEOC. Instead, you are allowed to go directly to court and file a lawsuit. The deadline for filing a charge or lawsuit under the EPA is two years from the day you received the last discriminatory paycheck (this is extended to three years in the case of willful discrimination).

How Long Does The EEOC Have To Resolve A Complaint?

Through its administrative enforcement process, the EEOC receives, investigates, and resolves charges of employment discrimination filed against private sector employers, employment agencies, labor unions, and state and local governments, including charges of systemic discrimination. Where the EEOC does not resolve these charges through conciliation or other informal methods, it may also engage in litigation against private sector employers, employment agencies and labor unions (and

against state and local governments in cases alleging age discrimination or equal pay violations

What kind of investigation the EEOC needs to undertake depends on the nature of your claim. In some cases, EEOC officials visit the employer to hold interviews and gather documents. In other cases, they interview witnesses over the phone and ask for documents by mail. After the investigation is over, the EEOC will let you and the employer know the result. How long the investigation takes depends on a lot of different things, including the amount of information that needs to be gathered and analyzed. On average, it takes nearly six months to investigate a charge.

CHAPTER 10

WHO IS ENTITLED TO RECEIVE UNEMPLOYMENT BENEFITS?

Eligibility requirements to qualify for unemployment compensation vary from state to state. However, according to the U.S. Department of Labor, there are two main criteria that must be met in order to qualify:

1. You must be unemployed through no fault of your own. In this case, a person's unemployment must be caused by an external factor beyond his or her control, such as a layoff or a furlough. Quitting your job with a

good reason or being fired for misconduct in the workplace will most likely render you ineligible for unemployment benefits.

There may be an exception, however, if wrongful termination or constructive discharge played a role in your termination from employment.

2. You must meet New York States requirements for time worked or wages earned during a set period of time. This marker can be confusing, but it's safe to assume that if you had a long-term job that you lost unexpectedly or without just cause, you would meet your state's requirements.

If An Employer Temporarily Lays Off Its Employees, Do Employees Have A Right To Be Paid In Full On The Date Of The Lay Off?

Wages must be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned. Manual workers for nonprofit entities must be paid in accordance with their agreed terms of employment but not less frequently than semi-monthly. Large employers

of manual workers may apply to the Commissioner of Labor to pay manual workers semi-monthly.

Commission Salespersons must be paid in accordance with the agreed terms set forth in the written commission agreement but not less frequently than once in each month and not later than the last day of the month following the month in which the wages are earned. If wages are substantial, additional compensation earned, including extra or incentive earnings, may be paid less frequently than once in each month.

Executives, Administrators, and Professionals:

New York frequency pay law does not apply to persons employed in a bona fide executive, administrative, or professional capacity whose earnings are in excess of $900 a week.

Clerical or Other Workers:

Wages must be paid in accordance with the agreed terms of employment and not less frequently than semi-monthly.

Can My Claim For Unemployment Benefits Be Denied? What Do I Do If That Happens?

Earnings and Work Requirements:

States measure whether your unemployment is temporary by looking at your recent work history. You must have worked a minimum amount of time, earned a certain amount, or both, in order to qualify for benefits. States require employees to meet these minimum requirements during the "base period": a one-year time frame consisting of the earliest four of the five complete calendar quarters before the employee files for unemployment. For example, if an employee files for benefits in August of 2019, the state will look at the employee's work history during the one-year period from April 1, 2018, through March 31, 2019.

Even if you have earned enough money to qualify, it must be in covered employment. For example, if you are in business for yourself, those earnings may not qualify.

If You Quit:

If you quit voluntarily, without good cause, your claim for unemployment benefits will be denied. Each state

has its own definition of good cause. Some states allow employees to collect benefits only if their reason for quitting was related to work (for example, because their working conditions were dangerous and the employer refused to do anything about it). Other states allow employees to collect benefits if they quit for certain compelling personal reasons, such as domestic violence.

If You Are Fired:

New York allows employees to collect unemployment benefits if they were fired for failing to meet performance standards or lacking the skills necessary for the job. As long as the employee's failure wasn't intentional, the employee will be eligible for benefits. However, every state disqualifies employees who are fired for serious misconduct, as defined by state law. As is true of eligibility for benefits after quitting, some states are more generous than others in deciding whether benefits should be available after an employee is fired.

If Your Benefits Are Granted:

Even if you are initially found eligible for benefits, the state may later decide to deny your claim if it finds that

you are no longer able, available, and actively seeking work. Employees must meet these ongoing requirements to continue collecting benefits. An employee who isn't looking for a job, or couldn't take one if it was offered, won't be eligible for benefits.

CHAPTER 11

SOME POTENTIAL RESOLUTIONS TO EMPLOYMENT LAW ISSUES

WAGES

Courts have ruled that undocumented aliens working in this country have the same right to file court claims for overtime compensation and liquidated damages under the Fair Labor Standards Act (FLSA) as workers who are in this country legally.

DISCRIMINATION

Anti-discrimination laws are intended to prevent discrimination and, if this prohibited conduct occurs, to put the victim back into the position he or she would have been in if it had not occurred. There are, therefore, a variety of remedies that may be available to an employee who has experienced discrimination. The specific remedies available will depend on the facts and circumstances of the particular case.

Title VII prohibits employers with 15 or more employees from engaging in discrimination based on race, color, national origin, age, sex, or religion. Depending on the facts of the case, a person who has experienced employment discrimination may be entitled to injunctive relief, front pay, back pay, and compensatory and punitive damages.

Injunctive Relief

Under Title VII, if a court determines that an employer intentionally engaged in an unlawful employment practice, it may issue an injunction to keep the

employer from engaging in that practice again. The court may also order the employer to hire or reinstate an employee, or other equitable relief.

Front Pay

If it is not feasible to order the employer to hire or reinstate the employee, a court may order the employer to pay "front pay" to an employee who has been the subject of employment discrimination. Front pay compensates the employee for the anticipated future damages resulting from the discrimination, in terms of wages and benefits he or she would have received.

Back Pay

Title VII specifically allows for the recovery of back pay in an employment discrimination case. Back pay includes not only lost wages but also other benefits the employee would have received. An employee may only recover back pay for a period of up to two years prior to the date the charge was filed with the Equal Employment Opportunity Commission.

Compensatory and Punitive Damages

If there was intentional discrimination, an employee may be able to recover compensatory and punitive damages. Compensatory and punitive damages under Title VII are subject to a combined cap based on the employer's size.

Compensatory damages may include future pecuniary and non-pecuniary losses, including suffering, mental anguish, inconvenience, and loss of enjoyment of life. Pursuant to 42 U.S. Code § 1981a, compensatory damages do not include back pay or interest on back pay. Back pay is not, therefore, subject to a cap.

Punitive damages are only available if the employer engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

Limitation on Recovery

In a case in which a claimant proves that sex, race, color, religion, or national origin was a motivating factor for the employment practice, but the employer is able to

show that it would have taken the same action without that impermissible motivating factor, the court cannot ward damages or order reinstatement, hiring, or promotion. The court may, however, grant other declaratory or injunctive relief and award attorney's fees and costs.

Attorney's Fees

Title VII allows a court to award attorney's fees and expert fees to the prevailing party. Americans with Disabilities Act ("ADA") the same remedies available under Title VII are available to individuals with employment discrimination claims under the ADA.

Age Discrimination in Employment Act of 1967 ("ADEA")

The remedies available under the ADEA for age discrimination may include injunctions, reinstatement, lost wages, and liquidated damages in the same amount as the lost wages. Liquidated damages are only available when the violation of the ADEA was "willful." The ADEA does not provide for the recovery of non-economic damages, such as pain and suffering. Equal Pay Act The Equal Pay

Act prohibits sex discrimination in compensation. Remedies available under the Equal Pay Act include injunctive relief and lost wages. Liquidated damages in an amount equal to the lost wages may be available if the violation of the law was "willful."

CHAPTER 12

WHAT RIGHTS DO UNDOCUMENTED IMMIGRANTS HAVE IN THE WORKPLACE?

With a few exceptions, undocumented workers enjoy all of the legal rights and remedies provided by both Federal and New York Law. Specifically, The New York courts have had to wrestle with the issue of whether the remedies typically available to workers under the Labor Law are applicable to illegal aliens. An undocumented alien's ability to recover lost wages under the New York Labor Law became a prominent issue after Congress

enacted the Federal Immigration Reform and Control Act in 1986 (IRCA), which makes it illegal for an employer "to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien" and for an illegal alien "to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document" in order to obtain employment.

Labor Rights Of Undocumented Workers

Like any employee, you have the right to be paid for the work you do, at minimum wage, at least, plus overtime pay when legally required. Like other workers, you also have the right to healthy and safe conditions on the job, free from abuse, exploitation, or sexual harassment. These rights are all too often violated, however, because employers know the workers don't want to reveal their undocumented status.

If you're hurt on the job, you have the right to collect workers' compensation benefits in New York.

Undocumented immigrants are blocked from collecting unemployment insurance in most states, because a condition of unemployment insurance is usually that the employee must be willing and able to work. Undocumented workers are not technically able to work, so they don't qualify.

Protections Against Discrimination

Undocumented immigrants are legally protected against discrimination on the basis of race or nationality, by employers or anyone else. Employers must ask you for your legal authorization to be in the United States before they can hire you, but they can't single you out and ask only you, or only individuals of your nationality. To be legal, the employer's asking for documentation must be company policy, covering all workers.

As An Undocumented Worker, What Are My Rights Under Health And Safety Laws At Work?

Health and safety laws protect all employees regardless of their immigration status. Therefore, undocumented workers have rights to information regarding their health and safety rights. They have the right to refuse unsafe work if they

reasonably believe it would create a real and apparent hazard to them or their co-workers.

Filing a Health and Safety Claim:

If you choose to file a health and safety claim, you should contact OSHA. The agency will then investigate for health and safety violations and your employer may be forced to stop its illegal practices. OSHA should not question you about your immigration status or report your lack of status, if it is somehow revealed.

CHAPTER 13

WHEN IS THE RIGHT TIME TO HIRE AN EMPLOYMENT LAW ATTORNEY?

Here are some of the situations in which you are strongly encouraged to speak with an attorney immediately:

- You have concerns about how you are being treated in the workplace or whether your termination or lay off was legal;
- You are considering quitting your employment because of your employer's apparently unlawful conduct;

- You do not want to or cannot negotiate with your employer regarding severance pay;
- You do not clearly understand your rights or are unsure of the proper action to take after your termination;
- You are nearing the end of your "statute of limitations" or deadline for filing suit and are still unsure of how or where to file a claim;
- You are being pressured to sign a complicated and lengthy "release of claims" that you do not fully understand;
- You want to file a lawsuit in state or federal court;
- You know of many other employees who want to bring the same type of claim against the same employer;
- You are dissatisfied with a governmental agency's (such as the EEOC) investigation of your complaint;
- You have powerful evidence that your termination was illegal.

If you delay contacting an attorney, you will not know what you may be able to do to prevent your situation from worsening and you may not properly document events as they occur. Because it is your burden to prove an illegal motive, such as discrimination or retaliation, you

must document the evidence that supports your claims. If you fail to document events as they happen, later you may not have the evidence necessary to prove your case. You need documents or a witness to confirm facts and events. If it is your word against your manager's word, it will be very difficult to prove your claim.

How Can Someone Help His Or Her Employment Law Attorney To Prove Their Case?

There are many different things that you can use as evidence in to prove your case and that you must provide to your lawyer. The list that you will find below does not represent all of the potential evidentiary forms that can be used to prove your employment discrimination claims. This list is meant to provide you with some examples of things that you can use in your case and hand to your attorney:

One of the hardest things about proving an employment discrimination case is the fact that many employment discrimination cases are based on circumstantial evidence. Circumstantial evidence is quite different from direct evidence.

It is extraordinarily rare for an employer to tell any employee that he or she is being terminated, demoted, etc., because of their race, religion, sex, or other protected distinction under the law. Instead, employers attempt to provide different reasons for termination, such as subpar performance, violations of the employee handbook, etc.

Many of the examples below provide circumstantial evidence to help you support your claim of employment discrimination. Keep in mind, a substantial percentage of cases do not actually go to trial; however, collecting this evidence can be important even if your case does not go to trial, because you can use this evidence during negotiations and the mediation process as leverage.

Performance Reports

If your employer claims that you were terminated due to poor performance, you should collect your past performance reports to use in your employment discrimination case. If you have never had a poor performance report, this can be used to show that your employer's claim is false and not based on any recorded performance issues. Indeed, your performance reports will

show that you were completing your job in a satisfactory or exceptional manner.

Timing of Discriminatory Adverse Employment Actions

The suspicious timing of your termination, demotion, wage/hour decrease, or other adverse employment action can also be used to show that you were discriminated against. For example, if you told your employer that you were pregnant, and then you were terminated a week later, you may be able to use the suspicious timing of the termination as evidence of employment discrimination.

Communication with your Employer

If you believe that you were terminated from your employment or that you suffered an adverse employment decision due to illegal discrimination, it is crucial that you save communications with your employer and/or the discriminatory actor. Make sure to get details about your termination in writing so that the trial of your case is not a "he said, she said" debate. You should also print and save any emails or other types of communications that you have that could show discrimination by your employer.

Job Description

This simple item of evidence will help you more than you would think! Employers will often attempt to state that an employee was not living up to expectations. If you have your job description, you can show that you were completing each task that was assigned to you in the job description in a satisfactory manner. You can also introduce evidence of your qualifications to show that an employer/potential-employer wrongfully passed you up for a promotion or job offer. This can also be used to show that your employer replaced you with someone who was less qualified for the job based on discriminatory reasons.

Your own Testimony

It often surprises people that their testimony during trial can be one of the most important elements of proving your case. In order to prepare for testimony in an employment discrimination case, you should write down an account of the discrimination that you were facing at work in as must detail as humanly possible. Write down your experiences with your supervisor and the company

management or human resources, as this information could prove to be invaluable when you take your case to trial.

Remember that it may not be the best decision to testify in court, so you should discuss your particular situation with an attorney. An experienced attorney will be able to help you determine whether testifying at trial is in your best interest.

Statements from Witnesses

Although cliché, witnesses can make or break a case. Jurors can often connect to the statements of certain witnesses when they are determining whether discrimination occurred as the plaintiff alleged.

Witness testimony can also help break the "he said, she said" nature of employment discrimination cases. Often, unfortunately, these types of cases put the word of the employer against the word of the employee. If you find yourself in this situation, witness testimony can be very helpful to sway the jury in your favor.

Medical Information & Protected Class Information

If you have been a victim of discrimination based on a recognized disability, you will need to show that you have such a disability. This can be shown through medical documentation and notes from medical care providers. In other words, you can introduce your medical records to support your claim.

You can also have your doctor (or an expert witness) testify about your medical condition. If you are claiming that you were discriminated against based on your membership in a protected class, you will need to prove that you are a member of the protected class. This will often be very easy to prove, and the parties may stipulate to this fact.

Documentation Relating to Your Termination

You may need to introduce documentation relating to your termination during your employment discrimination case. For example, if your employer claims that you were terminated because of excessive tardiness, you should request documentation of the tardiness from your employer. This will help you prove that the

employer's reason for your termination was not actually the reason for your termination.

One of the best things that you can do for your employment discrimination case is to hire an experienced employment law attorney. Unfortunately, your employer may not take you seriously if you attempt to represent yourself in an employment discrimination case. Once you have an experienced employment discrimination attorney on your side, you will be able to show your employer that you are serious and ready to fight back.

What Does It Mean To "Prove Facts" Or "Prove My Case"?

Judges at courts make decisions based on hearing 'evidence' in cases before them. Evidence can include things like:

- Information that witnesses and other people give in affidavits
- Information that witnesses and other people give at a hearing or trial in court (oral or verbal information given under oath, swearing or affirming that it is truthful)

- Documents, photographs, records, files, expert reports or other written papers presented or given in the court case.

In hearing court cases and making decisions, judges have to follow certain special rules, called 'rules of evidence.' Self-represented people and lawyers have to follow the same rules. The rules help judges decide whether to accept and believe the information presented in the case.

If the judge has not heard or seen the information or has heard or seen it but does not believe it to be true, then the judge cannot use that information to help them make a decision in the case or base their decision on. If the judge hears or sees the information and believes it, then we say that fact has been 'proven.'

There is also another legal term that is used in hearings and trials, called the 'burden of proof.' This means that the person asking the court to find that certain information is correct and truthful must prove it (has the 'onus' on them to prove it). In other words, each person has to give information to the court about a certain fact and the information has to be believed before the judge will say the

fact has been proven or that the person has passed the burden of proof. If a fact is proven, then the judge can use it to make a decision about the legal problem before the court.

There may be hundreds of facts or pieces of information to look at in any court case. The judge has to be sure that there are enough proven facts dealing with each legal issue to make a decision. We call this the 'the standard of proof.' The amount of proof needed in a family law case is called proof on 'a balance of probabilities' (more probable or likely than not).

At the end of the case, the judge has to be able to 'add up' all the facts and then come to a decision of whether things have been proven and how much proof has been given. We usually call this process 'weighing the evidence.' Then they have to apply the law to the facts that have been proven.

Sometimes it is hard to know what the real facts are. Judges do not have the benefit of having seen or heard things firsthand. Judges will also look at things like how people act in court, how they appear to have acted outside of court and how they answer questions, to help them decide whether people are being truthful.

All of these rules are in place for a reason. They have come into place over a long time with judges making decisions and governments making laws to try and make things fair. They are there to protect people and to make sure that cases are properly heard. If people could go into court and say anything they wanted and expect to be believed, then there would be no way for judges to decide what to do.

CHAPTER 14

WHAT TO LOOK FOR WHEN HIRING AN EMPLOYMENT LAW ATTORNEY?

First, you need to make sure that the Employment Lawyer specializes in Employment Law! You do not want someone who practices in a lot of areas because Employment law is highly specialized. Second, you need to make sure an attorney you are considering has a good reputation in the community. I get a lot of my clients just from referrals from other lawyers, and also from prior clients. Take a look at their website and read the reviews. Almost all Employment Lawyers give a free consultation.

A lot of it is just going by your instincts and whether you feel comfortable with that attorney or not.

Be very wary of any attorney that promises any kind of results because ethically, we are not allowed to do that. Do not hire any lawyer who implies that he can get your charge dismissed by some unethical means. Sometimes a lawyer may imply bribery or influence over the judge, or influence over the prosecutors. The fact of the matter is, lawyers like that eventually get caught and they may be disbarred by the time your case comes to trial. You are not going to be able to get that money back that you paid.

If that is what a client wants, that is fine. The main thing you have to do is make sure that you hire someone that is going to listen to your side and not just talk. This person needs to be creative in looking for solutions and not just trying to do things the way that they have always been done. You have to go with your instincts, but you also have to do some research. Another thing is, do not go by price. If somebody is charging less than everybody else, then they are probably taking a lot of volume, which means they are

not going to be able to give your case individual attention. You get what you pay for, just like with anything else.

You should also make sure that the lawyer you are talking to is the one that is going to handle your case. It is always a good idea to make sure he is not going to hand it over to some associate that you do not necessarily feel good about. You also need to ask the attorney what his policy is on returning calls and communication. I tell my clients if they want to text me or email me, it is going to be a lot easier for me to respond because I can be sitting in court waiting and I can reply immediately whereas I cannot call them.

I hear complaints all the time that lawyers will not return people's calls or will not talk to them. You need to ask about that. There is no reason to pester your lawyer because the more you pester them for no reason, then that is time he is not spending on your case. However, you ought to be able to have updates given to you regularly. All lawyers spend a lot of dead time in court, and that is when I try to answer my emails. If a lawyer is too busy to keep his client updated, then you do not want him or her.

What Sets You And Your Firm Apart In Handling Employment Law Cases In New York?

What sets my firm apart is that you have 100% access to me, the lawyer. A lot of law firms have paralegals or assistants answering all the questions. My firm advocates on behalf of plaintiffs exclusively! My trial experience is extensive, both in front of juries and court-tried cases. Such a background gives me the confidence that if a settlement is not feasible for any reason, then my trial skills and experience will be an invaluable asset to the client. I am willing to accept difficult cases and believe that even those can be resolved short of trial with the proper handling of the case.

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KNOWING YOUR RIGHTS

A GUIDE FOR WORKING PEOPLE IN NEW YORK

Lina Stillman, Esq.

Lina has dedicated her entire legal career to the practice of labor and employment law and to help employees exclusively. She has experience in all areas of employment law including strategy, tactics, state law, and complaints before the EEOC, the NLRB and all of the government agencies involved in employment law in New York. She is passionate about fighting for the rights of underserved populations and specially the working class. Her mission is made evident by her practice's motto: "We are the law firm for the working people."

In order to provide clients with the best service possible, she offers a wide range of employment advice, training, investigations, and litigation on the subjects of discrimination, sexual harassment, hostile work environment, unpaid overtime, and minimum wage.

"Lina Stillman has been my lawyer from 2015-Present. She is the most reliable attorney anyone can have! And has been the one I go to for my Employment Authorization Renewals. She is always on top of things very knowledgeable, trustworthy and caring also quick to respond to any questions via texts and she always returns calls if anything. It's even better we can communicate in English and Spanish as well!"

– Guadalupe R.

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"Lina Stillman is about as good as lawyers get. She is patient and unsurpassed in her knowledge of employment law. He responded to my inquiry extremely quickly and answered all my questions when no one else would. She provided clear, easy-to-implement options to my situation. I would highly recommend her."

– Ryan B.

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