

Attorneys: Employment Discrimination in Employee Benefits

William P. Callinan

Member

Johnson + Krol, LLC

Chicago, Illinois



The opinions expressed in this presentation are those of the speaker. The International Foundation disclaims responsibility for views expressed and statements made by the program speakers.

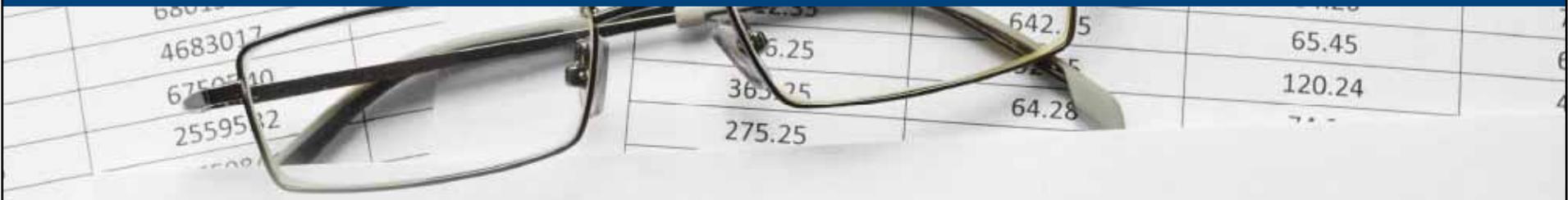
International Foundation
OF EMPLOYEE BENEFIT PLANS 

Today's Agenda

1. Relationship between ERISA and employment discrimination
 - Family and Medical Leave Act (FMLA)
 - Title VII of the Civil Rights Act of 1964
2. Avoiding employment discrimination in the fund office
3. Trustees' role in preventing employment discrimination



What Is ERISA?



6801	4683017	65.25	642.5	65.45
6750540	2559512	365.25	64.28	120.24
275.25				

ERISA

The Employee Retirement Income
Security Act



What Is ERISA?

- The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for most private retirement and health plans to provide protection for individuals in these plans.
- The goal of Title I of ERISA is to protect the interests of participants and their beneficiaries in employee benefit plans.



What Is ERISA?

- ERISA covers retirement plans including both defined benefit and defined contribution plans and welfare benefit plans (including apprenticeship/training plans).
- ERISA does not cover plans established by governmental entities, churches, or plans maintained solely to comply with workers compensation, unemployment or disability laws.

What Is ERISA?

- ERISA is enforced by the Employee Benefits Security Administration (EBSA).
 - EBSA is responsible for administering and enforcing the fiduciary, reporting and disclosure provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA).
 - DOL Audits.



What Is ERISA?

- **Section 510 of ERISA** makes it illegal for an employer to "discharge, . . . suspend, . . . discipline, or discriminate against [an employee] for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . Or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." 29 U.S.C. § 1140.
- To recover under section 510 of ERISA, an employee must establish that an adverse action affecting his employment situation was taken by his employer with the "*specific intent*" of interfering with his benefit rights.

Section 510 of ERISA

- Section 510 of ERISA was aimed primarily at preventing employers from discharging or harassing their employees to keep them from obtaining vested pension or welfare rights.



Employment Discrimination: ERISA and the Family and Medical Leave Act (FMLA)



FMLA and ERISA

- What is FMLA?
 - The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, job-protected leave per year.
 - FMLA also requires the employee's group health benefits be maintained during the leave.
 - FMLA applies to all public agencies, all public and private elementary and secondary schools, and companies with 50 or more employees.

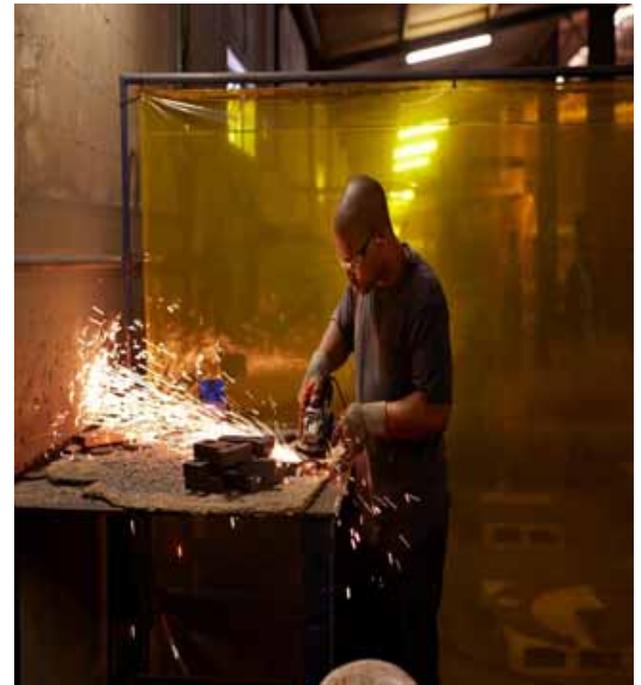
FMLA and ERISA

- Covered employers must provide an eligible employee with up to 12 weeks of unpaid leave each year for any of the following reasons:
 - For the birth and care of a newborn child
 - For care of an adopted child
 - To care for an immediate family member
 - To take medical leave for a serious health condition
 - When a family member is deployed to a foreign country (added in 2008)



FMLA and ERISA

- Employees are eligible for leave if they have worked for their employer at least 12 months, at least 1,250 hours over the past 12 months, and work at a location where the company employs 50 or more employees within 75 miles.



FMLA and ERISA

- There are two distinct theories of recovery under the FMLA.
 - **Interference**: An employee may raise a claim against his or her employer for interfering with rights to which the employee was entitled.
 - **Retaliation**: An employee may file a claim against an employer for retaliating against the employee for invoking his or her rights under the FLMA.

FMLA and ERISA

- *Norrell v. Jeff Foster Trucking, Inc.*
 - Employee worked for Employer for a period of six years. Employee requested FMLA leave to receive treatment for depression and alcoholism. After completing a treatment program, Employee requested to return to work, but Employer refused to reinstate him. Employer made comments about how much the Employee's medical treatment was costing the company, which was self-insured. Employer eventually terminated Employee.
 - Employee brought a lawsuit against the Employer alleging the Employer violated FMLA and ERISA by terminating him for taking FMLA leave and getting treatment under the welfare plan.
 - The Employer moved to dismiss the Complaint.



FMLA and ERISA

- *Norrell v. Jeff Foster Trucking, Inc.*
 - The court denied the Employer's Motion to Dismiss on both the FMLA and the ERISA claim.
 - The court determined the Employee had established a prima facie case that he was entitled to FMLA leave and the Employer intentionally denied him such leave.
 - For the ERISA claim, the Court determined the Employer's statements about how much the treatment was costing the company were "more than sufficient to raise an inference that [the Employer] acted with the requisite specific intent " to deny the Plaintiff benefits under the ERISA plan.
 - The case eventually settled.



FMLA and ERISA

- *Maynard v. Total Image Specialists, Inc.*

- Employee worked for Employer for more than 20 years. In 2003, Employee requested leave from Employer to have a lump in his breast examined. Employee then sought time off to seek treatment for the lump in his breast and requested disability paperwork from the Employer. Employer terminated Employee for absenteeism prior to processing Employee's disability claim. Employee brought suit under FMLA (interference and retaliation) and Section 510 of ERISA.
- The Employer moved for Summary Judgment on the FMLA and ERISA claims on the grounds that Employee was terminated for absenteeism and not for taking FMLA leave.



FMLA and ERISA

- *Maynard v. Total Image Specialists, Inc.*
 - The Court denied the Employer's Motion for Summary Judgment on the FMLA claims (interference and retaliation) and the ERISA claim.
 - On the ERISA Section 510 claim, the Court determined the Employee had established a prima facie case that the Employer acted with the *specific intent* to deny paying the disability benefits.
 - The Court held that a genuine issue of material fact existed as to whether the Employer's proffered reason for terminating the Employee, absenteeism, was mere pretext.



FMLA and ERISA

- *Stein vs. Atlas Industries*

- Plaintiff's son suffered from a very rare neurological condition. Plaintiff was forced to take time off work to care for his son. Plaintiff then tore his meniscus at work. That injury required surgery. Plaintiff took medical leave to have the operation and recover.
- After being released by his doctor to return to work, Plaintiff failed to show up for work. The Employer fired Plaintiff for missing work three days in a row, which was company policy. Plaintiff sued under Section 510 of ERISA and FMLA.
- The Employer moved for Summary Judgment on the grounds that Plaintiff was terminated for missing work three days in a row after being cleared by his doctor to return.



FMLA and ERISA

- *Stein vs. Atlas Industries*

- The Court granted the Employer's summary judgment motion holding the Plaintiff had an obligation to return to work after being cleared by his doctor. The Court further held that the Employer was within its right to terminate Plaintiff as per company policy for missed work. The employer did not act with the *specific intent* to deny employee benefits under the Plan.
- The District Court's decision to grant summary judgment in favor of Employer was upheld on appeal to the Sixth Circuit.



FMLA and ERISA

- **Practice Tips**

- If you are making an employment decision (hiring, firing, promoting, etc.) with the *specific intent* to avoid paying benefits under a retirement or health plan you are likely violating Section 510 of ERISA.
- Talking about the specific cost of health or retirement benefits prior to terminating an employee, is not advised.

Employment Discrimination: ERISA and Title VII



What Is Title VII?

- Title VII of the Civil Rights Act of 1964 is a federal law that prohibits discrimination in employment based on race, color, religion, sex and national origin.
 - Title VII generally applies to employers with 15 or more employees.
 - The prohibition against discrimination on the basis of “sex” includes discrimination based on sexual orientation and gender identity. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
 - “Sex” also includes pregnancy.



ERISA and Title VII

- Under Title VII, employers may not consider a person's race, color, sex, national origin or religion in determining eligibility for or the cost of employee benefits.
- Said another way, all health and retirement benefits must be provided without regard to race, color sex, religion or nation origin.



ERISA and Title VII

- EEOC Example
 - Employer health plan covers treatment of heart attacks. Citing statistics that show that men suffer heart attacks more frequently, and at earlier ages, than women. Employer treats coverage of heart conditions as a supplemental benefit for which men, but not women, will have to pay an additional premium.
 - This is unlawful discrimination on the basis of sex.
 - It is not a defense that coverage for heart conditions may cost the Employer more for men than for women.

ERISA and Title VII

- *Fleming v. Ayers & Assoc.*

- Employee worked for Employer as a Licensed Practical Nurse. While working for the Employer, the Employee gave birth to a baby boy. The baby was born prematurely and required hospitalization for several months and continuing treatment thereafter. With Employer's approval, Employee extended her maternity leave to care for her newborn child. When Employee sought to return to work, Employer notified her that she was no longer employed there.
- Employee brought suit for pregnancy discrimination under Title VII and for discrimination under Section 510 of ERISA.
- Employer admitted the decision not to retain Employee was "because of the high insurance costs associated with the illness of her child."



ERISA and Title VII

- *Fleming v. Ayers & Assoc.*
 - After a trial, the Court found the Employer violated Section 510 of ERISA by discharging the Employee to avoid paying the high medical costs for her newborn child.
 - In its decision, the Court pointed to the Employer's statement that it was terminating the employee "because of the high insurance costs associated with the illness of her child."
 - The Court did not find a violation of Title VII. The Court determined that the Employee was not terminated specifically due to her sex, only to avoid the high costs of the dependent child.



ERISA and Title VII

- *Echols v. Lokan and Associates*

- Employee was hired by Employer as a consultant. Shortly after being hired, Employee informed her direct supervisor that she was pregnant. Employee later inquired with her supervisor about enrolling in the company health plan. The supervisor told Employee that he would get her the enrollment materials the following day. Employee was terminated the next day before ever receiving the enrollment materials.
- Employee brought suit for pregnancy discrimination under Title VII and for discrimination under Section 510 of ERISA.
- Employer filed for summary judgment on the grounds that it terminated Employee for poor performance, not due to her pregnancy.



ERISA and Title VII

- *Echols v. Lokan and Associates*

- The Court granted the Employer's motion for summary judgment on the ERISA claim but denied summary judgment on the Title VII claims.
- In denying the Employer's motion for summary judgment on the Title VII claims, the Court held that although the Employer had provided evidence to show a legitimate non-discriminatory reason for the Employee's termination (poor performance), a genuine issue of material fact existed as to whether the non-discriminatory reason was simply pretext. The Court said that the timing of the termination (immediately following the notice of pregnancy) was suspect.
- Other employees who also missed their sales goals were not fired, combined with specific statements about Employee's pregnancy leave.



ERISA and Title VII

- **Practice Tip**

- It is important to have supporting documentation to back up the basis for an employee's termination.
- Termination for poor performance should be supported by written evaluations, sales records, reports, etc. This helps get past a pretext argument.
- Statements that you are terminating an employee "to avoid paying medical bills" are not recommended.

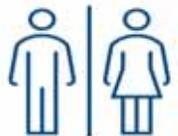
Avoiding Employment Discrimination



Recent Discrimination and Harassment Cases— Equal Employment Opportunity Commission

- Transportation company ordered to pay \$36 million for ADA violations. (2023)
- Lowes settles sexual harassment suit for \$700,000 (2022).
- Tesla ordered to pay more than \$130 million in damages to former black worker (2021).
- Chicago Meat Authority to pay \$1.1 million to settle EEOC racial discrimination and retaliation suit (2022).
- EEOC files racial harassment lawsuits against three construction employers (2021).
- EEOC sues Security Company in New York for discrimination and harassment based on age and disability (2022).
- McDonalds Franchise owner settles sex discrimination and retaliation lawsuit for \$1.6 million (2022).

Common theme: Employer was aware of the hostile work environment or discriminatory actions but failed to take action to stop it.



Federal Law and Regulations Enforced by the EEOC

- **Title VII of The Civil Rights Act of 1964 (Title VII)**
 - Prohibits discrimination against an individual on the basis of race, color, religion, national origin, or sex.
- **The Equal Pay Act Of 1963 (EPA)**
 - Prohibits an employer from paying different wages to men and women who perform equal work in the same workplace.
- **The Age Discrimination in Employment Act Of 1967 (ADEA)**
 - Prohibits discrimination against an individual because of their age who is 40 or older.
- **Sections 501 and 505 of the Rehabilitation Act of 1973**
 - Prohibits discrimination against a qualified individual with a disability in the federal government.

Federal Law and Regulations Enforced by the EEOC

- **Title I of The Americans Disabilities Act of 1990 (ADA)**
 - Prohibits discrimination against a qualified individual with a disability in the private sector and in state and local governments.
- **Genetic Information Nondiscrimination Act of 2008 (GINA)**
 - Prohibits discrimination against an individual because of their genetic information regarding any disease, disorder or condition of an individual's family medical history.
- All federal laws and regulations prohibit the retaliation against an individual for complaining, filing or participating in a discrimination investigation or lawsuit against an employer.

Federal Law and Regulations Enforced by the EEOC

- Federal laws against discrimination and harassment are enforced and regulated by the U.S. Equal Employment Opportunity Commission (EEOC).
- Federal laws divide discrimination by type
 - Race
 - Color
 - Religion
 - National origin
 - Sex
 - Sexual orientation
 - Gender identity
 - Pregnancy
 - Age (40 or older)
 - Disability
 - Genetic information



Harassment and Discrimination: What Is It?



Harassment and Discrimination: What Is It?

- **What is Harassment?**

- “**Harassment**” is verbal, written or physical conduct that denigrates or shows hostility or aversion toward an individual because of his or her race, color, religion, sex, sexual orientation, gender identity or expression, national origin, age, disability, marital status, pregnancy, citizenship, national origin, genetic information, or any other characteristic protected by law, and that:

- Has the purpose or effect of creating an intimidating, hostile, or offensive work environment; or
 - Has the purpose or effect of unreasonably interfering with an individual's work performance

- ***In short***: *Verbal, written or physical conduct that shows hostility towards an individual because of a characteristic that is protected by law (race, color, religion, national origin, sex, etc.)*

Harassment and Discrimination: What Is It?

- **What is Sexual Harassment?**
 - “**Sexual Harassment**” is unwelcome conduct of a sexual nature that is sufficiently persistent or offensive to unreasonably interfere with an employee's job performance or create an intimidating, hostile or offensive working environment.
- ***In short: Unwelcome conduct of a sexual nature that is **persistent** or **offensive**.***

Harassment and Discrimination: What is it?

- What is Discrimination?
 - “**Discrimination**” is an employment practice that tends to treat employees unequally based on a trait or characteristic proscribed by law. Such traits or characteristics include race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.
- ***In short: Biased treatment of an individual because of a characteristic that is protect by law.***

Categories of Sexual Harassment

Sexual harassment can be divided into **two** categories:

Quid Pro Quo (“This for That”): The employee or employer seeks to exchange a sexual act in return for a loss of, or gain of, an opportunity in the workplace.

Example: A person in authority threatens to prevent the employee’s promotion unless employee submits to the sexual advances.

Hostile Work Environment: Uninvited behavior that creates an intimidating, hostile or offensive workplace that can be created through direct or indirect actions.

Example: An employee cracks jokes about a co-worker’s appearance almost on a daily basis when he walks by.

Quid Pro Quo vs. Hostile Work Environment

Ex 1. Paul, a first-year apprentice, was subjected to offensive and derogatory comments from his co-workers regarding his sexual preferences and sexual tendencies. He informed management of the comments/treatment, and he was told that he needed to “grow thicker skin if he is going to survive working construction.”

HOSTILE WORK ENVIRONMENT

Ex 2. James has repeatedly complained to his supervisor of inappropriate text messages that he received from his coworker. The text messages included derogatory slurs, inappropriate jokes and occasionally nude photos. Most of the text messages were sent after hours or during personal time.

HOSTILE WORK ENVIRONMENT

Quid Pro Quo vs. Hostile Work Environment

Ex 3. Laura, an apprentice, is in a meeting with two of her supervising journeymen, Roger and Don. Roger spends the majority of the meeting making comments about Joan's outfits and her physical appearance. At the end of the meeting, Roger tells Joan "that if she continues to dress and act that way, she is guaranteed to get good apprentice reviews from him."

QUID PRO QUO AND HOSTILE WORK ENVIRONMENT

Workplace Harassment in the Eyes of the Court

- *EEOC vs. Smith's Detection Inc.*
 - The EEOC brought suit against Smith's Detection, Inc., for demoting a disabled employee to avoid providing her with certain personal protective equipment (PPE). The employee, who suffered from near complete hearing loss in her left ear, asked her employer for PPE to protect her remaining hearing from the manufacturing noise in the area where she worked as a team lead. The employer responded to the requested accommodation by demoting the employee from her team lead position, resulting in reduced pay, and instead assigned her to a different area.
 - The EEOC determined this conduct by the Employer violates Title I of the Americans with Disabilities Act, which prohibits discrimination on the basis of disability.
 - The EEOC said that "Employers must be reminded that a reasonable accommodation is an adjustment or modification to the workplace that enables the employee to continue her work."

Workplace Harassment in the Eyes of the Court

- *EEOC vs. Rooms-to-Go*

- The Claimant was hired to work as a shop apprentice. The job required the use of various chemicals to repair furniture. Several months after being hired, the Claimant informed her supervisor that she was pregnant. Thereafter, the Claimant was told that some of the chemicals used to repair furniture could pose a risk to a pregnant woman and/or her unborn child. She was then placed on restricted duty and told she could no longer work at the facility.
- The EEOC determined this conduct by the Employer violates Title VII of the Civil Rights Act of 1964.
- The EEOC said that “Pregnant women have the right to make their own decisions about working while pregnant, including the risks they are willing to assume”.
- *Employers can offer accommodations to pregnant employees but should not treat them differently than other employees.*

Workplace Harassment in the Eyes of the Court

- *EEOC vs. River's Edge Bar and Grill*
 - The EEOC filed suit against River's Edge Bar and Grill after one of its owners subjected female employees to a sexually hostile work environment. One of the restaurant's owners, who owns the bar with two of his brothers, openly and on nearly a daily basis, made sexually charged comments, propositioned his female employees to have sex with him, and touched and groped female employees without their consent. The other two owners witnessed the conduct but failed to take action. When a female employee complained about the harassment, she was terminated.
 - The EEOC determined this conduct by the Employer violates Title VII of the Civil Rights Act of 1964 which prohibits discrimination, including harassment, based on sex.
 - The EEOC stated, "sexual harassment continues to be a pervasive issue in the bar and restaurant industry. Employers who prey on vulnerable restaurant workers will be held accountable under Title VII."

Workplace Harassment in the Eyes of the Court

- *EEOC vs. Frizzell Furniture*

- A job applicant for a sales position with Frizzell Furniture, a furniture retailer in Minnesota, was not hired by the employer because the applicant was transgender. A hiring official for the employer informed the job applicant that he would likely “not mix well with the customers.”
- The applicant brought a Charge with the EEOC for sex discrimination, which includes discrimination based on gender identity.
- The EEOC determined the conduct by the Employer violated Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, including transgender status or identity.

Workplace Harassment in the Eyes of the Court

- *EEOC v. Elite Wireless Group*

- A 34-year-old store manager began subjecting a 19-year-old salesclerk to unwelcome sexual advances. The salesclerk repeatedly received and rejected social media "friend" requests and invites from the manager.
- The harassment escalated to an alleged sexual assault after the company's afterhours holiday party.
- EEOC brought suit against the Employer in the U.S. District Court for Eastern California, Sacramento Division. The EEOC is seeking money damages and injunctive relief to prevent future sexual harassment.
- **Good example that sexual harassment can occur outside of the work location, including online and at social events, and holiday parties or other gatherings.**
- **The EEOC Senior Trial Attorney stated, "Employees should take note: acts of harassment need not be committed in the workplace to have consequences there."**

Workplace Harassment in the Eyes of the Court

- **EEOC vs. Apprenticeship Programs**

- **EEOC vs. Starrett City, Inc.**—The EEOC brought suit against Starrett City after it refused to promote an apprentice because he had a learning disability (ADHD). (Settled for \$70,000)
- **EEOC vs. Superior Electric**—The EEOC brought suit against Superior Electric after it failed to investigate or take other action after an apprentice filed a complaint for sexual harassment by her supervising journeyman. (Settled for \$55,000)
- **EEOC vs. Jacksonville Plumbers**—The EEOC brought suit against the Jacksonville Plumbers' apprenticeship program on behalf of African-American applicants who were denied admission into the apprenticeship because they were black.

Workplace Harassment in the Eyes of the Court

- **EEOC vs. Apprenticeship Programs**
 - **EEOC vs. Sheet Metal Workers Local 25, *et al.***—The EEOC brought suit against the Sheet Metal Workers Local 25 and its training program due to discrimination in hiring and assignments against Black and Hispanic journey workers and apprentices. (Settled for \$1.65 million)

Prevention and Effective Management

- Every workplace should have a harassment policy in place that uses clear language to address what is not allowed in the workplace, and what an employee's options are if he or she feels that the harassment policy is not being followed.
- An employer's harassment policy should be carefully drafted to fit that employer specifically.



Prevention and Effective Management

- A well drafted harassment policy will include:
 - Zero-tolerance language
 - Confidentiality language
 - Responsibilities of employees and employer
 - Procedures for filing a complaint as an employee
 - Disciplinary consequences and procedures
 - False and frivolous complaints language

Prevention and Effective Management

- **Every complaint should be taken seriously, and an investigation should be conducted as soon as possible.**
- The person handling the investigation should gather facts, conduct interviews with the individuals involved, review camera footage, etc.
- It is important that the investigator maintain a neutral perspective while conducting the investigation—They should not pick sides or assume facts.
- The investigator should ensure confidentiality and only discuss the matter on a need-to-know basis with other individuals in the workplace.

Prevention and Effective Management

- **If harassment has occurred:**
 - The appropriate corrective actions against the wrongdoer should be taken as soon as possible.
 - The appropriate corrective actions may differ from case to case as it is important to consider the seriousness of the misconduct and the facts in the matter.
- **If it is unclear that harassment occurred:**
 - Use your best judgment on how to proceed. For example, should these individuals be separated to work in different areas, should there be a harassment training, transfer of work locations, different shifts, etc.

Prevention Is the Best Medicine

- **Preventive measures**

- **Policy:** Develop an anti-discrimination and anti-harassment policy.
- **Distribute** and publicize the policy on a regular basis.
- **Train** staff and managers regarding their rights and obligations under the policy.
- **Investigate:** Respond promptly to any complaints of discrimination or harassment (i.e., investigate).

Practice tip: Don't wait for a "complaint" to investigate if you become aware of the potential issue from a source other than the complainant filing a complaint.

Trustees Role: Prevention



Trustee Role in Preventing Employment Discrimination

- Every fund office should have an employee handbook which includes:
 - Anti-harassment/discrimination policy
 - Complaint procedures
 - FMLA leave (if applicable)
 - Equal employment language
 - Disability/pregnancy accommodations
 - Other terms of employment



Trustee Role in Preventing Employment Discrimination

- Trustees should obtain an employment practices liability policy covering the fund office.
- Employment practices liability insurance covers:
 - Discrimination claims (based on race, color, religion, sex and national origin)
 - Wrongful termination
 - Harassment
 - Other employment-related issues, such as failure to provide leave or failure to promote

Trustee Role in Preventing Employment Discrimination

- All trustees and all fund office employees should receive annual or regular training on harassment, discrimination, and proper workplace behavior.



Key Takeaways

- Section 510 of ERISA prohibits employers from discriminating against employees for exercising any rights under an employee benefit plan.
 - If you are taking employment action against an employee to avoid paying benefits, it likely violates section 510 of ERISA.
- Employers/fund offices should act early and should not wait for a complaint to investigate harassment/discrimination. Get legal advice early.
- All fund offices should have a well drafted employee handbook (covering harassment/discrimination, FMLA, Title VII, etc.)
- All trustees/employees should receive regular training to avoid employment discrimination.

**Your Feedback
Is Important.
Please Scan
This QR Code.**

Session Evaluation

