# The Fallacious Five: Employment law misconceptions that trip up employers

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Plaintiff's lawyer Donna Ballman and The Evil HR Lady have had good posts recently on common employee misconceptions about employment law, including the "right" to see what is in one's personnel file and the "right" to take a break.*

**Depending on where the employee lives, he may have these rights, but in many states he does not. And the federal Fair Labor Standards Act does not require breaks.*

What's good for the goose is good for the gander. So, what are the most common misconceptions about the law by employers? Here are five that I see frequently:

**No. 1 - "This is a right-to-work state. We can fire you at any time, and for a good reason, a bad reason or no reason at all."** This is wrong on so many levels. First, many states -- particularly in the North and Northeast -- are not right-to-work states. But even assuming the speaker really is in a right-to-work state, he has misunderstood what it means. A right-to-work state is one in which employees cannot be forced to join a union or pay union dues as a condition of employment. The speaker is confusing "right-to-work" with "employment at will," which brings me to my next misconception . . .

**No. 2 - "This is an employment-at-will state. We can fire you at any time, and for a good reason, a bad reason or no reason at all."** Oh, *yeah?* I dare ya to try firing someone for a bad reason or no reason, even in an employment-at-will state. I've blogged about this before. Even if your state is technically employment-at-will (and not all are), you still can't terminate an employee for an illegal reason. And there are an awful lot of illegal reasons -- so many, in fact, that they swallow the rule.

Allow me to use my relatively employer-friendly home state of North Carolina as an example. Even though we are at-will (allegedly), many grounds for termination are unlawful, including (1) because the employee refused to break the law, (2) because the employee filed or is expected to file a workers' compensation claim, (3) because of the employee's race, color, national origin, sex, age, or disability, (4) because the ground for termination is found to have violated a "public policy" of the State, (5) because the employee filed a state workplace safety complaint, (6) because the employee exercised her rights to join or not join a union (see #1, above!), (6) because the employee uses lawful products during non-working hours, and on and on and on, yada yada yada. And this doesn't even count all the federal laws that also protect employees in all 50 states.

And you may say, "But I'm not firing the employee for any of these illegal reasons! I just don't like her hairdo!" Technically and superficially, that would be a "legal" reason to terminate an employee in an at-will state . . . if she's foolish enough to agree that this was the reason. But you can be sure that the employee fired because of her bad hairdo will claim you really fired her because she was a woman (illegal), because of her race or national origin (illegal), or because she testified truthfully in her best friend's unemployment hearing (illegal). Which means, at the very least, an expensive lawsuit for you and, at worst, a jury verdict in her favor because who would ever believe that an employer would get rid of a good employee just because she had bad hair?

**3. "Exempt = salaried."** This one is very common. Employers frequently believe that they have to pay overtime only to "hourly" employees and that everyone who is "salaried" is FLSA-exempt. Not true, and it can be very expensive to find out you've been doing it wrong, especially if you find that out during a collective action brought by all of your non-exempt "salaried" employees. Under the FLSA, being salaried is usually a necessary condition for exemption, but not a sufficient one. The employee must also satisfy the "duties" requirements for the executive, administrative, or professional exemptions. (There are exemptions for outside salespersons and certain computer employees that do not require payment of a salary.) This is why clerical employees, for example, fill out time sheets and (should) get overtime if they work more than 40 hours in a workweek.

**4. "Just treat everyone the same, and you'll never go wrong."** This was great advice in 1970, when "non-discrimination" was a new-fangled idea, but not any more. Generally, an employer does want to be fair and be as consistent as possible. However, there are some major exceptions that can really cause problems if the employer is not aware of them. First, there is the Americans with Disabilities Act, which I have discussed at length elsewhere and which requires reasonable accommodation in appropriate cases. "Reasonable accommodation" by definition requires that you treat one employee differently from other employees. Covered federal contractors face similar requirements under the Rehabilitation Act and the Vietnam-Era Veterans Rehabilitation and Adjustment Act and its amendments. In addition to these laws, Title VII requires that employers make reasonable accommodations to the religious beliefs and practices of employees. In this context, as well, "accommodation" means "differential treatment."

As Ralph Waldo Emerson said, "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines."

**5. "Women make only 59 cents for every dollar that men make, and it's because sex discrimination is rampant in the workplace even though it's been illegal for almost 50 years."** This one drives me crazy, so I had to save it for last. First, ladies, we are moving up in the world. We are now making *77* cents for every dollar that men earn. So *there!* More importantly, even the 77-cent statistic is dishonest because it measures only the average pay of all men versus the average pay of all women. Some little details not taken into account include, oh, I don't know -- job held, education, time in workplace, full-time versus part-time . . ..

Seriously, there is a gender-based pay gap, but it is not at all clear that discrimination is the reason. A more likely explanation is the difference in men's and women's lifestyle choices.

Statistically speaking, women are more likely to start their paid-work lives later and to take more breaks, usually as they bear and rear children. (We break for children.) For family reasons, women are also more likely to work in "clean, safe" jobs with regular hours and minimal travel, and to seek part-time work schedules. The physically demanding, dangerous work with rotten hours or extensive travel is usually performed by men. (Please note that I am speaking statistically and realize that there are exceptions to these rules.)

I have also seen that our bad economy has resulted in more male than female unemployment. (Scroll down to second-to-last paragraph.) So it may be that men are really the ones getting the raw deal, not women. Or, perhaps we can just agree that things are tough all over, and for all of us.

I'd love to hear from you if you have more employer misconceptions to add. And, to all of you readers who are moms, Happy Mother's Day. I hope that you think your kids were well worth the pay gap that "they" caused. Mine were!