

CENTRAL VIRGINIA LEGAL AID SOCIETY, INC.



1000 Preston Ave, Suite B 101 W Broad, Ste 101 2006 Wakefield Street
Charlottesville, VA 22903 Richmond, VA 23241 Petersburg, VA 23805
434-296-8851 (Voice) 804-648-1012 (Voice) 804-862-1100 (Voice)
434-296-5731 (Fax) 804-649-8794 (Fax) 804-861-4311 (Fax)



Employment Law

Are there questions an employer may not ask me during a job interview?

An employer may not ask certain questions in a job interview. An employer may not seek medical information about you before you have received a conditional job offer. This includes these questions. Are you disabled? How many sick days did you take last year? Have you ever made a workers' compensation claim? Will you need any physical accommodation for this job?

An employer may describe the job duties and ask if you can do those duties, either with or without reasonable accommodation. In addition, if you clearly have a physical disability that would seem to keep you from doing the job, the employer may ask how you plan to do the job. An employer may not ask about your race, national origin, religion, or your family status or plans, such as plans to have children.

An employer may ask if you have been convicted of a crime. Asking whether you have been arrested may violate anti-discrimination laws. An employer may not ask if you have taken part in a strike in the past or done union organizing activities.

When may I be entitled to medical leave from work?

If you need time off due to injury or illness, you may not be limited to sick leave, vacation, or personal leave. You may be entitled to up to twelve weeks of unpaid leave per year under the Family and Medical Leave Act (FMLA). You can get FMLA leave if you or a family member has a serious health condition. This means an illness or injury that needs in-patient medical treatment or ongoing out-patient treatment, or a chronic medical condition. You also can get FMLA leave if you have a newborn or newly adopted child.

Medical leave also may be a reasonable accommodation of a disability under the Americans with Disabilities Act (ADA). However, this cannot unduly burden your employer. If you use up your FMLA leave, it does not automatically mean you may be fired. You may be entitled to additional leave as an accommodation under the ADA.

If you suffer a work-related injury, you may be entitled to workers' compensation during the time you are totally or partially disabled from doing your usual job. Your employer must offer you any available light duty job you might be able to do. If none is available, you should be entitled to workers' compensation.

How can I get a reasonable accommodation for my disability from my employer?

Even when your employer knows you are disabled, your employer is not automatically required to find out if you need an accommodation. You must ask for an accommodation. You don't have to use the term "accommodation." You only need to tell your employer about your disability and that you need some help in doing your job. After you have asked, your employer is required to see if an accommodation is needed, and if so, what might be needed. Both you and your employer have a duty to cooperate to find a reasonable accommodation.

Can my employer monitor me in the workplace?

You have a right to privacy. This right extends into the workplace to protect you from excess monitoring by your employer. You have a limited right to privacy in your phone conversations and voice mail messages. An employer who wishes to monitor phone calls or voice mail messages must warn you it is doing so and show that the monitoring is done in the usual course of business.

An employer also may monitor communications if it has reason to believe you are using the phone or voice mail to commit theft or damage the company. Again, your employer must warn you that it plans to monitor. An employer who monitors phone calls or voice mail messages must stop as soon as it determines that a call or message is private. E-mail messages using the employer's network, and Internet access from the employer's computer, generally are not protected. You should assume your E-mail and Internet activities at work are not private.

Employers have monitored employees by putting video cameras around the workplace. This may or may not violate the law. An employer who places a camera in the lunchroom or on a loading dock does not violate the law. However, employers have been held liable for invasion of privacy, and sometimes for sexual harassment, after putting hidden cameras in bathrooms or in the ceilings of employees' offices.

When is harassment illegal?

It is not illegal for a supervisor to harass an employee simply because your supervisor doesn't like your work or doesn't like you as a person. Harassment is illegal only if it is based on some protected factor, such race, religion, national origin, age, sex, or disability.

Harassment must be severe and widespread to violate the law. Courts have held that the government cannot make workplaces perfect, and only may ensure that they are not hostile and abusive to an employee because you are a member of a protected group.

Isolated or occasional racial or ethnic slurs or dirty jokes, while offensive, will not violate the law. However, one incident of harassment, if it is severe enough, may be enough to violate the law. Harassment which is continual or which pervades the workplace also may violate the law. This includes constant dirty jokes or comments, repeated unwelcome passes, anti-Semitic or racist comments, or a workplace decorated with pornographic posters.

The harassing behavior must be offensive to the reasonable person. Behavior which offends a highly sensitive person, but which would not offend a reasonable person, does not violate the law. In addition, behavior that might offend a reasonable person, but that clearly did not offend you, does not violate the law. In determining whether you were personally offended, the court considers whether you willingly took part in the conduct and whether you used reasonably available methods to complain about the conduct.

May my employer or supervisor play favorites among employees?

Giving special treatment to an employee because of race, religion, national origin, age, sex, or lack of a disability may be illegal under federal and state anti-discrimination laws if the special treatment results in some disadvantage to non-favored employees. Although affirmative action has been publicized greatly, it is only permitted when ordered by a court to remedy past discrimination, or in the government or certain employers working with the federal government.

On the other hand, it is not illegal to have favorite employees, to treat some employees better than others or even to be unfair – as long as such unfairness is not based on protected factors such as race, religion, national origin, age, sex, or disability.

What is considered work time under the Wage and Hour laws?

Any work your employer asks you to do, or allows you to do, is time for which you must be paid under the wage and hour laws. Even if you work outside your normal hours, you must be paid for time spent doing this work. The time also is counted in determining whether you have worked forty hours in a week, and entitled to overtime. Your employer may discipline you for doing unauthorized work, but also must pay you for that work.

Commuting to and from work, changing clothes or washing up at the work site, generally are not work time. Doing other preparatory duties, and short rest periods during the workday, are hours worked. A meal period must be at least thirty minutes long to be excluded from hours worked.

Time spent on training or education is not hours worked as long as your participation is completely voluntary, you attend outside of regular working hours, and you do no productive work during the class. Time spent traveling for your employer is hours worked if the traveling is part of your main duties. Travel for an overnight trip is not hours worked unless the travel is done during normal working hours, or you actually work while traveling.

What is the minimum wage?

As of July 24, 2009, the minimum wage is \$7.25 per hour. Tips may be credited toward the minimum wage, except you must be paid at least \$2.13 per hour regardless of any tips you receive. If lodging and meals usually are furnished by your employer, the reasonable value of these items also can be credited toward the minimum wage. Generally, time-and-a-half must be paid for all hours over 40 hours in a week.

If I am not paid minimum wage or overtime wage, what can I do?

If your employer violates these laws, you may complain to the U.S. Department of Labor, Wage and Hour Division. This office enforces the minimum wage and overtime wage laws.

Is my employer limited in its ability to fire me?

Most employment in Virginia is at will. This means your employer may fire you for any reason at all, or no reason at all. However, your employer may not fire you for a legally prohibited reason. This includes discrimination based on your race, religion, national origin, age (if 40 or older), sex, pregnancy, or handicap.

Your employer also may not fire you because you took part in a protected activity. These include complaining of discrimination or another violation of the law, filing a lawsuit against your employer claiming discrimination, filing a workers' compensation claim, filing a health or safety complaint against your employer, or participating in an investigation of your employer by an administrative agency such as the Equal Employment Opportunity Commission or the Environmental Protection Agency.

If you refuse your employer's demand to perform an illegal act and are fired, you may have a claim for wrongful discharge. If you are fired for taking time off under a law that gives you a legal right to have that time off – such as time off for voting, jury duty or military service – you also may have a wrongful discharge claim. If you can show you were fired shortly after taking part in protected activity, you may be able to sue your employer for illegal retaliation.

Your employer also may be limited in its ability to fire you by the terms of a union contract or an individual employment contract. Finally, if your employer is a public entity, such as a federal, state or local government, a school district, or a government agency, your employer may be required to provide you with notice and an opportunity to be heard before firing you. A public entity also may be required to show just cause, such as poor performance or a violation of a work-related rule, in order to fire you.

If your employer has not followed specific discipline and firing policies, you may have a claim for wrongful discharge. However, if the personnel manual or employee handbook has a good enough statement saying there is no employment contract, then you probably do not have a wrongful discharge claim.

If I am fired for a legally prohibited discriminatory reason, what must I do?

If you are fired or treated unfairly due to your race, religion, national origin, age (if 40 or older), sex, pregnancy, or handicap, you can't sue your employer right away. First you must file a complaint with the Equal Employment Opportunity Commission (EEOC) and /or with the Virginia Council on Human Rights. You have 300 days to file a written complaint with the U.S. Equal Employment Opportunity Commission (EEOC) and/or the Virginia Council on Human Rights.

Equal Employment Opportunity Commission
Richmond Area Office
830 East Main Street, 6th Floor
Richmond, VA. 23219
800-669-4000 (toll-free)
804-771-2200 (V) & 804-771-2222 (F)

Virginia Council on Human Rights
Pocahontas Building
900 East Main Street, 4th Floor
Richmond, VA. 23219
804-225-2292 (V)

What happens after I file a complaint?

If you file a complaint with the EEOC and/or the Virginia Council on Human Rights, you may wish to ask for mediation. This is where a neutral person helps the parties reach a voluntary settlement to solve a complaint of discrimination. The process is free and confidential. Both parties have to agree to mediation. If mediation is not successful, your complaint will be investigated like any other complaint.

If the EEOC believes there was no discrimination, it will close the case and issue a “right to sue” letter. If the EEOC believes there was discrimination, it will try to settle the case. If the EEOC believes there was discrimination but cannot settle the case, it also will close the case and issue a “right to sue” letter. In addition, you can ask for a “right to sue” letter after the EEOC has had the case for 180 days. You must file a lawsuit within 90 days of the “right to sue” letter.

May my employer fire me and then ask me to sign a waiver of claims or severance agreement?

Many employers will offer some severance pay if you have been fired or laid off, but will require you to sign an agreement to release any claims you may have against the employer. These claims could include breach of contract or discrimination. Such agreements generally are legal. However, the employer must follow certain rules.

Your employer must make clear just what claims you are giving up. You must be given a chance to review the agreement and consult an attorney. If your employer gives you a severance agreement at the same meeting at which you are fired and demands that you sign the agreement or do without severance, your employer may have a hard time enforcing the agreement.

Some claims cannot be released under a severance agreement. Claims under the Fair Labor Standards Act (the federal wage and hour law) cannot be given up by an agreement between you and your employer. The Department of Labor must be allowed to participate in any such agreement to ensure you are treated fairly.

What may my employer say about why I left or was fired?

Your employer generally may tell the true reason why you left or were fired. Your employer may tell this to your co-workers and to potential employers. Your former employer can't willfully and maliciously say untruthful things about you to prevent you from getting another job. If this happens, you may have a legal claim against your former employer.

Many employers, out of fear of a lawsuit, now will not release any information, good or bad, about present or former employees.

What other laws govern employment?

In the past, few workers had any protections from low wages, discrimination, or unsafe or unhealthy workplaces. However, over the past 75 years, many laws have been passed to protect workers. These include laws against discrimination due to race, sex and age, and more recently due to disability. Today many laws govern the employer – employee relationship. Here are some of the laws and terms relating to those laws.

Adverse Employment Action. This is any action taken by your employer that negatively affects your job. This includes demotion, firing, discipline, or failure to promote. In most employment discrimination cases, you have to prove your employer took some sort of adverse employment action in order to win.

Affirmative action. This includes efforts by employers to remedy past discrimination in the workplace or an industry by making a special effort to hire women or members of certain minority groups. Most private employers are not required to do affirmative action and may violate the law by doing so. Government employers and contractors often are required by law to do affirmative action.

Age Discrimination in Employment Act (ADEA). This is a federal law that protects older workers (40 and older) from discrimination due to age. Only employers with more than 20 workers are covered by ADEA.

Americans with Disabilities Act (ADA). This is a federal law that prohibits discrimination against any disabled employee or applicant who, with or without a reasonable accommodation of that disability, could perform a job. The act also requires employers to provide accommodation, such as modified work hours or duties, or special equipment, if such an accommodation is not too large a burden and is needed to help a disabled employee do the job.

At-will employment. This means that an employer may hire, refuse to hire, promote, demote, fire, or lay off employees for any reason at all – good reason, bad reason, or no reason – as long as it is not a prohibited reason. This also means you can leave the job for any reason or no reason at all. Unless there is a valid agreement of employment, you usually are considered to be an at-will employee.

Bona fide occupational qualification (BFOQ). This is a job requirement, such as a certain age or sex, or the ability to lift a certain weight, which is possibly illegal if it excludes a protected group of people. However, a BFOQ that is shown to be in good faith can be legal.

Consolidated Omnibus Budget Reconciliation Act (COBRA). This is a federal law that requires employers to allow you to continue your health insurance coverage after termination from your job, in the same insurance group at the group rate, and to get the same benefits.

Employee Retirement Income Security Act (ERISA). This is a federal law that governs how private employers must manage employee benefit plans, such as pensions, health insurance, and disability benefits. ERISA sets limits on the way the funds in such plans may be invested. ERISA prohibits an employer or plan administrator from wrongly refusing to provide plan benefits, such as not paying disability benefits to a plan participant who is truly disabled.

Employee rights. These include the right to privacy, to get your job back in certain cases after you serve with the military, and limits on your employer's right to conduct a background or credit check, to garnish your wages, or to require a polygraph (lie detector) test.

Employment contracts. These include written agreements signed by you and your employer. They also may include implied contracts created by employee handbook terms or verbal agreements. An employment contract can govern the length of employment, vacation, benefits, reasons why you can be fired, and whether you may compete with your employer after you leave the job.

Employment discrimination. This is prohibited by federal and state law. Discrimination due to your race, religion, national origin, age (if 40 or older), sex, and disability is illegal. Harassment because you are in one of these protected groups also is illegal discrimination.

Equal Pay Act. This is a federal law that requires employers to pay the same wages to all employees who do the same work, regardless of sex.

Family and Medical Leave Act (FMLA). This is a federal law that requires most employers to give up to twelve weeks unpaid leave for the birth or adoption of a child, or to take care of your own or your family member's serious illness. FMLA also prohibits retaliation if you ask about or use your FMLA rights.

Fair Labor Standards Act (FLSA). This is a federal law that sets the minimum wage and maximum hours of work per day or week (see Wage and Hours laws below).

Federal Employers' Liability Act (FELA). This provides a way for employees of railroads to sue their employers for on the job injuries. This federal law covers railroad workers the way state workers' compensation laws cover other workers.

Health Information Portability and Accountability Act (HIPAA). This is a federal law that protects confidential medical information belonging to you. This means your employer may not have access to your confidential medical information unless it is needed for the business.

Hostile work environment. This is the basis for a type of harassment claim. Although most hostile work environment claims involve claims of sexual harassment, a claim also may be based on being in another protected group, such as your race or religion. A hostile work environment is created where harassing behavior is so severe and widespread that it creates an intimidating and offensive workplace and changes the terms and conditions of employment.

Municipal employment (employment by a city government). This is governed by special employee protections, including the right to due process of law, such as an administrative hearing before you are fired, and additional privacy protections.

National Labor Relations Act (NLRA). This is a federal law that governs the relationship between certain employers and employees. Although the NLRA is most commonly associated with unionized employees, some of it covers all employees and their employers.

Occupational Safety and Health Act (OSHA). This federal law requires every employer to provide a workplace that is free of dangers that could physically harm you. The law covers everything from dangerous equipment to long-term exposure to pollutants or radiation.

Pensions, benefits and compensation. These are governed by many laws. These include the Employee Retirement Income Security Act (ERISA), the Fair Labor Standards Act (FLSA), and the Consolidated Omnibus Budget Reconciliation Act (COBRA). Other employment benefits are governed by other laws such as Social Security, unemployment compensation, and workers' compensation.

Retaliation. If your employer retaliates for making a claim or reporting a violation, this can be a violation of most of the federal and state workplace laws.

Sexual harassment. This is a form of discrimination barred by federal and state law. This includes creating a hostile or offensive work environment – such as tolerating offensive language or pictures or unwelcome sexual conduct directed at you. This also includes requiring you to submit to unwelcome sexual advances to remain employed or receive some job benefit.

Title VII. This is a federal law that prohibits discrimination in employment on the basis of race, religion, national origin, age (if 40 or older) or sex. Title VII also protects employees who complain about discrimination from being retaliated against by their employer.

Wage and Hours laws. These include the Fair Labor Standards Act (FLSA) which sets the federal minimum wage, and requires that overtime be paid. These laws also govern whether and when children may work.

Whistleblower laws. These laws prevent retaliation against you for reporting or complaining about a violation of the law by your employer.

Worker Adjustment and Retraining Notification Act (WARN Act). This law requires your employer to give written notice to union representatives, or to state agencies and individual employees, before closing a plant or making a mass layoff.

Wrongful termination or discharge. This refers to firing an employee in violation of a federal or state law, or in violation of the public policy of a state, such as when you have reported a violation of the law by your employer.

Authorized by Steve Dickinson, Esq., Executive Director, P.O. Box 12206, Richmond, VA 23241