UNDERSTANDING OTHER ASPECTS OF EMPLOYMENT LAW

by

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Yellow HIGHLIGHTED areas are new for 2020

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I. AFFIRMATIVE ACTION: U.S. SUPREME COURT DECISIONS IN GRUTTER AND GRATZ

A. Mandated v. Voluntary Programs

Most employers have Affirmative Action Programs in place because they are government employers, federal contractors or are federal subcontractors who must comply with the affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974 or other state and local laws.

However, these laws do not cover the majority of employers. There are two other ways employers can become subject to affirmative action:

1. By entering into a consent decree with a union or the EEOC, usually in order to remedy the effects of past discrimination or

2. Voluntarily.

In June 2003, the U.S. Supreme Court decided two major affirmative action cases that further defined the legal parameters of these plans.

B. The Grutter U.S. Supreme Court Decision

In Grutter v. Bollinger, 123 S.Ct. 2325 (2003), the University of Michigan Law School had an admissions policy that gave its applicants a "plus factor" if they belonged to an underrepresented minority group, as determined by the UM Law School. The Court upheld the UM Law School's Affirmative Action Program.

Specifically, the Court reasoned that in order to have a legitimate Affirmative Action Program, it must pass a test of "strict scrutiny," which means the Program must meet two requirements:

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1. There must be a compelling state interest and

2. The plan must be narrowly tailored.

COMPELLING STATE INTEREST

The UM Law School claimed that having a diverse student body was a compelling interest. The Court upheld this interest.

However, the Court clearly stated that enrolling a "critical mass" of minority students to simply assure some specific percentage or "quota" of a particular group merely because of their ethnic or racial origin would be patently unconstitutional. Such an approach would be clear "racial balancing," which would be unconstitutional.

NARROWLY TAILORED

The UM Law School next argued that its Affirmative Action Program was in fact narrowly tailored to meet its compelling interest. The UM Law School did not have a certain percentage of minority students, or a quota, as a goal. Nor did it have separate criteria for admission or separate "admission tracks" based upon minority status.

Instead, UM Law School only used race as one of many "plus" factors that could be considered in admitting students. The UM Law School therefore engaged in a "highly individualized, holistic review of each applicant's file, giving serious consideration to many different "plus" factors which an applicant might contribute to a diverse educational environment." UM Law School had no practice or policy of "automatic acceptance or rejection" based upon race.

The Court gave its approval to the UM Law School's Affirmative Action Program. The Court stressed that "narrowly tailoring" a race-conscious admissions program must not unduly harm members of any racial group and that such a program must remain subject to "continuing oversight" to ensure the least possible harm to "other innocent persons competing for the benefit."

The Court stressed that the Affirmative Action Program must also be limited in time and have a "logical endpoint" because a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."

C. The Gratz U.S. Supreme Court Decision

At the same time it decided the Grutter case, the Supreme Court also made its ruling in the Gratz case.

In Gratz v. Bollinger, 123 S.Ct. 2411 (2003), the University of Michigan undergraduate admissions policy was different from the UM Law School's policy since it did not allow for "individualized consideration" of its applicants, but

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instead operated on a point system and "automatically distributed 20 points to every single applicant from an "underrepresented minority" group, as defined by the UM.

The Court struck down this system.

The Court held that this system had the effect of making race a decisive factor for "virtually every minimally qualified underrepresented minority applicant." The Court concluded that the UM undergraduate admissions policy was not narrowly tailored to achieve its asserted compelling interest in diversity.

The Court therefore held that the UM undergraduate admissions policy violated the Equal Protection Clause of the Fourteenth Amendment and was unconstitutional.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

If you have an Affirmative Action Program, make certain that it follows the dictates of these cases. Minority status CANNOT be a priority or an overriding factor. Minority status may be one of many other "plus" factors. If minority status is a single determining factor or is unduly weighted in the decision-making process, the Affirmative Action Program is unconstitutional.

Also, Affirmative Action is **NOT DIVERSITY**. Diversity stresses the importance of being tolerant of others. (I am not going to persecute someone because they are different ... which a very low standard that we are still unable to hit.)

Affirmative Action, which focuses on special treatment for others, is a separate topic. Affirmative Action Programs that follow the model used in the University of Michigan's undergraduate admissions process destroy Diversity Programs, since it clearly leaves the impression with people of majority status that people of minority status are getting an unfair advantage. If you want to kill you Diversity Program, do that.

Programs that follow the University of Michigan Law School model do not leave such an impression, since minority status is only one of many factors considered.

As these cases demonstrate, the minority status of applicants can only play a small equalizing factor in the final decision. Otherwise, the Affirmative Action Plan in unconstitutional and destroys employee morale.

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II. ARBITRATION AGREEMENTS

A. Arbitration And The Civil Rights Act Of 1991

Section 118 of the Civil Rights Act of 1991 specifically states,

> **"Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolutions including, ... arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title." (Notes following 42 U.S.C. § 1981)**

Still, the use of arbitration agreements has become a controversial issue.

B. Arbitration And Statutory Rights

In Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), the U.S. Supreme Court considered the issue of whether an employer could enforce a preemployment arbitration agreement under the ADEA and the Federal Arbitration Act (FAA) (9 U.S.C. §§ 1 et seq.) when the employee agreed to waive his rights to file his own private civil suit against his employer in lieu of arbitration.

In Gilmer, the Court upheld the employer's arbitration agreement, which forbade the employee from filing his own private civil suit under the ADEA. The Gilmer Court held that deciding whether such agreements are enforceable is determined by looking to see if Congress intended to preclude arbitrating such claims under this statute.

The Gilmer Court then held that arbitration was not inconsistent with the purpose of the ADEA, so claimants are not improperly denied the use of a judicial forum in deciding these disputes. The Court first reasoned that it was never Congress' intent to preclude employees and employers from using arbitration or other nonjudicial forms of resolution. In fact, the Court reasoned that the EEOC commonly uses informal nonjudicial methods to resolve the disputes before it. Therefore, the Court held that out-of-court dispute resolution is consistent with the statutory scheme of the ADEA.

The Gilmer Court also reasoned that since Congress granted concurrent jurisdiction over ADEA claims to both the state and federal courts, allowing parties to use arbitration to settle their differences advances Congress' objective of allowing claimants the ability to select from different forums to settle their disputes.

The Gilmer Court then dismissed the plaintiff's claim that adequate relief cannot be obtained through arbitration. Still, the Court did stress that it is vital to the

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enforceability of such agreements that the arbitrators be competent, unbiased, and that the awards and the decisions of the arbitrators be open to the public, just as they would be in a judicial forum.

However, in Gilmer, the plaintiff's agreement was with the Securities and Exchange Commission and not with his employer. Additionally, § 1 of the FAA states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Therefore, the exact impact Gilmer will have in non-FAA situations, or in FAA employment situations, was unclear.

C. Arbitration And Contract Rights

It is also important to note that arbitration over the terms of a union contract dispute does not qualify as arbitration over an employment discrimination practice. In Alexander v. Gardner-Denver Company, 415 U.S. 36 (1974), the U.S. Supreme Court held that the remedies available under Title VII are totally separate and independent from those awarded through arbitration under a collective bargaining agreement. As a result, in Alexander, even though the employee had taken his claim through arbitration under the collective bargaining agreement of his union, the U.S. Supreme Court held that the employee was not precluded from bringing his own private civil suit under Title VII.

However, the Gilmer Court differentiated its situation from Alexander in many respects. First, the Gilmer Court reasoned that when an employee submits his grievance to arbitration under a collective bargaining agreement, the key issue centers on determining if the employee's *contractual* rights, not his statutory rights, have been violated (i.e., Title VII). Even if both sets of rights have been violated, the analysis used to vindicate the employee's rights under each scenario is different.

Next, an arbitrator deciding a case based on a collective bargaining agreement has no authority to invoke the employee's statutory rights that may conflict with his/her contractual rights.

And finally, under a collective bargaining agreement, the interests of the employee may actually be subordinated to the collective interests of all the employees in the bargaining unit.

Therefore, the Gilmer Court drew a very important distinction between arbitration agreements used to resolve disputes over an employee's rights regarding a collective bargaining agreement and disputes regarding an employee's statutory rights which result in precluding an employee from later bringing a private civil suit against the employer.

Still, the Gilmer Court made it clear that even though it was permissible to have an arbitration agreement that precludes an employee from exercising his judicial rights, it is not permissible for such agreements to preclude an employee from filing a charge with the EEOC. The Court also stressed how important it was that

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arbitrators were not biased in favor of employers.

III. U.S. SUPREME COURT: ARBITRATION CLAUSE UPHELD

A. Circuit City Wants To Arbitrate Employment Discrimination Suit

In Circuit City v. Adams, No. 99-1379 (U.S., Mar. 21, 2000), Saint Clair Adams applied for a job with Circuit City in 1995. Adams completed and signed Circuit City's employment application, which contained the following language:

> "I agree that I will settle any and all previously unasserted claims, disputes, or controversies arising out of or relating to my application, candidacy for employment, employment, and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator."

Adams was then hired as a sales counselor. However, two years later, Adams sued Circuit City for employment discrimination in California state court.

Circuit City immediately filed its own lawsuit in federal court. Circuit City argued that Adams was barred from filing a lawsuit in court against the company. Instead, under the Arbitration Clause found in his employment application, Adams must attempt to resolve his claim against Circuit City through arbitration.

B. Rule Of Law: Federal Arbitration Act Of 1925

To support its case, Circuit City looked to the Federal Arbitration Act (FAA) of 1925. The FAA states that arbitration is a legitimate method for resolving disputes if both parties have entered into such an agreement. If so, the FAA states that the federal courts are to "compel" the parties to resolve their dispute through the use of arbitration.

However, the FAA specifically excludes from its coverage:

> "contracts of employment of seaman, railroad employees, or ***any other class of workers engaged in foreign or interstate commerce***." (emphasis added)

Circuit City argued that the FAA only excludes from its coverage only those employees engaged in the transportation industry…not anyone who engages in "foreign or interstate commerce." Therefore, according to Circuit City, the Arbitration Enforcement Clause of the FAA did in fact apply to them.

Adams argued the opposite. Adams argued that the FAA specifically excludes from its coverage "*any other class of workers engaged in foreign or interstate commerce*." Adams stated that since he sold merchandise that was manufactured and imported from other countries (foreign commerce) and merchandise that crossed state lines (interstate commerce) that the FAA excluded Circuit City from

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the arbitration, which is the common interpretation of the phrase "foreign and interstate commerce" under federal law. Therefore, Adams claimed the Arbitration Clause in his employment application with Circuit City was not enforceable and he should be allowed to proceed with his claim in state court.

C. The U.S. Supreme Court Holds For Circuit City: Mandates Arbitration

The Supreme Court agreed with Circuit City, which prevented Adams from filing a lawsuit in state court. In short, the Supreme Court ruled that if employees sign an agreement with their employer requiring them to settle all of their workplace disputes through arbitration proceedings rather than through the court system, such agreement will be rendered enforceable. Adams must therefore resolve his dispute with Circuit City through arbitration … not through the courts.

Specifically, the Supreme Court agreed with Circuit City, holding that the FAA only bans "transportation workers" from its Arbitration Enforcement Clause, not anyone involved in foreign or interstate commerce. Therefore, the Supreme Court ruled that the Arbitration Enforcement Clause of the FAA does apply to Adams and Circuit City.

D. General Guidelines

Based on various court opinions interpreting the FAA, including the U.S. Supreme Court, it appears as if compulsory arbitration clauses may be upheld by the courts if:

1. The employee voluntarily signs the agreement,

2. The agreement clearly states that its provisions apply to the employee's status of employment and that the employee is agreeing to forfeit his right to pursue his rights in civil court in lieu of binding arbitration,

3. The agreement has "mutuality," which means both the employer and the employee give up their rights to pursue claims in the courts in lieu of arbitration,

4. The agreement does not require the employee to pay for the arbitration process,

5. The agreement does not require the employee to forego any of his rights to file a charge with the EEOC; rather, the employee only agrees to forego his right to pursue any private causes of action against the employer in civil court,

6. No fraud or duress was used in obtaining the agreement,

7. Competent unbiased arbitrators are used who apply the individual employee's statutory rights, and

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8. The awards given through these proceedings are a matter of public record.

E. U.S. SUPREME COURT: Arbitration Agreement Does Not Bar EEOC's Suit For Victim-Specific Remedies

In EEOC v. Waffle House, Inc., No. 99-1823 (2002) after Eric Baker suffered a seizure and was fired by Waffle House, Baker filed an EEOC charge alleging that his discharge violated the Americans with Disabilities Act of 1990 (ADA). The EEOC filed a lawsuit against Waffle House, claiming that terminating Baker violated the ADA. However, it was the EEOC who filed the lawsuit … not Baker.

Waffle House filed to have the EEOC's lawsuit dismissed, claiming that since Baker signed an arbitration agreement, arbitration was the only avenue of relief. The court disagreed.

The Court concluded that the arbitration agreement between Baker and the Waffle House only prevented Baker from filing a lawsuit against the company. Since the EEOC was not a party to the arbitration agreement, it was not compelled to arbitrate its complaint. The Court also held that the EEOC was allowed to pursue such remedies as backpay, reinstatement, and damages.

F. No Fee-Splitting Allowed

In Perez v. Globe Airport Securities Svcs., Inc., No. 00-13489 (11th Cir. 2001), Damiana Perez was an airport security guard for Globe. When she was hired, she signed an agreement that required her to arbitrate her employment disputes with Globe rather than pursue them in civil court. The arbitration agreement stated that all of the costs of the arbitration, including the filing fee and arbitrator fees, will be equally split between the employee and the company.

When Perez was terminated, she sued Globe for gender discrimination. Globe claimed that Perez could not sue in civil court, but was instead required to arbitrate her claim. The court disagreed and invalidated the arbitration agreement.

The court reasoned that the fee-splitting portion of the agreement invalidated the requirement to arbitrate. The court reasoned that such a requirement limits the arbitrator's ability to render an effective relief by mandating equal sharing of costs. Under Title VII, the courts are permitted to provide an award for fees and costs to prevailing parties. Therefore, this arbitration agreement gave fewer rights to employees than they are afforded under Title VII. The court noted that arbitration agreements are only enforceable under the Federal Arbitration Act, or FAA, when the remedial and deterrent functions exist that exist under federal law and litigation. Since the employer removed those rights in this agreement, the agreement was declared invalid and Perez was allowed to proceed with her civil case against Globe.

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G. Arbitration Agreement Should NOT Be Part Of Handbook

In Strasser v. Fortney & Weygandt, Inc. (8th Dist. Ct. of Appeals, Cuyahoga Cty.), No. 79621, Christine Strasser was employed as a project manager for Fortney & Weygandt, a construction company based in North Olmstead, Ohio. Strasser was one of only two female project managers employed by Fortney & Weygandt. In September 2000, she was terminated. Strasser sued Fortney & Weygandt for sex discrimination, claiming that she had been treated differently from the company's male project managers.

Fortney & Weygandt argued that Strasser could not sue the company in court since Strasser had signed an arbitration agreement. The agreement clearly stated that Strasser was agreeing to arbitrate any employment disputes rather than pursue remedies in a civil suit.

However, the court sided with Strasser and allowed her lawsuit to go forward. In reaching this decision, the court reasoned that Fortney & Weygandt's arbitration agreement had been written into the "Employee Handbook." The court looked specifically at the disclaimer placed in the handbook. The disclaimer stated that the policies and content of the handbook are **NOT** conditions of employment. It also stated that the handbook does **NOT** form a contract and can be altered in any way at any time by the employer.

Consequently, the court ruled that the arbitration agreement was NOT really a contract, so neither party was bound to honor it.

H. Forcing Current Employees To Endorse Arbitration Agreements

It is also important to note that the courts have taken a very dim view of employers forcing employees to sign arbitration agreements. In EEOC v. River Oaks Imaging, 67 F.E.P. 1243 (S.D. Tx. 1995), where the employer fired many of its employees who refused to sign an arbitration agreement, the court granted an injunction against the employer's use of these agreements entirely.

The court also forbade the employer from requiring its employees to pay the cost of the arbitration proceedings and from trying to preclude its employees from filing a charge with the EEOC.

I. General Guidelines

Therefore, today it appears as if compulsory arbitration clauses may be upheld by the courts if:

1. The employee voluntarily signs the agreement,

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2. The agreement clearly states that its provisions apply to the employee's status of employment and that the employee is agreeing to forfeit his right to pursue his rights in civil court in lieu of binding arbitration,

3. The agreement does not require the employee to pay for the arbitration process,

4. The agreement does not require the employee to forego any of his rights to file a charge with the EEOC, rather, the employee only agrees to forego his right to pursue any private causes of action against the employer in civil court.

5. Competent unbiased arbitrators are used who apply the individual employee's statutory rights, and

6. The awards given through these proceedings are a matter of public record.

IV. CIVIL RIGHTS ACT OF 1866: SECTION 1981

A. Equal Rights Under Contracts

In 1866, Congress passed 42 U.S.C. § 1981, or simply § 1981, which was part of the Civil Rights Act of 1866. The purpose of the Act was to effectuate the rights supposedly given to the newly freed slaves under the Thirteenth Amendment of the U.S. Constitution.

Specifically, § 1981 states that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..."

As a result, today, in addition to Title VII's prohibition against race discrimination, § 1981 also makes it unlawful to discriminate against individuals due to their race regarding in their right to contract with others, which includes the employment relationship.

Section 1981 applies to all private and public employers, including state and local governments, except for employees of the federal government.

However, §1981 differs from Title VII in a number of ways. First, it is much broader than Title VII in that it applies to nonemployment contracts as well as to the employment setting. Also, § 1981 applies to all persons, whereas Title VII applies only to employers who employ 15 or more employees for at least 20 weeks out of the year. However, § 1981 is also much more narrow than Title VII since it applies only to race, whereas Title VII also covers sex, national origin,

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and religion.

Additionally, § 1981 has a two-year statute of limitation for filing claims, whereas the statute of limitations for filing a Title VII claim with the EEOC is either 180 or 300 days, depending on whether the violation occurred in a work-sharing state.

Next, plaintiffs can file their § 1981 claims directly in federal court since no administrative procedural requirements exist as do in Title VII actions. (i.e., A plaintiff in a Title VII action must file a charge of discrimination with the EEOC before filing a private civil suit.) Also, no limit on punitive or compensatory damages exists under § 1981 as do under Title VII.

All three theories of discrimination apply to § 1981 actions, which include disparate treatment, systemic disparate treatment, and disparate impact causes of action. The U.S. Supreme Court has also held that § 1981 disparate treatment claims are decided in the same manner as Title VII disparate treatment claims.

B. All Races Are Covered By § 1981

In McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976), two white employees were discharged from their employer for stealing company property, even though a black employee who was charged with the same offense was not discharged. The two white plaintiffs sued for race discrimination under Title VII and § 1981.

The Court first held that the two white employees could sue for race discrimination under Title VII since the plain language of the Act specifically prohibits discrimination against “any individual” due to “such individual’s race, sex, religion, color, or national origin.” However, the Court then examined the question of whether these white employees were also covered by § 1981. The Court held that § 1981 covered white and black citizens alike.

The Court reasoned that § 1981 granted the same rights to all persons as “enjoyed by white citizens,” which includes white citizens. The Court then looked to § 1981's legislative history where Senator Trumbull, author of the bill, said on the Senate floor that “this bill applies to white men as well as black men.” Therefore, the Court held that § 1981 covered both white and black citizens alike. Consequently, § 1981 now applies to all races.

C. What Is A “Race” Under § 1981?

In Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the U.S. Supreme Court engaged in a lengthy discussion regarding the meaning of the term “race” under § 1981. The Court concluded that § 1981 protects those who are subject to differential treatment solely because of their ethnic or cultural backgrounds or physical characteristics, whether such discrimination would be classified as being racial in terms of modern scientific theory or not. Following that reasoning, the Court held that an Arabian plaintiff could indeed bring suit under § 1981.

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Based on this definition of "race" for § 1981 actions developed by the U.S. Supreme Court in Al-Khazraji, the courts have also held that such classifications of people as Mexicans and Hebrews constitutes a "race" of people under the Act.

V. CIVIL RIGHTS ACT OF 1871: SECTION 1983

Basically, as derived from the Civil Rights Act of 1871, or the Ku Klux Klan Act of 1871, § 1983 (42 U.S.C. § 1983) forbids any state or territory from depriving any citizen of his rights, privileges or immunities secured by the U.S. Constitution or federal law. Consequently, § 1983 does not create any substantive rights for anyone, but instead, it merely provides a remedy for plaintiffs to pursue whenever their "rights, privileges, or immunities secured by the Constitution and laws" have been violated. More often than not, § 1983 is used to invoke a Fourteenth Amendment Equal Protection argument. (i.e., Treating one class of persons differently from another class of persons.)

However, § 1983 actions are greatly limited in their scope.

First, § 1983 only applies to governmental actions, so it is primarily used by public sector employees for asserting a U.S. Constitutional claim. Also, since § 1983 actions usually involve Equal Protection arguments, the disparate impact theory is not available to plaintiffs since Equal Protection arguments are made regarding differential treatment between classes of people, not unintentional adverse impact.

Next, § 1983 does not permit suits against state officials acting in their official capacities since they are not "persons" within the meaning of the Act.

And finally, § 1983 does not require plaintiffs to first resort to administrative remedies (i.e., EEOC) as Title VII does.

VI. CONSUMER CREDIT PROTECTION ACT

A. Garnishments

Once a creditor is awarded a judgment against a debtor, in order to obtain the sum of money stated in the judgment, the creditor often has the debtor's wages garnished. If an employee's wages are garnished, then the employer must withhold the amount specified by the court order each pay period and submit this sum back to the court, which then distributes it to the creditor. Each state has its own statutory requirements governing garnishments, many of which require that child support payments be automatically collected by way of a garnishment. Still, garnishments often place an administrative hardship on employers, especially if employees incur multiple garnishments.

However, under § 1674 of the Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1601, et seq.), employers are forbidden from discharging an employee due to the fact that his wages have been subjected to a single garnishment. The Act defines a "single garnishment" as being one single debt or several debts combined into one single garnishment action. Consequently, if an employee's wages are attached by a series of different garnishments but they are all related to

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the same indebtedness, then the employee cannot be terminated for this reason since only one garnishment is involved under the law.

On the other hand, should this same employee have a second garnishment imposed against him that is unrelated to the first indebtedness, then the employee is no longer protected by the CCPA. The employer may then legally terminate the employee for incurring too many garnishments under federal law.

The CCPA's regulations also state that an employee's garnishments may not exceed 25 percent of his disposable income for the week *and* the employee must still retain a net weekly amount of at least 30 times the federal minimum wage, as established under the FLSA. Therefore, if an employee's disposable weekly income is already 30 times the federal minimum wage or less, then the employee's wages may not be garnished.

The CCPA provides both civil and criminal penalties against those who violate its provisions. Employees may privately sue their employers for damages they incur for violating the CCPA. Employers may also be fined up to $1,000 per offense under the CCPA, as well as possibly receive up to one year in prison for a willful violation.

VII. CONSTRUCTIVE DISCHARGE

A. Standard

In order to prove a case of constructive discharge, the employee must show that the employer made working conditions so intolerable that a reasonable person would have felt compelled to resign. In Jurgens v. EEOC, 903 F.2d 386 (5th Cir. 1990), when Jules Gordon, an attorney with the EEOC, was passed over for promotion and given the choice of either accepting a demotion or early retirement, he opted for early retirement.

Gordon then filed suit against the EEOC claiming not only that he had been illegally discriminated against due to his age, but also that he was given no real choice in the matter, since all of the options that were made available to him were undesirable. Consequently, Gordon claimed he was constructively discharged.

However, the court held that in order to find that an employer has constructively discharged an employee, the employee must show that the employee's working conditions would have been so difficult or so unpleasant that a reasonable person would have felt compelled to resign. A slight decrease in pay coupled with some loss of supervisory responsibilities, as was the case here, was seen as being insufficient to constitute a constructive discharge.

Moreover, most of the humiliation and embarrassment that might ordinarily accompany a demotion were absent here because the demotion was part of a nondiscriminatory reorganization. Thus, a reasonable employee would not have felt compelled to resign in this situation, according to the court.

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Additionally, the court reasoned that without any continued harassment or repeated attempts to impede the employee's advancement based on a discriminatory motive, diminished future job prospects based upon past discrimination are simply not enough to support a finding of constructive discharge.

B. Intent For Employee To Resign Requirement

Today, in proving a constructive discharge case, the courts are split as to whether a plaintiff must only demonstrate that the working conditions were so intolerable that a reasonable person would have resigned, or if the plaintiff must also prove that the employer intended to force the plaintiff to resign by treating the plaintiff in a reprehensible manner. However, even in those jurisdictions where the employee must also show that the employer intended to force the employee to resign, the courts disagree as to how this intent requirement is met.

In Wheeler v. Southland Corporation, 875 F.2d 1246 (6th Cir. 1989), where the plaintiff informed her employer that she had been subjected to sexual harassment, and then resigned when the company took no action in response to her charge. The Sixth Circuit held that the plaintiff had in fact shown that the employer intended for her to resign in order to sustain her constructive discharge claim. The court stated that a reasonable employer should have foreseen that the intolerable working conditions the plaintiff was forced to endure would have compelled her to resign if not corrected.

On the other hand, in Paroline v. Unisys Corporation, 900 F.2d 27 (4th Cir. 1990), the Fourth Circuit found that the intent necessary to support a constructive discharge claim was absent when management, after being informed that the plaintiff was being sexually harassed, took effective steps to stop the harassment. Specifically, in addition to disciplining the harasser, the employer offered the plaintiff counseling and it assured her that it wanted her to remain as an employee. As a result, the court found that the employee had not been constructively discharged.

VIII. DEFAMATION

A. Definition And Elements Of The Prima Facie Case

"Defamation" occurs under the law in two forms: Slander, which is the spoken word, and libel, which exists in written form. In the employment setting, employers are exposed to defamation liability in a number of situations. Most commonly, such situations arise when confidential information regarding an employee is disseminated to those who are not on a "need-to-know" basis or when an employer gives a reference regarding an employee to another employer.

However, in order for an employer to be liable for defamation, the plaintiff must typically prove that:

1. The employer made a false statement regarding the plaintiff,

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2. This false statement was an unprivileged publication to a third party,

3. The employer (publisher) was at least negligent in making the statement, and

4. The plaintiff was harmed by the false statement (Restatement (Second) of Torts, § 558 (1977)).

In most situations, if all of these factors are shown to exist, then the plaintiff will have established a prima facie case against the publisher, which shifts the burden of proof (persuasion and production) to the defendant. However, if any one of these factors is missing, the plaintiff's case will fail.

For instance, if the employer can prove that the statement it made was true, then the plaintiff's case must fail, since no liability exists under defamation for true statements. The truth of the statement made by the employer is an absolute defense to a claim of defamation.

Also, the plaintiff must prove that the employer was at least negligent in communicating this information. Such negligence most often arises when the publisher fails to use the proper level of care in determining whether the information being conveyed was either true or false.

Additionally, the false statement must cause harm to the plaintiff in some way. If no harm can be shown to exist, then neither will a claim of defamation, even if the statement was false and the employer was negligent in making it.

And finally, if the false statement was publicized to a third party where some type of privilege exists, then no claim of defamation will be substantiated unless the privilege is violated. ("Publication" simply means that a statement is communicated to another person by any means chosen by the publisher.)

However, one of the most confusing aspects of defamation law to understand are the two types of privileges that exist, one of which is referred to as an "absolute" privilege and the other as a "qualified" privilege. If one of these two privileges exist, then employers may publicize information to third parties with a greatly reduced risk of incurring liability for their statements.

B. Absolute Privilege

An "absolute" privilege, as its name suggests, affords the publisher complete protection from incurring any liability for making any defamatory remarks, regardless of whatever statements the publisher makes. However, the absolute privilege is a very limited one, generally existing only in legislative, administrative and judicial proceedings. However, the protection offered by the absolute privilege only covers information that bears some reasonable relation to the proceeding in which it appears. Therefore, an employer is not free to repeat defamatory statements made about an employee to others who are not connected to those proceedings.

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The rationale behind having an absolute privilege is to encourage those individuals who are testifying before a legislative, administrative, or judicial body to speak freely in order to assist the court in the fact-finders in the truth-seeking process.

Following this same logic, some states have also held that this absolute privilege also extends to grievance proceedings. In Bailey v. Sams, (Hardin Cty. 1985) 24 Ohio App.3d 137, citing General Motors Corporation v. Mendicki, 367 F.2d 66 (10th Cir. 1966), the court held that the "statements made either by representatives of management or by representatives of an employee at a conference and bargaining session having for its purpose the adjustment of a grievance of the employee or other peaceable disposition of such grievance are unqualifiedly privileged."

C. Qualified Privilege

A "qualified privilege," on the other hand, exists when, under the circumstances, the publisher reasonably believes that he has a duty to communicate (publish) this information to a third party (35 Ohio Jur. 3d Defamation and Privacy, § 65). Obviously, any statements made in the course of an employer-employee relationship are covered by this qualified privilege. Since most statements made about an employee are protected by a qualified privilege, it is important to understand the scope of this doctrine.

In Hahn v. Kolten (1975) 43 Ohio St.2d 237, when an insurance agent's former employer sent letters to its policyholders claiming that the plaintiff had been terminated from the company and that the company had questioned the plaintiff's capability to perform his duties as an insurance agent, the former employee sued for defamation. The Hahn court then set forth the standard in determining when a qualified privilege exists, which is also very similar to the standard used in many states.

The Hahn court then held that a qualified or conditionally privileged communication exists when the statement is:

1. Made in good faith,

2. On any subject matter in which the person making the statement has an interest, or a right, or duty to disclose the information,

3. The person receiving the communication has a corresponding interest, or right to know the information,

4. The circumstances warrant a communication of the information,

5. The communication is limited to the scope of the necessary information for a proper purpose, and

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6. The information is communicated in a proper manner so that it is only received by the proper parties.

Therefore, under the Hahn decision, the essential elements of a qualified privilege are that the statements are made in good faith, that each party has a proper interest in the statement, that a right or duty to hear and communicate the information exists, the statement was limited to this proper purpose, and the publication was made in a proper manner to the proper parties.

It is also well settled in most states that communications between two supervisors regarding the conduct or performance of current or a former employee made in good faith concerning a matter of common interest falls within the doctrine of the qualified privilege. Therefore, employers who make statements regarding their employees or their former employees will only be liable to these offended employees if it can be shown that the defamatory statements were made to someone who was not on a "need-to-know" basis and therefore not within the scope of the privilege.

As for defining the "scope of the privilege," in Creps v. Waltz (Wood Cty. 1982), 5 Ohio App.3d 213, the court held that a statement falls within the scope of the qualified privilege where a "commonality of interest" exists between the publisher and the recipient and the communication is one that is reasonably calculated to protect or further that interest. As a result, a statement made by an employer regarding an employee's performance or work-related behavior will be afforded a qualified privilege if it was directed to the proper party.

For example, communications between supervisors within the chain of command, or statements made to the personnel department, or comments made on employee evaluations are all covered by the qualified privilege.

The courts have also tended to find that a commonality of interest exists between employers when providing references on a former employee. In Rainey v. Shaffer (Lake Cty. 1983), 8 Ohio App.3d 262, the court held that since a qualified privilege exists in the employment reference setting, an employer may pass on to a prospective employer facts, opinions, or suspicions regarding a former employee and not be subject to an action for slander.

Next, even if the defamatory statement is made within the scope of the privilege regarding a topic that has a commonality of interest, a qualified privilege will not protect a publisher who acts with "actual malice" in making the statement. In Hahn, supra, the court held that actual malice will be shown to exist if the publisher makes a statement which he knows to be false or the publisher acts with reckless disregard as to whether his statement was true or not. This "false or reckless disregard for the truth" standard is a much higher standard for plaintiffs to meet than is required if no qualified privilege exists at all. If no such privilege exists, then a basic negligence standard is applied.

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D. Self-Publication

As previously stated, in order to recover in a defamation action, simply put, a plaintiff must show that the defamatory statement was published. In order to satisfy this requirement, the plaintiff must show that the defamatory statement or writing was "published" to a third party. As a general rule, no publication exists when the employer makes a defamatory statement to the plaintiff who then in turn publicizes it to a third party (Restatement (Second) of Torts § 577, Comment m (1977)).

However, in a minority of jurisdictions, a theory has developed under the law where the original publisher of a defamatory statement may be held liable for defamation if the "natural and probable consequences" of the statement made by the publisher is to disclose it to unprivileged third parties. This logic forms the basis of the self-publication theory of defamation.

Where this self-publication theory most often comes into play is when former employees go to apply for new jobs with other employers. For instance, in Grist v. Upjohn Company, 16 Mich. App. 452 (1969), the plaintiff argued that since her former employer, the defendant, had given her false and defamatory reasons for terminating her employment, she was then forced to repeat these defamatory statements to her prospective employers whenever she was asked why she left her previous employer.

The Grist court held that the plaintiff's former employer could be held liable for these defamatory statements since the plaintiff was forced to repeat them to prospective employers. As a result, these statements had indeed been published within the meaning of the requirements of defamation. Therefore, giving employees false and defamatory reasons for terminating their employment may set the stage for a future defamation suit based on the theory of self-publication.

IX. DRUG-FREE WORKPLACE ACT OF 1988

In an effort to intensify the government's war against illegal drugs, Congress passed the Drug-Free Workplace Act, or the "DFWA," which became effective on March 19, 1989 (41 U.S.C. § 701, et seq). Under the Act, any employer who is awarded $25,000 or more per year in federal government contracts or grants must comply with its provisions.

First, § 701 and § 702 of the DFWA state that covered employers must publish and distribute to each of their employees a policy statement informing them that unlawfully manufacturing, distributing, dispensing, possessing or using any controlled substance in the workplace without a prescription is prohibited. This statement must also inform employees what disciplinary actions will be taken against anyone who violates this policy, such as suspension, termination, and so on.

Additionally, as a condition of employment, every employee must agree to abide by this

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policy, as well as agree to notify their employer if they should ever be convicted of a workplace-related criminal drug charge within five days of this conviction.

Sections 701 and 702 of the DFWA also state that employers who receive notice that one of their employees has been convicted of a drug-related offense occurring in the workplace must notify any governmental agencies with whom it has contracts or grants totaling $25,000.00 or more each year of this fact within ten days of receiving such notice. Section 703 of the DFWA requires covered employers to take appropriate disciplinary action against the employee within 30 days of receiving this notice, which may include termination, or, in the alternative, the employer may require the employee to enroll in an approved drug rehabilitation program in lieu of invoking disciplinary measures.

Sections 701 and 702 of the Act also state that covered employers are required to establish a drug-free awareness program informing employees of the harm drug abuse can cause in the workplace, as well as reiterating the employer's policy on this matter and the penalties employees may suffer for committing drug abuse violations in the workplace. Such communications must also make employees aware of any drug counseling, rehabilitation or employee assistance programs that may be available to them.

Failure to comply with the DFWA could result in a loss of federal contracts or grants for up to five years. The DFWA is enforced by each governmental agency responsible for awarding the contract or grant.

X. THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

A. Coverage Of The EPPA

The Employee Polygraph Protection Act of 1988 (EPPA) (29 U.S.C. § 2001, et seq.) made it illegal for private employers to require their employees, or their potential employees, to submit to a polygraph test, which includes a prohibition against deceptographs, psychological stress evaluators, voice stress analyzers or any other similar devices used for determining whether someone is telling the truth regarding their honesty or dishonesty. On the other hand, written "honesty" tests are not covered by this Act.

Section 2006 of the Act states that the EPPA does not apply to federal, state, or local governmental employers, nor does it apply when such testing is being used for national security or defense purposes. This Act also does not apply to private employers whose business relates to security services or who are engaged in the manufacturing, distribution, or disbursement of controlled substances.

However, § 2006 of the EPPA does allow private employers to administer such tests whenever the testing is performed as a result of an economic loss or injury suffered by the business. Still, in order to qualify for this exception, the employer must have a reasonable suspicion that those employees being tested were involved in the loss. The employer must also be able to show that those employees being tested had access to the property that is the subject of the investigation.

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B. Rights Of Examinees

Should a qualifying event occur, § 2006 requires employers who want to test their employees' honesty to execute a written statement, which is to be given to each employee before the test is administered. This statement must:

1. Specifically identify the incident or activity being investigated, which includes identifying the specific economic loss suffered by the employer,

2. It must specifically state the basis for testing each particular employee, including a statement indicating that the employee had access to the property that is the subject of the investigation, as well as a statement describing the employer's reasonable suspicion for believing the employee was involved in the incident,

3. The statement must then be signed by someone who is authorized to legally bind the employer, other than the polygraph examiner, and

4. These documents must be retained by the employer for at least three years.

Section 2005 states that the Act is enforced by the Secretary of the Department of Labor, who may fine employers up to $10,000 for each offense. Additionally, plaintiffs are allowed to pursue their own private civil actions against employers.

Further, § 2007 of the EPPA states that the examinee may not be asked questions in a manner that is designed to degrade or intrude on the privacy of the examinee. The examinee may not be asked any questions regarding his:

1. Religious beliefs or affiliations,

2. Beliefs or opinions regarding racial matters,

3. Political beliefs or affiliations,

4. Any matter relating to sexual behavior, or

5. Any beliefs, affiliations, opinions, or lawful activities regarding labor organizations.

Also, § 2007 states that an employee who produces sufficient written evidence from a physician that he is suffering from either a medical or psychological condition or is undergoing treatment that may cause an abnormal response cannot not be required to undergo the examination.

Before the test is administered, the employee must be provided with a written notice that fully explains:

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- The date, time and location of where the test will be given,

- The fact that the individual has the right to obtain and consult with legal counsel, or an employee representative, before beginning each phase of the test,

- That the employee may end the test at anytime,

- The employee must also be provided an opportunity to review all the questions that will be asked during the test beforehand,

- The nature of the test that will be administered, the instruments that will be used,

- Whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed,

- Whether any other type of recording or monitoring device will be used, including any device used for recording or monitoring the test itself and not the individual,

- That either the employer or the examinee have the right, with mutual knowledge, make a recording of the test, and

- Before any adverse employment action can be taken against the employee based even in part upon the results of this polygraph test, the employer is required to discuss the results of the test with the employee.

The employee must also read and sign a written notice explaining:

- That the employee cannot be required to take the test as a condition of employment,

- That any statement made during the test may constitute additional supporting evidence that can be used against the employee,

- The summary of the full legal rights of both the employee and the employer under the EPPA, as previously explained, including the fact that the employee may end the test at any time,

- The legal remedies available to the employer and the employee under the EPPA, and

- Any other limitations imposed by the EPPA.

Additionally, after the test is completed, the employer must give to the employee:

- A written copy of the results of the test,

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- A copy of the questions that were asked during the test and
- A charted record of the employee's responses.

And finally, § 2003 states that employers are required to notify their employees of their rights under the EPPA Act by posting a notice outlining these rights in a "conspicuous place" at the employer's place of business.

C. Requirements Placed Upon Examiners

The EPPA also places specific requirements upon polygraph examiners. Section 2007 of the EPPA states that:

1. Examiners are not allowed to conduct and complete more than five polygraph tests on a calendar day,
2. Every polygraph test administered by an examiner shall be at least 90 minutes in duration,
3. The examiner must have a valid and current license granted by the proper licensing and regulatory authorities of the state in which the test is given, if the state requires such a license,
4. The examiner is required to maintain at least a $50,000 bond or an equivalent amount in professional liability coverage and
5. The examiner is then required to render his opinion or conclusions regarding the test in writing based solely on his analysis of the polygraph test's charted responses. Therefore, the examiner's opinions or conclusions of the results of the test cannot contain any information other than:
    a) The employee's admissions,
    b) The information provided by the employee,
    c) The facts of the case, and
    d) The examiner's interpretation of the employee's charted responses that are relevant to the purpose and stated objectives of the test. The examiner is therefore forbidden to make any recommendations regarding the employee's discipline or the future employment prospects of the employee.

D. Enforcement And Penalties

Section 2005 states that the Act is enforced by the Secretary of the Department of Labor, who may fine employers who are found to be in violation of the EPPA up to $10,000 for each offense. Additionally, plaintiffs are allowed to pursue their

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own private civil actions against employers who violate the Act.

XI. THE NEW I-9 FORM

A. General Issues

The new Form I-9 makes several small but important changes to the previous form:

- The form itself has expanded to three pages, with the section for reverification now appearing on its own page.

- Just as the form has expanded, so have the instructions, from nine pages to 15 pages. The instructions are now in a separate document from the form itself. This is an important change because employers are required to make a copy of the instructions available to employees during completion of Section 1 of the I-9. Fortunately, the instructions can simply be made available electronically, but if employers provide I-9s solely in paper format, employers will need to be sure to include a copy of the instructions for the employee.

- A few of the individual fields on the form have changed to help eliminate confusion. For example, date fields have been changed to read, "Today's Date." This change helps highlight the fact that I-9s should ***never*** be backdated.

- Section 2 of the form now includes a block for "Additional Information," which employers may use to record termination and document retention dates, E-Verify notes, post audit comments and corrections, and any other details that were previously written in the margins or on separate pages.

- The window for completing the I-9 is within the first week of work.

- The completed form is not submitted to the government for review and feedback, which means errors and mistakes not only can go unnoticed but they can also continuously on new forms for years to come.

- It can be easy to overlook some of the requirements on the form, including the signature and date.

- If audited by U.S. Immigration and Customs Enforcement (ICE), even minor mistakes can add up quickly. In August 2016, the fines were increased, so they can now range from $216.00 to $2,156.00 per I-9.

The new I-9 addresses a few of these issues via its "smart" features.

For example, if a required field is left blank, the new I-9 will alert the employer of the missing data and will prevent the form from being saved.

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The form also includes drop-down menus, "tooltips" that provide help and guidance on individual fields, and smart filters that will autofill or remove options that don't correspond with the details provided by the employee in Section 1.

B. Integrated "Smart" Features

The integrated "smart" features of the new I-9 encourage employers and employees to fill out the form in its digital PDF format. However, the form still is not in an "electronic" form, according to government standards. That means that despite the form's numerous improvements, the U.S. Citizenship and Immigration Services (USCIS) version still is not equipped to be completed entirely in digital/electronic format.

The problem is that this new form cannot be signed. Specifically, for an I-9 to be completed electronically, the attestations must be made using a compliant electronic signature protocol. This electronic signature method must:

- Require the person signing to acknowledge that he read the attestation;
- At the time of the transaction, attach the electronic signature to (or associate it with) a completed Form I-9; and
- Create and preserve a record verifying the identity of the persons signing the form and then provide a printed confirmation of the transaction.

The new Form I-9 (as provided by USCIS) doesn't comply with those requirements.

Employers wishing to move to a fully electronic I-9 process generally must use a third-party vendor to meet these requirements. Those currently using such a vendor or service may continue to do so, but they will need to ensure that the service provider has updated its forms to a compliant version of the new I-9.

Otherwise, employers and employees may fill out the new I-9 via the digital form, but when it comes time to signing the form, the completed form will still need to be printed and signed manually. Once signed, this physical copy may be scanned and stored digitally. If it is scanned and stored according to applicable electronic retention standards, then it will fulfill I-9 retention requirements just as if it were the original paper.

C. I-9 Commonly Asked Questions Answered

Q: Is it acceptable to use Skype or FaceTime to complete I-9s for remote workers?

Unfortunately, no … and U.S. Citizenship and Immigration Services (USCIS) addresses this directly in its FAQ (available at www.uscis.gov/i-9-central). When an employee presents authorization documents required by List A or Lists B and C of Form I-9, these documents must be

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physically examined by the person completing Section 2 of Form I-9. This review must also occur in the presence of the employee. So, reviewing or examining these documents via webcam, Skype, FaceTime, or similar remote services isn't permissible.

If an employer has remote employees who do not physically report to the workplace, then employers may have a third party act as an authorized representative of the employer to review these documents and fill out Form I-9. However, this authorized representative must be able to physically review the documents. If that is not feasible, then another representative who can review the documents must be selected.

Q: Are we required to hire a notary public as our authorized representative?

When an organization has no authorized representative or agent in the same geographic area as the remote worker, the employer **may** use a notary public to perform this service. After all, USCIS specifically notes that employers "may designate or contract with someone such as a personnel officer, foreman, agent, or anyone else acting on your behalf, including a notary public, to complete Section 2."

First, it is important for employers to understand that the authorized representative serves as an agent of the employer, so if the authorized representative makes a mistake or misrepresentation in verifying documentation or filling out Section 2 of Form I-9, then the employer, not the individual representative, is liable for the mistake. So, it is clearly in the best interest of the employer to ensure that the person reviewing its employees' documentation and completing Form I-9 is as familiar with the process, and its pitfalls, as you would be if you were completing the form yourself.

Employers are not required to have an I-9 notarized. In fact, notaries should not affix their seals to the I-9 because they are not acting in their official capacity as notaries public.

XII. THE E-VERIFY RULE

E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS), U.S. Citizenship and Immigration Services (USCIS) that allows employers to verify the employment eligibility of their employees, regardless of citizenship. Based on the information provided by the employee on his or her Form I-9, E-Verify checks this information electronically against records contained in DHS and Social Security Administration (SSA) databases.

On June 6, 2008, the President issued Executive Order 13465 "Economy and Efficiency in Government Procurement through Compliance with Certain Immigration and Nationality Act Provisions and the Use of an Electronic Employment Eligibility Verification System," providing that "Executive departments and agencies that enter into

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contracts shall require, as a condition of each contract, that the contractor agree to use an electronic employment eligibility verification system designated by the Secretary of Homeland Security to verify the employment of:

- all persons hired during the contract term by the contractor to perform employment duties within the United States; and

- all persons assigned by the contractor to perform work within the United States on the federal contract."

The Federal Acquisition Regulation (FAR) was therefore amended to require federal contractors to use E-Verify, which is the system designated to implement the Executive Order.

FEDERAL CONTRACTS AFFECTED BY THE RULE

What is the E-Verify clause?

The rule requires the insertion of the E-Verify clause into applicable federal contracts, committing Government contractors to use E-Verify for their new hires and all employees (existing and new) assigned to any given federal contract.

What is the acquisition threshold for this rule?

The rule requires the insertion of the E-Verify clause for prime federal contracts with a period of performance lasting longer than **120 days** and with a value above the simplified acquisition threshold **($100,000).**

Does the rule apply to subcontracts?

The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for construction with a value over **$3,000**.

Does the rule extend to contracts outside the United States?

The rule applies only to employees working in the United States, which is currently defined to include the fifty States and the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Does the rule apply to existing indefinite-delivery/indefinite-quantity contracts?

Existing indefinite-delivery/indefinite-quantity contracts should be modified by Contracting Officers on a bilateral basis in accordance with FAR 1.108(d)(3), to include the clause for future orders if the remaining period of performance extends at **least six months** after the final rule effective date, and the amount of work or number of orders expected under the remaining performance period is substantial.

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Types of Contracts Exempted

What types of prime contracts are exempt from the rule?

The rule exempts:

- Contracts that include only commercially available off-the-shelf (COTS) items (or minor modifications to a COTS item) and related services;
- Contracts of less than the simplified acquisition threshold ($100,000);
- Contracts less than 120 days; and
- Contracts where all work is performed outside the United States.

What is considered to be a COTS item?

A COTS item is a commercial item that is sold in substantial quantities in the commercial marketplace and is offered to the government in the same form that it is available in the commercial marketplace, or with minor modifications.

Are contracts for agricultural and food products exempt from the rule?

Nearly all food and agricultural products fall within the definition of "commercially available off-the-shelf (COTS)" items. Federal contracts for COTS items are exempt from the rule. Federal contracts for food and agricultural products shipped as bulk cargo, but that otherwise would be considered COTS items, such as grains, oils and produce are also exempt.

Subcontracts that only provide supplies, such as food, are exempt from the rule.

EMPLOYEES AFFECTED BY THE RULE

As a federal contractor, which employees may I verify through the E-Verify system?

As a federal contractor participant in E-Verify, you are required to use E-Verify for:

- All new employees, following completion of the Employment Eligibility Verification Form I-9 (Form I-9); and
- All existing employees who are classified as "employees assigned to the contract."

Employees whom you have already verified through E-Verify should not be re-verified. However, an employee's previous employment authorization through E-Verify from another employer does not satisfy your obligation to use E-Verify once you have hired them.

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Those who have an active federal agency HSPD-12 credential or who have been granted and hold an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual do not need to be verified.

Under the rule, only those employers that win a contract or subcontract that includes the E-Verify clause may run existing employees through E-Verify. A federal contractor must verify their new hires and the employees who are assigned to the contract, and may elect to also verify their entire workforce.

There are some exceptions to the requirement to use E-Verify for all new hires. The exceptions apply to institutions of higher learning, state and local governments, governments of federally recognized Indian tribes and for sureties performing under a takeover agreement with a federal agency. Under the rule, such entities may choose to only use E-Verify on new and existing employees assigned to the covered federal contract.

What is an "employee assigned to the federal contract"?

The rule defines an "employee assigned to the federal contract" as any employee hired after November 6, 1986, who is directly performing work in the United States under a contract that includes the clause committing the contractor to use E-Verify. An employee is not considered to be directly performing work under the contract if the employee normally performs support work, such as indirect or overhead functions, and does not perform any substantial duties under the contract.

**My employee is working on a contract for a minimal amount of time.
Is he or she subject to E-Verify?**

Yes. The rule does not exempt employees based on the intermittent nature of the work or the length of time spent performing the work.

**One of my employees was run through E-Verify by a previous employer.
Do I need to run this employee through E-Verify again?**

Yes. Under the rule, federal contractors are required to enter the worker's identity and employment eligibility information into the E-Verify system following completion of the Form I-9 at the time of hire.

**One of my employees was previously run through E-Verify by my company.
Do I need to run this employee through E-Verify again?**

No. Once an employee has been run through E-Verify they should not be re-verified through E-Verify by the same employer.

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Must I verify all new employees?
What are the exceptions to this requirement?

The rule requires most federal contractors to use E-Verify for all new employees, regardless whether the employees are assigned to a federal contract.

Federal contractors who are state and local governments, governments of federally recognized Native American tribes, and sureties performing under a takeover agreement entered into with a federal agency pursuant to a performance bond need only use E-Verify for employees assigned to a covered federal contract.

What employees are not considered to be directly performing work under a contract and therefore excluded?

Those employees who normally perform support work, such as indirect or overhead functions, and do not perform any substantial duties applicable to the contract, would be excluded.

My employee has been previously confirmed as work authorized through E-Verify but is moving to another contract.
Do I need to run him or her through E-Verify again?

No. Once an employee has been run through E-Verify and employment authorization has been confirmed, the employee should not be reverified through E-Verify again by the same employer.

Are there any exceptions to verify employees with certain credentials and security clearances?

Yes. The federal contractor is not required to perform employment verification using E-Verify for any employee who has been granted and holds an active federal agency HSPD-12 compliant credential or a U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual. The employer still must complete the Form I-9 at the time of hire for such employees.

Can my subcontractor verify under my MOU?

No. Each employer must enter into its own MOU with DHS and SSA.

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BEFORE YOUR COMPANY ENROLLS IN E-VERIFY

As a current or prospective federal contractor, am I required by the final rule to enroll in E-Verify now?

The final rule applies to solicitations issued and contracts awarded after the applicability date of the final rule. The final rule will become applicable to contractors on September 8, 2009. All employers, including federal contractors, may enroll in E-Verify at any time without waiting for the applicability date. Under the final rule, employers are required to enroll in E-Verify if and when they are awarded a federal contract or subcontract that requires participation in E-Verify as a term of the contract.

If you wish to enroll in E-Verify before the applicability date of this rule you may do so now. Enrolling now may help you become familiar with the system and may make it easier for you to use E-Verify if and when you are awarded a federal contract. Verification of employees through E-Verify is limited to new hires only, unless you are a federal contractor who has been awarded a contract on or after September 8, 2009.

If you have already enrolled in E-Verify and you are awarded a federal contract after September 8, 2009, you will need to update your company profile through the "Maintain Company" page once the contract has been awarded. Once you designate your organization as a federal contractor, all E-Verify users at your company will need to take a federal contractor tutorial that explains the new policies and features that are unique to federal contractors.

My company was just awarded a federal contract and the rule is now in effect. When is my company required to enroll in E-Verify?

When a contractor wins the bid on a federal contract that contains the E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date.

Usage of E-Verify also applies to indefinite-delivery/indefinite-quantity contracts modified after the September 8, 2009 effective date.

How do I enroll my company in E-Verify?

Before you can start using E-Verify, you need to enroll your company in the program. When you enroll your company, you will be asked to provide basic contact information for your company and agree to follow the rules of the program. At the end of the enrollment process, you will be required to sign a "Memorandum of Understanding (MOU) that provides the terms of agreement between your company and DHS.

You can register your company at the U.S. Citizenship and Immigration Services website:

http://www.uscis.gov

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During the E-Verify company enrollment process, you will be asked "Which category best describes your organization?" If you have been awarded a federal contract after September 8, 2009, you should select "federal contractor" from the drop-down box.

Once you have indicated that you are a federal contractor, the system will then prompt you to identify the federal contractor category (e.g., institutions of higher education; state and local governments and governments of federally recognized Indian tribes; and certain sureties) that best describes your organization along with what groups of your current employees you plan to verify (i.e., current employees assigned to the federal contract or your entire workforce).

Once you have completed the enrollment process, USCIS will review your information and activate your account. After the account is activated, you will receive an email with your login instructions, user ID, and password.

The proposed FAR rule would require federal contractors to use E-Verify for both new hires and existing employees who work on a new federal contract.

Does the federal government use E-Verify for both new hires and existing employees?

Yes. Federal agencies verify employment eligibility of new and existing employees. In most instances, the federal government goes well beyond an E-Verify check to confirm work eligibility as part of a variety of suitability and other background checks that are required to be performed on federal employees.

These background checks may include, but are not limited to:

- FBI fingerprint and name check;
- Checks against local law enforcement databases;
- Written inquiries to educational institutions, previous employers, and neighbors;
- Credit check;
- Checks to verify name, SSN, date of birth, and citizenship; and
- Checks against other federal and private data sources.

For all new hires, federal agencies are required to use E-Verify to verify their employment eligibility. Additionally, many new hires also subsequently undergo background investigations and an FBI fingerprint and name check.

For both new and existing employees, federal agencies are required by Homeland Security Presidential Directive – 12, "Policy for a Common Identification Standard for Federal Employees and Contractors" to follow certain credentialing standards prior to

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issuing personal identity verification cards. These standards include conducting a background investigation which includes verification of name, DOB, and SSN (among other data points) against federal and private data sources. This includes a check against Social Security Administration (SSA) records to validate social security numbers. Additionally, these standards require verification of work authorization for non-U.S. citizens against federal immigration databases.

How much will it cost my company to enroll in E-Verify?

Nothing; E-Verify is free. It is the best means available for determining employment eligibility of new hires and the validity of their Social Security Numbers.

My company is required to use E-Verify as a federal contractor for the first time. How do I proceed?

If your company has not yet enrolled in E-Verify, then you have 30 days from the date of contract award to enroll and 90 days from the date you enroll with E-Verify to initiate verification queries for employees already on your staff who will be working on the contract and to begin using the system to verify newly hired employees. After this 90-day phase-in period, you will be required to initiate verification of each newly hired employee within 3 business days after their start date. To meet this three-day requirement, employers may initiate verification of a newly hired employee before their start date if the employee has accepted the job offer and filled out the Form I-9.

Please note that pre-screening of job applicants is not allowed. Instead, the system may be used for new hires only after the employee has been offered the job and has accepted.

Also remember that you must continue to use E-Verify for the life of the contract for all your new hires, whether or not they are employees assigned to the contract, unless certain exceptions apply.

My company enrolled in E-Verify, but did not enroll us as a federal contractor. Does my company need to re-enroll to comply with this rule?

No. You do not need to enroll again, but you will need to update your company profile through the “Maintain Company” page. Please log in to E-Verify, go to the Maintain Company page, and select the option indicating you are a federal contractor. Once you designate your organization as a federal contractor, all users (including yourself) will need to take a brief federal contract tutorial that explains the new policies and features that are unique to federal contractors. When the employer changes its profile to reflect itself as a “federal contractor,” it will not be able to proceed with processing cases in E-Verify until it has taken the refresher tutorial.

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My company has already been using E-Verify for more than 90 days. When must we begin verifying existing employees assigned to work on a federal contract that contains the FAR E-Verify clause?

If your company has been enrolled in E-Verify for more than 90 days, then you are required to continue to initiate verification of newly hired employees within **three business days** of their start date, but you have 90 days from the contract award date to begin using E-Verify for each employee already on your staff who are assigned to the contract. Your transition to using the system as a federal contractor does not allow you to stop using E-Verify for your new hires on the standard three-day schedule. The 90-day window in the FAR rule to start using E-Verify for new hires applies to new E-Verify users and is intended to provide additional implementation time.

Remember that you are required to continue using E-Verify throughout the duration of your federal contract for all new hires, whether or not they are employees assigned to the contract, unless your company falls under one of the exceptions to this policy.

My company's federal contract has ended. May we continue to use E-Verify?

Yes. Your company may continue to use E-Verify but you should update your company profile through the Maintain Company page. Additionally, you will no longer be able to run existing employees through E-Verify.

My company's Federal contract has ended. Do we need to notify USCIS if we no longer want to participate in E-Verify?

Yes. Federal contractors who no longer wish to participate in E-Verify after a contract has ended can terminate their participation by selecting the "request termination" link in the E-Verify system. If your company fails to do so, then the terms of the MOU remain in place.

Option to Verify Entire Workforce

May I verify my entire workforce?

Yes. Federal contractors and subcontractors have the option of verifying their entire workforce, both new hires and existing employees – including those not assigned to a federal contract. If your company elects to do this, you must notify DHS by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant. A federal contractor that chooses to exercise this option must initiate an E-Verify query for each employee in the contractor's entire work force within 180 days of updating its company profile.

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The final rule instructs me that I must notify the Department of Homeland Security if I plan to verify my entire workforce. How do I do this?

If your company plans to verify its entire workforce, you must notify the Department of Homeland Security (DHS) by updating your company profile through the "Maintain Company" page.

If your company is already enrolled in E-Verify and plans to verify its entire workforce, your program administrator must notify the Department of Homeland Security (DHS) by updating your company profile through the Maintain Company page if you are a current participant, or during enrollment if you are a new participant.

Once you have indicated you are a federal contractor, the system will then prompt you to identify the federal contractor category that best describes your organization. You will then have the option to select "all new hires and existing employees" indicating that you wish to verify your entire workforce through E-Verify. A federal contractor that chooses to exercise this option must initiate verifications for the contractor's entire work force within 180 days of updating their company profile.

Social Security Numbers

Is the employee required to provide his or her SSN on the Form I-9?

Yes. The employee must provide his or her SSN to an E-Verify employer if the employee has one. If the employee has applied for and is waiting to receive an SSN, the employer should make a notation on their Form I-9 and proceed with E-Verify upon receipt of the SSN.

Additional Information for All Users

May I use E-Verify prior to making a job offer to a job applicant?

No. All users, including federal contractors, are prohibited from using E-Verify prior to a job offer and acceptance by the applicant. By signing the MOU to participate in E-Verify, all employers agree not to use E-Verify for pre-employment screening of job applicants, support for any unlawful employment practice, or any other use not authorized by the MOU. Should the employer use E-Verify procedures for any purpose other than as authorized by the MOU, the employer may be subject to appropriate legal action and termination of its access to the E-Verify systems.

Does participation in E-Verify provide safe harbor from work site enforcement?

No. However, using E-Verify creates a rebuttable presumption that your company has not knowingly hired an unauthorized alien. Participation in the program does not provide a "safe harbor" from worksite enforcement, however.

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If my company participates in E-Verify, are we required to notify applicants of our participation?

As an employer participating in E-Verify, you are required to post the notice provided by DHS indicating your company's participation in the E-Verify program as well as the anti-discrimination notice issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices at the Department of Justice. The posting must take place in a prominent place that is clearly visible to prospective employees and all employees who are to be verified through the system. Once you are enrolled, and able to log into the E-Verify online system, these notices can be found in the "On-line Resources" section.

Where can I find additional resources?

The Federal Contractor User Manual and Tutorial contain instructions and other related materials on E-Verify procedures and requirements.

Once your company enrolls in E-Verify and is able to log in to the system, these items are available under the "Online Resources." In addition, you may also call E-Verify Customer Support at 1-888-464-4218.

For more information about unfair employment practices and verifying the employment eligibility of your employees, you may contact the Office of Special Counsel for Immigration Related Unfair Employment Practices, Civil Rights Division, United States Department of Justice, at 1-800-255-7688.

You can find more information at the U.S. Citizenship and Immigration Services website: http://www.uscis.gov

XIII. FAIR CREDIT REPORTING ACT

A. General Coverage

The Fair Credit Reporting Act, or the "FCRA," (15 U.S.C. § 1681, et seq.), which was an amendment to the Consumer Credit Reporting Act, and was most recently amended by the Consumer Credit Reporting Reform Act of 1996, regulates two types of background reports generated by consumer reporting agencies. These two types of reports include "consumer reports" and "investigative consumer reports." The FCRA was previously regulated by the Federal Trade Commission, or the "FTC." However, the FRCRA is now regulated by the Consumer Financial Protection Bureau, or the "CFPB."

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B. Definitions

1. Consumer Reporting Agencies

The FCRA further defines "consumer reporting agencies" as being any person or organization which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing this information to third parties, such as employers.

2. Consumer Report

The FCRA defines a “consumer report” as being any written, oral or other communication of any information by a consumer reporting agency relating to a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is to be used or is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:

a) Credit or insurance to be used primarily for personal, family or household purposes,

b) Employment purposes, including reassignment, retention, and so on, or

c) Any other purpose permitted under the FCRA.

3. Investigative Consumer Report

The second type of report governed by the FCRA is an “investigative consumer report.” The FCRA defines an "investigative consumer report" as being any report generated by a consumer reporting agency which involves investigating an individual’s character, general reputation, personal characteristics and mode of living by interviewing the person’s friends, neighbors, relatives, associates and so on.

Therefore, an investigative consumer report differs from a consumer report in that no personal interviews with friends, former employers or anyone else occurs in generating a consumer report. Instead, basically a "records only" type of report is requested when an employer authorizes a consumer report, unlike an investigative consumer report.

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C. Requirements For Requesting A Consumer Report

Under the FCRA, whenever an employer requests a consumer report be generated on an employee or job applicant, the following requirements must be met:

1. The job applicant or employee must be provided with a "clear and conspicuous" written disclosure informing the individual that the employer intends to request and possibly use a consumer report in making its employment decision. This disclosure must exist as its own document and may not be part of the employer's employment application or any other form.

   However, this disclosure notice may be combined with the individual's authorization to perform and use the consumer report. The employer is then required to obtain the individual's signature acknowledging receipt of this disclosure either before ordering the report from the consumer reporting agency or within three days of placing such an order. This signed disclosure must then be retained by the employer.

2. The employer must also first obtain the individual's written authorization to have the consumer reporting agency conduct such an investigation. This authorization form must state that the job applicant or employee consents to the employer's use of this report. The individual's authorization may be included on the same form as the employer's notice of disclosure, as mentioned above.

Further, consumer reporting agencies are prohibited from supplying an employer with any information relating to the individual's medical history without first obtaining that person's written permission. (See sample "Consumer Report Disclosure and Authorization" form at the end of this section.)

D. Requirements For Requesting An Investigative Consumer Report

The second type of report governed by the FCRA is the "investigative consumer report." The FCRA defines an "investigative consumer report" as being any report generated by a consumer reporting agency which involves investigating an individual's character, general reputation, personal characteristics and mode of living by interviewing the person's friends, neighbors, relatives, associates and so on.

Therefore, an investigative consumer report differs from a consumer report in that no personal interviews with friends, former employers or anyone else occurs in generating a consumer report. Instead, basically a "records only" type of report is requested when an employer authorizes a consumer report, unlike an investigative consumer report.

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Due to the more intrusive nature of conducting investigative consumer reports, either before an employer orders an investigative consumer report from a consumer reporting agency or within three days of making such a request, included in the disclosure the employer provides to the employee or job applicant is a statement which also informs the person that he has the right to request a complete and accurate disclosure of the nature and scope of the investigation requested by the employer and a summary of the individual's rights under the FCRA.

(Opinion letters generated by the Federal Trade Commission indicate that it is only necessary to provide these individuals with a summary of their rights after they have made such a request. This disclosure therefore must merely inform them of their right to receive such information.)

(See sample "Summary Of Rights Under The Fair Credit Reporting Act" handout, the "Acknowledgment Of Receipt Of Summary of Rights And/Or the Nature and Scope of the investigative Consumer Report Requested Under The Fair Credit Reporting Act" and the "Fair Credit Reporting Act Investigative Consumer Report Disclosure and Authorization" form at the end of this section.)

However, the FCRA provides an exemption from complying with the requirements of the Act regarding investigative consumer reports for employment agencies. Specifically, the Act states that if an agency is procuring an employee to work for a prospective employer, and that agency regularly performs such procurement, and the information collected is used only for the purpose of procuring the individual's employment, then the requirements of the FCRA for conducting an investigative consumer report need not be met. This situation most often arises when a search firm checks the references of a potential job candidate.

E. Obsolete Information And The FCRA

Reports supplied to employers under the FCRA cannot include any **obsolete** information that may be adverse to the individual. Previously, obsolete information was defined so as to include records as arrest records, indictments, convictions, lawsuits, judgments, and so on, which are over seven years old.

However, this seven-year limit on considering arrest records, indictments or convictions has been eliminated. Therefore, employers now have no time restrictions placed upon them by the FCRA when considering such information in relation to their employment decisions.

Any information relating to **bankruptcies** over ten years old is also considered obsolete and may not be included in these reports. However, if the report is relating to the employment of an individual who will earn an annual salary of $75,000 or more a year, such information may be included.

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F. Requirements Relating To Adverse Actions Taken Against Individuals

Before an employer takes any action adverse against a job applicant or an employee that is based even in part upon the results contained in any consumer report or investigative consumer report, the individual must be provided with the following:

1. Oral, written or electronic notice of the adverse action to be taken against the person,

2. A copy of the report,

3. A summary of the person's rights under the FCRA, which includes the individual's right to request a disclosure of the nature of the report, the sources of the information contained in the report and a listing of anyone who received a copy of the report,

4. The name, address and telephone number of the consumer reporting agency that provided the report (If a toll free telephone number exists, that must be provided as well.),

5. A statement that the consumer reporting agency did not make the employment decision which was adverse to the individual and is therefore unable to explain why the decision was made,

6. A statement informing the individual that he is entitled to receive a free copy of his file from the consumer reporting agency within 60 days of making such a request, and

7. A statement informing the individual that he has the right to dispute the accuracy and/or the completeness of the information provided by the consumer reporting agency.

(The FCRA defines an "adverse action" as being any denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.)

(See sample letter to a person receiving an adverse action based at least in part upon a consumer report at the end of this section.)

Although the FCRA fails to state how long an employer must wait to take its action which is adverse to the job applicant or employee after the individual has received notice of the employer's decision, an FTC Opinion Letter dated June 27, 1997 states that a reasonable period of time for an employer to wait would be **five business days.**

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G. Disputing Information In An Investigative Consumer Report Or A Consumer Report

1. Dispute Existing With Consumer Reporting Agency Data

If an applicant or employee wishes to dispute the information contained in the report, the individual must first inform the agency that he is challenging the accuracy of its data. The agency would then have **30 days** in which to reinvestigate its information. If the applicant or employee supplies the agency with new information, the agency would then have an additional **15 days** to investigate, if necessary. The agency would then have **five business days** after receiving the individual's objection or presentment of new information to inform its source of this dispute and to supply its source with this newly discovered information.

Within **five days** after completing its reinvestigation, the agency must inform the applicant or employee of its results. If the agency changes its report as a result of this reinvestigation, then the agency must also give the individual a copy of this revised report within this **five-day** period.

2. Dispute Existing With An Employer's Data

If a job applicant or employee notifies an employer that it has supplied incomplete or inaccurate data, the employer is also under a duty to conduct an investigation and review all of the relevant information it has supplied to the consumer reporting agency within **30 days** of receiving the individual's notice. If the employer discovers an error, it must notify the consumer reporting agency of its correction. The employer must also notify the agency of any such disputes as they arise.

The FCRA also prohibits employers from providing information to a consumer reporting agency that they know or consciously avoid knowing to be incomplete or inaccurate.

Further, if an employer "regularly and in the ordinary course of business" supplies information to either one or more consumer reporting agencies and later discovers that it has furnished incomplete or inaccurate information, the employer must promptly notify the agency of the error. The employer must inform the agency of any additional information it discovers and it must make any necessary corrections to the information it furnished to the consumer reporting agency in order to ensure the accuracy and completeness of the information it provided.

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H. Requirements Placed Upon Consumer Reporting Agencies

The FCRA also places significant restrictions on consumer reporting agencies themselves. Under the FCRA, consumer reporting agencies may furnish employers with consumer reports only if:

1. They have provided the employer with a written summary of their job applicants' and employees' rights under the Act and

2. They have obtained a written certification from the employer stating that the report they requested will be used only for purposes permitted under the FCRA, that the employer will fulfill its disclosure and adverse action obligations under the FCRA and that the information contained in the report will not be used in violation of any other federal or state equal opportunity law or regulation. As a result, it will then be the employer's responsibility to ensure that it is in compliance with the law.

I. An Additional Consideration Regarding The Use Of Credit Information In Making Employment Decisions

Of course, if an employer does request that a consumer report or an investigative consumer report be conducted and intends to consider the individual's credit history in making its employment decision, the employer should be certain that the person’s credit is **clearly** relevant to the position.

If it can be shown that the individual’s credit is not clearly relevant to the position, then using such information in making the employment decision may be seen as a discriminatory employment practice in violation of Title VII. Since more minorities have poor credit than do non-minorities, then such a practice has been found to have a disparate impact against certain protected class individuals.

J. Penalties Under The FCRA

Penalties for violating the FCRA can be quite severe. For willfully violating the Act, an employer could be forced to pay the applicant or employee his actual damages, statutory damages, attorney's fees, costs and punitive damages. Such damages may be no less than $100.00 and no more than $1,000.00.

If an employer willfully obtains a report from a consumer reporting agency under false pretenses or without a permissible purpose, both the individual who was the subject of the report and the consumer reporting agency may collect the greater of their actual damages or $1,000.00 from the employer.

If either the employer or the consumer reporting agency acts negligently and violates the FCRA, both could be held liable to the applicant or employee for actual damages. Costs and attorney's fees are also available.

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Violating the FCRA may involve criminal penalties as well. Obtaining a consumer report under false pretenses may also bring criminal penalties, which may include fines and imprisonment for up to two years.

Fair Credit Reporting Act Sample Forms

Prescribed Summary of Consumer Rights

This summary must be a separate document on paper no smaller than 8x11 inches in size with text no less than 12-point type (8-point for the chart of federal agencies) in bold or capital letters as indicated. The form in this appendix prescribes both the content and the sequence of items in the required summary. A summary may accurately reflect changes in numerical items that change over time (e.g., dollar mounts, or phone numbers and addresses of federal agencies), and remain in compliance.

A Summary of Your Rights Under the Fair Credit Reporting Act

For a complete report on the FTC's Final Summaries And Notices Under FACTA, go to http://www.ftc.gov/opa/2004/11/facta.htm.

For the latest Summary of Rights Form and a full description of the FCRA, just go to here (www.gpo.gov) and here (Amazon – Federal Register Public Inspection).

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A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.consumerfinance.gov/learnmore or write to: Consumer Financial Protection Bureau, 1700 G Street N.W., Washington, DC 20552.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.

- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:
  - a person has taken adverse action against you because of information in your credit report;
  - you are the victim of identity theft and place a fraud alert in your file;
  - your file contains inaccurate information as a result of fraud;
  - you are on public assistance;
  - you are unemployed but expect to apply for employment within 60 days.

  In addition, all consumers are entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.consumerfinance.gov/learnmore for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit-worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.consumerfinance.gov/learnmore for an explanation of dispute procedures.

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- **Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.** Inaccurate, incomplete, or unverifiable information must be removed or corrected, usually within 30 days. However , a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need – usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.consumerfinance.gov/learnmore.

- **You many limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt out with the nationwide credit bureaus at 1-800-XXX-XXXX.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identity theft victims and active duty military personnel have additional rights.** For more information, visit www.consumerfinance.gov/learnmore.

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TYPE OF BUSINESS:	CONTACT:
1.a. Banks, savings associations, and credit unions with total assets of over $10 billion and their affiliates b. Such affiliates that are not banks, savings associations, or credit unions also should list, in addition to the CFPB:	a. Consumer Financial Protection Bureau 1700 G Street, N.W. Washington, DC 20552 b. Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357
2. To the extent not included in item 1 above: a. National banks, federal savings associations, and federal branches and federal agencies of foreign banks b. State member banks, branches and agencies of foreign banks (other than federal branches, federal agencies, and Insured State Branches of Foreign Banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act c. Nonmember Insured Banks, Insured State Branches of Foreign Banks, and insured state savings associations d. Federal Credit Unions	 a. Office of the Comptroller of the Currency Customer Assistance Group 1301 McKinney Street, Suite 3450 Houston, TX 77010-9050 b. Federal Reserve Consumer Help Center P.O. Box. 1200 Minneapolis, MN 55480 c. FDIC Consumer Response Center 1100 Walnut Street, Box #11 Kansas City, MO 64106 d. National Credit Union Administration Office of Consumer Protection (OCP) Division of Consumer Compliance and Outreach (DCCO) 1775 Duke Street Alexandria, VA 22314
3. Air carriers	Asst. General Counsel for Aviation Enforcement & Proceedings Aviation Consumer Protection Division Department of Transportation 1200 New Jersey Avenue, S.E. Washington, DC 20590
4. Creditors Subject to the Surface Transportation Board	Office of Proceedings, Surface Transportation Board Department of Transportation 395 E Street, S.W. Washington, DC 20423
5. Creditors Subject to the Packers and Stockyards Act, 1921	Nearest Packers and Stockyards Administration area supervisor
6. Small Business Investment Companies	Associate Deputy Administrator for Capital Access United States Small Business Administration 409 Third Street, SW, 8th Floor Washington, DC 20416
7. Brokers and Dealers	Securities and Exchange Commission 100 F Street, N.E. Washington, DC 20549
8. Federal Land Banks, Federal Land Bank Associations, Federal Intermediate Credit Banks, and Production Credit Associations	Farm Credit Administration 1501 Farm Credit Drive McLean, VA 22102-5090
9. Retailers, Finance Companies, and All Other Creditors Not Listed Above	FTC Regional Office for region in which the creditor operates <u>or</u> Federal Trade Commission: Consumer Response Center – FCRA Washington, DC 20580 (877) 382-4357

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SAMPLE
FAIR CREDIT REPORTING ACT
CONSUMER REPORT
DISCLOSURE AND AUTHORIZATION

_______________(Company) has disclosed to me that it may procure and may take into consideration the results of a consumer report as part of its background investigative process for pre-employment purposes and/or at any time throughout my employment with the Company, should I be hired.

I also authorize________________(Company) to procure and use as part of its background investigation the results of such a consumer report for pre-employment purposes and/or at any time throughout my employment with the Company, should I be hired.

Should I become employed by _____________(Company), ______________(Company) will retain this form on file.

My signature below signifies my authorization of these above mentioned items and my receipt of this disclosure.

________________________________   ______________

Signature   Date

____

Print Name

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SAMPLE
FAIR CREDIT REPORTING ACT
INVESTIGATIVE CONSUMER REPORT
DISCLOSURE AND AUTHORIZATION

_______________(Company) has disclosed to me that it may procure and may take into consideration the results of an investigative consumer report for pre-employment purposes and/or at any time throughout my employment with the Company, should I be hired.

I also authorize________________(Company) to procure and use as part of its background investigation the results of such an investigative consumer report for pre-employment purposes and/or at any time throughout my employment with the Company, should I be hired.

Should I become employed by ___________(Company), ___________(Company) will retain this form on file.

I understand that I have the right to demand a complete and accurate disclosure of the nature and scope of any investigative consumer report requested on my background, as well as a summary of my rights under the FCRA.

My signature below signifies my authorization of these above mentioned items and my receipt of this disclosure.

_________________________________ ______________

Signature Date

____

Print Name

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Sample letter to individual receiving adverse action based at least in part upon a consumer report.

Dear ____________:

This letter is to inform you that (Explain the adverse action taken against the individual.) As part of our decision making process, a consumer report was obtained on you. Attached you will find a copy of this report for your inspection, as well as a summary of your rights under the Fair Credit Reporting Act.

In compiling this report, the following sources were used: (List the sources of this report from the agency.) Further, this report was provided only to (List those who received a copy of this report.)

This report was provided to us by (Give name, address and telephone number of the Consumer Reporting Agency compiling the report. If a toll free number exists, it must be provided as well.)

You are also entitled to receive a complete copy of your file from this agency at no charge within 60 days of making such a request in writing to the agency at the previously mentioned address. However, even though this agency provided this report to us, it played no part in making this decision and is unable to explain to you why this decision was made.

You also have the right to dispute the accuracy and/or the completeness of the information provided by the agency.

Sincerely,

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XIV. FACTA (THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT OF 2003)

The Fair and Accurate Credit Transactions Act of 2003 (FACTA) is best known for allowing consumers to annually request and obtain one free credit report from each of the nationwide consumer credit reporting companies (Equifax, Experian and TransUnion), as well as for creating new compliance obligations designed to reduce identity theft. However, FACTA also amended the Fair Credit Reporting Act (FCRA) to require federal agencies to implement new rules designed to increase the "accuracy" and "integrity" of information that "furnishers" provide to consumer reporting agencies.

(Information is "accurate" when it is factually correct. 16 C.F.R. § 660.2(a). Information has "integrity" when it can be substantiated by business records and is presented to a consumer reporting agency in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in any report prepared by a consumer reporting agency. 16 C.F.R. § 660.(2)(e).)

Consistent with this directive, on July 1, 2009, the Federal Trade Commission (FTC) and several other federal agencies (including the Federal Reserve Board and the Federal Deposit Insurance Corp.) issued a joint final rule that imposes additional regulatory requirements on businesses, including employers, that provide consumer information to consumer reporting agencies (16 C.F.R Part 660).

The final rule was effective July 1, 2010.

Although a "furnisher" typically is a bank or credit card company that provides credit-related information about a customer (consumer) to one of the three major credit bureaus, there are situations where an employer will be a furnisher within the meaning of the FCRA. Recently, the FTC determined that certain companies, such as TALX (a reference-checking provider), are consumer reporting agencies under the FCRA. As a result, employers that provide payroll and other employee-related information to consumer reporting agencies in connection with outsourced services, such as unemployment processing and reference checking, will be considered "furnishers" within the meaning of the FCRA and, therefore, subject to applicable federal and comparable state law regulations.

In addition, employers that outsource these functions to consumer reporting agencies must comply with the new final rule, which requires an employer to implement and maintain policies and procedures designed to ensure the accuracy and integrity of information provided to these agencies.

An employer also must investigate a "direct dispute" from a current or former employee regarding the accuracy or completeness of information the employer provided to the consumer reporting agency.

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Employees Are Now Permitted to Submit 'Direct Dispute' to Employers

Under the FCRA, employers that furnish information to consumer reporting agencies already are required to investigate indirect employee disputes, i.e., disputes the current or former employee presents directly to the consumer reporting agency to relay to the employer. In addition, if the employer discovers that inaccurate or incomplete information about an employee was furnished to a *consumer reporting agency*, the employer has an affirmative duty to provide any recipient with complete and accurate information.

The final rule expands on the FCRA and now permits "direct disputes" to the *employer* and allows an employee to challenge the accuracy or completeness of information contained in a consumer report by contacting his or her current or prior employer. It further requires employers to conduct a reasonable investigation to determine the validity of the employee's dispute.

However, the final rule requires an individual or entity to investigate a dispute if it relates to "any other information contained in a consumer report regarding an account or other relationship with the furnisher that bears on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." Information that employers furnish to consumer reporting agencies, such as TALX, usually consists of information about the employee's work or work history, such as the employee's current or former position, compensation, dates of employment, and the reason the employment relationship ended. This type of information appears to come squarely within the parameters of the final rule. As a result, if a current or former employee disputes any of this type of information, the employer must conduct an investigation.

The employee must provide the employer with sufficient information to prove that he or she has or had an employment relationship with the employer, an explanation for the employee's belief that the information is inaccurate or incomplete, and supporting documentation regarding the dispute, if any. Upon receiving the notice, the employer must conduct a reasonable investigation, which means at a minimum reviewing the submitted information and determining the validity of the employee's dispute. The employer must complete the investigation and report back to the employee within 30 days of receiving notice of the dispute (with a possible extra 15 days if the employee provides new information). If the employer determines that the employee information reported was inaccurate, the furnisher must also promptly notify each consumer reporting agency that received the information and provide any correction necessary to make the information accurate.

The final rule does not require an employer to investigate all disputes that a current or former employee submits. For example, if the employee only disputes identifying information in his or her file (e.g., name, Social Security number, date of birth, address, or telephone number) or the identity of past or present employers, the employer is not required to conduct an investigation. In addition, an investigation is not required if the

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employee does not provide sufficient information to allow the employer to investigate. Under these circumstances, the final rule considers the dispute to be "frivolous or irrelevant," and the employer has five business days from reaching this determination to provide the employee with written notification that the dispute will not be investigated. The notice must inform the employee of the reason for the employer's determination that the dispute is frivolous or irrelevant and, therefore, will not be investigated, and should include a description of the type of information necessary to proceed with the investigation, if any.

Employers Must Establish Policies and Procedures

The final rule requires employers that furnish information to consumer reporting agencies to establish and implement reasonable written policies and procedures to ensure the accuracy and integrity of information reported about its employees. In developing policies and procedures, employers must consider the final rule's accuracy and integrity guidelines, although not all of them must be implemented in the employer's policies. Rather, the rule merely requires that an employer's policies and procedures be appropriate to the nature, size, complexity and scope of its actual activities. (This aspect of the final rule implicitly acknowledges the difference between the exchange of information with a consumer reporting agency by a merchant or creditor, on the one hand, and an employer, on the other.) An audit requirement is not imposed expressly by the final rule, but employers must review their policies and procedures periodically and update them as necessary.

In formulating its policies and procedures, the employer should identify areas that potentially may compromise the accuracy or integrity of reported information, evaluate the effectiveness of existing policies and procedures, and evaluate the effectiveness of how information is provided to consumer reporting agencies, making changes as necessary. If applicable, the policies and procedures should also describe the process the employer uses to report information about employees, its procedures for investigating disputes, the manner in which records will be maintained and staff will be trained, and mechanisms for maintaining internal controls, oversight, data integrity, and complying with applicable laws and regulations.

Implications for Employers

Employers should take measures to prepare for the final rule by assessing whether, when and how they are exchanging employment history and other information with any consumer reporting agencies and developing and implementing the policies and procedures mandated by the final rule, including but not limited to procedures for timely complying with the notice-related obligations imposed by the final rule. Although these requirements are not especially onerous, they are very technical and employers may benefit from bringing together various resources from within the organization, including compliance personnel, human resources personnel and information technology staff.

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XV. FAIR CREDIT REPORTING ACT: WORKPLACE INVESTIGATIONS

A. FACTA (Fair and Accurate Credit Transactions Act) and Workplace Investigations

FACTA, which became effective January 31, 2005, sets a new standard for what the law calls "employee misconduct investigations."

1. What is an "employee misconduct investigation?"

This is an investigation conducted by a third-party which the employer may hire if the employer suspects an employee of:

a) Misconduct relating to the employee's employment,

b) A violation of federal, state, or local laws or regulations,

c) A violation of any preexisting written policies of the employer or

d) Noncompliance with the rules of a self-regulatory organization that, for example, oversees the securities and commodity futures industry.

2. Why was this change made to the FCRA?

This section was adopted to make it clear that employers do not have to get permission to conduct a misconduct investigation. Prior to this, FTC staff issued an opinion letter, the so-called Vail Letter (www.ftc.gov/os/statutes/fcra/vail.htm). This Opinion Letter said that the disclosure and consent requirements of FCRA apply even when an employee is suspected of misconduct and the employer hires an outside investigator.

3. If an employer suspects an employee of misconduct, what does this mean?

It means the employer does not have to give the employee notice of the investigation or get the employee's permission to conduct a misconduct investigation. Like other inquiries covered by the FCRA, this only applies if the employer hires an outside party to conduct the investigation.

It also means the employee does not have to receive a notice of rights under the FCRA. If, at the end of the investigation, the employer decides to take some action against the employee, the employee must receive the "adverse action" notice **only after** the action has been taken.

Employees need only receive a "summary" of the investigation report, but not the more detailed report that may include sources.

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4. **Who will see the investigation report?**

The employer's final report may be communicated to:

e) The employer or its agent,

f) Any federal or state officer, agency or department, or any officer, agency or department of a unit of general local government,

g) Any self-regulatory organization with regulatory authority over the activities of the employer or the employee,

h) Others, as otherwise required by law or

i) A government agency, in accordance with an existing FCRA section that allows a consumer reporting agency to disclose personal identifying information to a government agency

5. **Can an employee dispute the findings?**

Not under the FCRA's dispute procedure since the FACT Law amended the regulations by removing "workplace misconduct investigations" from being classified as a "consumer report." Thus, the usual protections that apply to a consumer report conducted for employment purposes do not apply to workplace misconduct investigations.

XVI. JOINT AND SINGLE EMPLOYER LIABILITY

A. Title VII, ADEA, And ADA

Title VII of the 1964 Civil Rights Act, the Age Discrimination in Employment Act of 1967, or "ADEA," and the Americans With Disabilities Act, or "ADA," all prohibit discrimination against employees or potential employees with respect to the compensation, terms, conditions and privileges of employment. However, understanding how the terms "employer" and "employee" are defined under these Acts is critical in determining where liability might fall when illegal discrimination exists.

Under Title VII in particular, with similar definitions existing under the ADEA and the ADA, "employer" is defined as being any person "engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." (42 U.S.C. §2000e(b)) "Employee" is vaguely defined as being "an individual employed by an employer." (42 U.S.C. §2000e(f))

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B. Leased And Temporary Employees: Is Client Company An "Employer"?

In a joint employment context, such as when leased and/or temporary employees are used, the question arises as to whether the client company must count the leased and temporary employees working on its premises towards fulfilling the minimum employment requirements under Title VII, the ADEA, and the ADA. Further, another question that arises is whether the client company can be held liable for its discriminatory acts against the leased or temporary employees as an "employer."

In general, the client company must count the temporary or leased employees working on its premises towards meeting the threshold employment requirements under Title VII, the ADEA, and the ADA if the client company is found to truly be part of a joint employment relationship.

Additionally, if such a relationship is found to exist, the client company may also be held liable for its discriminatory acts against either leased or temporary employees. The leasing or temporary agency may also be held liable if it can be shown that these employers acted in concert.

C. Joint Employer Theory

Whether a client company can be deemed to be a statutory "employer" under Title VII, the ADEA, and the ADA depends on whether the client exercises "substantial control over significant aspects of the compensation, terms, conditions, or privileges of employment." (Magnuson v. Peak Technical Services, 808 F.Supp. 500 (E.D. Va. 1992)).

In making such a determination the factors that are generally considered include:

1. The degree of control/supervision the client company exercises over the employees' day-to-day work,
2. Who determines the working conditions and hours of work for these employees,
3. Who retains the authority to hire, fire and discipline these employees and
4. Who is responsible for the payment of wages and benefits for these employees?

Such determinations involve much analysis of the facts for each instance and are therefore determined on a case-by-case basis.

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D. Interference Theory

Under an interference theory, it is presumed that the employee is not able to establish that the requirements of a joint employer theory have been met. However, the interference theory protects individuals from discriminatory treatment by entities that, while not technically acting as the individual's "employer," the corporation nevertheless exercises "direct and significant control" over the employment or employment opportunities of the employee.

Under this theory, the employee argues that the client company interfered with its employment opportunities. However, the client company must still be a statutory employer and meet the requirements of Title VII, the ADEA, or the ADA, which either law is in question.

E. Single Employer Theory

Organizations are incorporated for the purpose of shielding their "owners" from liability. Many times, "holding" corporations begin subsidiary companies that operate as entirely separate entities. As a result, if one entity is sued, the holding corporation and its other subsidiary corporations cannot be held liable for the actions of the subsidiary.

However, if these corporations do not truly operate as separate entities, but rather as a single employer, then it may be determined that the holding company can indeed be held liable for the acts of its subsidiary. This is referred to as "piercing the corporate veil."

In determining if the holding corporation should be held liable for the actions of one of its subsidiaries under a "single employer theory," the following factors are commonly considered:

1. How interrelated are the operations of the two corporations?

2. Does common control over the labor relations of the two corporations exist?

3. Do both corporations have common management?

4. Is there common ownership or common financial control over both corporations?

No single factor or combination of factors will determine if the corporate veil will be pierced. Instead, the courts will analyze how "intermingled" various functions are in their totality. Most often this situation arises in a franchiser and franchisee situation.

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F. Americans With Disabilities Act In Particular

The ADA specifically prohibits an employer from participating in any type of contractual or other type of arrangement that has the effect of subjecting a covered employer's qualified applicants or employees with a disability to any type of discrimination under the Act. (42 U.S.C. §12112(b)(2); 29 C.F.R. §1630.6(a))

Further, it is unlawful for a client company to reject a temporary or leased employee on account of a disability. It is also unlawful for a temporary or leasing agency to comply with a client company's request for a non-disabled employee.

On the other hand, it is unclear whether a client company has a duty to accommodate temporary or leased employees. Even if no such duty exists, the employee could argue that the client company's failure to accommodate him "interfered" with his employment opportunities.

G. Family And Medical Leave Act

Under the Family and Medical Leave Act, or the "FMLA," employers with fifty or more employees are required to provide up to twelve weeks of unpaid job protected leave to all covered employees. Public employers are always covered by the FMLA regardless of the number of employees they employ, although their employees may not be covered.

A "covered employee" is defined as being any employee who has been employed by his employer for at least the preceding twelve months, has worked at least 1,250 hours during the immediately preceding twelve-month period, and works within 75 miles of 50 employees of the employer.

The FMLA also specifically states that leased or temporary employees need not satisfy this twelve-month tenure requirement by working twelve months in a row. Such tenure need only be twelve months "total." (29 C.F.R. §825.110(b))

The FMLA regulations also specifically state that a client company will be considered a joint employer if it exercises ***some*** control over the duties or working conditions of an employee. (29 C.F.R. §825.106(a)) Ordinarily, joint employment will be found to exist where a temporary or leasing agency supplies employees to the client employer. (29 C.F.R. §825.106(b))

The FMLA regulations also specifically state that such employees are to be counted as being employed by ***both*** the leasing or temporary agency as well as the client employer for purposes of determining whether either are covered by the Act. (29 C.F.R. §825.106(d))

The FMLA then states that the primary employer, which is the leasing or temporary agency, is required to provide notice to the employees of their rights under the FMLA, to provide the leave to such employees under the FMLA, to

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maintain their benefits while they are on leave, and to ensure their job restoration. (29 C.F.R. §825.16(c) and (e))

Further, the FMLA states that the second employer, which is the client employer, may not retaliate against an individual for taking FMLA leave and that the secondary employer must accept a temporary employee returning from leave in place of any replacement employee and may not interfere with the temporary or leasing agency's attempt to return an employee to his previous position.

H. DOL Releases Fact Sheet For The FMLA and Joint Employment

The DOL also issued a fact sheet detailing joint employers' responsibilities under the Family and Medical Leave Act (FMLA). The fact sheet states that when an individual is employed by two employers in a joint-employment relationship under the FMLA, in most cases, one employer will be the primary employer while the other will be the secondary employer.

Determining whether an employer is a primary or secondary employer depends upon the particular facts of the situation. Factors to consider include:

- Who has authority to hire and fire, and to place or assign work to the employee;
- Who decides how, when, and the amount that the employee is paid; and,
- Who provides the employee's leave or other employment benefits.

In the case of a temporary placement or staffing agency, the agency is most commonly the primary employer.

The primary employer is responsible for giving required notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same job or an equivalent job upon return from leave. Also, the primary employer is prohibited from interfering with a jointly employed employee's exercise of or attempt to exercise her FMLA rights.

The secondary employer, whether an FMLA-covered employer or not, also is prohibited from interfering with a jointly employed employee's exercise of FMLA rights and is responsible in certain circumstances for restoring the employee to the same or equivalent job upon return from FMLA leave.

Employees who are jointly employed by two employers must be counted by **both employers** in determining employer coverage and employee eligibility under the FMLA, regardless of whether the employee is maintained on one or both of the employers' payrolls. For purposes of employee eligibility, in determining whether a jointly-employed employee works at a worksite where the employer employs at least 50 employees within 75 miles, the employee's worksite is the primary employer's office from which the employee is assigned or to which the employee reports.

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However, if the employee has physically worked for at least one year at a facility of a secondary employer, then the employee's worksite is that location.

I. Immigration Reform Control Act,

Under the Immigration Reform Control Act, or "IRCA," the client company is not generally required to verify the employment status or the identity of its temporary or leased employees, which is accomplished by requiring the employee to complete an I-9 form.

J. Wage And Hour's Joint Employment Fact Sheets

On January 20, 2016, David Weil, administrator of the DOL's Wage and Hour Division (WHD), released new guidance on the issue of joint-employment. Mr. Weil made a point of saying that under these laws, "it is possible for a worker to be jointly employed by two or more employers who are both responsible, simultaneously, for compliance."

The DOL says that since the nature of work has changed, joint employment has become more common and the "need to address it more pressing."

Consequently, employers who share employees or who use third-party management companies, independent contractors, staffing agencies, or other labor providers may will most likely be assuming more liability than they realize.

At the same time Mr. Weil's interpretation on joint employment was released, the DOL also released fact sheets explaining that joint employment situations exist under the Fair Labor Standards Act (FLSA) and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) when an employee is employed by two or more employers. In such situations, both employers can be held responsible, individually and jointly, to the employee for failing to comply with these laws.

The fact sheets reminds employers that both the FLSA and the MSPA share the same broad definition of employment, which includes "to suffer or permit to work."

The DOL outlined two likely scenarios for joint employment:

1. Where the employee has two or more technically separate but related or associated employers; or

2. Where one employer provides labor to another employer and the workers are economically dependent on both employers.

In the first scenario, the DOL describes a situation where joint employment would exist when two or more employers benefit from an employee's work and the employers are sufficiently associated with each other. Of course, the key issue in

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this scenario is the degree of association between the employers. This relationship is sometimes called "horizontal" joint employment.

The fact sheet details some facts to consider in determining horizontal joint employment:

- Who owns or operates the possible joint employers?
- Do the employers have any overlapping officers, directors, executives, or managers?
- Do the employers share control over operations?
- Are the operations of the employers intermingled?
- Does one employer supervise the work of the other?
- Do the employers share supervisory authority over the employees?
- Do the employers treat the employees as a pool of workers available to both of them?
- Do they share clients or customers?
- Are there any agreements between the employers?

The fact sheet says the other type of joint employment, often referred to as "vertical joint employment," occurs when a worker is economically dependent on two employers. This would include:

1. An intermediary employer, which includes staffing agencies, farm labor contractors, or other labor providers, and
2. Another employer that engages the intermediary to provide workers.

In both cases, the workers are obviously employees of the intermediary employer. However, the bigger issue is whether these workers are also employees of the employer that engaged the intermediary to provide it with labor.

The fact sheet says that in a vertical joint employment situation, the following factors must be considered in order to determine whether a worker is ***economically dependent*** on not just the intermediary employer but also the other employer. A nonexhaustive list of factors to consider includes the following questions:

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- Does the other employer direct, control, or supervise, even indirectly, the work?

- Does the other employer have the power, even indirectly, to hire or fire the employee, change employment conditions, or determine the rate and method of pay?

- How permanent or lengthy is the relationship between the employee and the other employer?

- Does the employee perform repetitive work or work requiring little skill?

- Is the employee's work integral to the other employer's business?

- Is the work performed on the other employer's premises?

- Does the other employer perform functions for the employee typically performed by employers, such as handling payroll or providing tools, equipment, or workers' compensation insurance or, in agriculture, providing housing or transportation?

Therefore, those laws overseen by the Wage and Hour Division of the Department of Labor, such as the Fair Labor Standards Act, both the client company and the leasing or temporary agency should expect to have liability thrust upon them if they fail to pay overtime or minimum wages.

Of course, in practical application, this potential liability should be included as part of the agreement between the client and the temporary or leasing agency.

XVII. LEGAL AND EFFECTIVE INTERVIEW QUESTIONS

A. Legal Parameters of Interview Questions

In short, when selecting questions to use in the interviewing process, two cardinal rules should be observed:

1. The questions asked are job related or have a legitimate business reason for being asked and

2. The questions do not ask about a person's protected class.

Therefore, only information that is needed to make the employment decision for the job in question should be solicited. In choosing these questions, interviewers should ask themselves:

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▪ Why do you ask the question?

1. What is the information you are seeking to ascertain?

2. How is that information important or necessary for you to make a decision on whether or not you are going to employ this person?

B. Legal v. Illegal Interview Questions

1. National Origin

a) Legal

- Applicant's place of residence.
- Can applicant legally work in the U.S.?
- Languages which applicant writes or speaks fluently, if applicable to position.

b) Illegal

- Applicant's birthplace, or applicant's parents', spouse's, or other close relative's birthplace.
- Require applicant to submit birth certificate, naturalization, or baptismal certificate before hire.
- Of what country applicant is a citizen.
- Whether applicant is naturalized or native-born citizen, or date citizenship was acquired.
- Inquiry into applicant's lineage, ancestry, national origin, descent, parentage, or nationality.
- How applicant acquired ability to read, write, or speak a foreign language.

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2. Race

a) Illegal

- Complexion, color of skin.
- Require photograph affixed to employment form before hire.

3. Religious affiliation

a) Legal

- Willingness to work required work schedule.
- General personal and work references not related to any protected class.

b) Illegal

- Inquire into applicant's religious denomination, affiliation, church, parish, pastor, or religious holidays observed.
- Request references specifically from clergy or any other persons who might reveal an applicant's protected class status.

4. Sex

a) Legal

- Does applicant have any family, business, health, or social obligations that would prevent him/her from working consistently, or working overtime, or traveling? (Takes in religious preference area as well.)
- Is applicant willing and able to lift "X" number of pounds? If yes, and there are doubts, then applicant can be tested by the employer. (Must be applicable to position and present employees.)

b) Illegal

- Intentions of marriage or plans to raise a family?
- While applicant is working, who will take care of children?
- If applicant is married, divorced or widowed.

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5. Age

a) Legal

- Is applicant over 16 years of age? 18 years of age? 21 years of age?

b) Illegal

- Applicant's age.

6. Other Areas

a) Legal

- Organizations of which applicant is a member, excluding organizations which indicate the person's protected class status.

- Is applicant willing to relocate?

C. Types of Interview Questions

There are many different ways to ask interview questions.

1. **Closed-Ended Questions**: Closed-ended questions ask for a short definitive answer from the interviewee ("Did you like working with ABC Company?")

2. **Open-Ended Questions**: Open-ended questions ask for a longer explanation from the interviewee ("Tell me why you liked it at ABC Company.")

3. **Hypothetical Questions**: Hypothetical questions occur when the interviewer poses a specific situation to the interviewee and the interviewee explains how he/she would handle the situation. ("If a disgruntled employee came into the building wrapped in dynamite, what would you do?")

   It is always a good idea to include in an interview hypothetical situations to determine how the interviewee would react in certain situations. Good interviewers also give their interviewees real-life situations to reason through based on situations that actually happened within the organization.

   The true advantage of asking interviewees to solve hypothetical situations based upon real-life instances is that they allow the interviewer to get a glimpse of the person's instantaneous thought and problem-solving processes.

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4. **Experience/Behavioral Questions (S/A/R Format: Situation-Task/Action/Result)**: Experience/Behavioral questions in an S/A/R format ask the interviewee to think of a specific **situation** he/she has had in the past, what was the interviewee's role, what **actions** the interviewee took in this situation and what was the **result**. This allows the interviewer to see how the person reacts in such situations in real life, how their thought processes work in real situations and how successful this person has been in these situations.

Such questions would be posed in the following manner:

"Think of a situation you have been in where you had to layoff an employee. What actions did you take to do this and what was the final result?"

As follow up questions, it may also be a good idea to ask the interviewee if he/she would now do anything differently. Also, in order to help establish the truthfulness of the answer, interviewers may want to ask the interviewee what his/her supervisor or co-workers would say if the interviewer was to call them on the phone and ask them about this instance? The interviewee's reaction to such follow up questions can be quite revealing.

D. Sample Interview Questions

Perhaps the most important part of the interview process lies in preparing for the interview itself, which includes choosing the proper questions to ask. Below is a list of sample interview questions from which interviews may choose a set of questions for their upcoming session.

1. Experience (Review Pertinent Former Positions or Responsibilities):

a) Tell me about this (particular former) position?

b) Why did you or are you leaving?

c) What did you like best about this job or find particularly satisfying?

d) What did you not like? (Is that why you left?)

e) What kind of responsibilities did you have and what kind of decisions did you typically make?

f) What did you like best about the company?

g) What did you like least?

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h) What sort of atmosphere or environment did this company promote?

i) What was the most challenging part of this position?

j) What do you feel are the greatest strengths you can bring to this company?

2. Knowledge of Organization

a) What do you know about our organization?

b) What do you like and dislike about this type of organization?

c) How does this organization fit into your goals?

3. Goals/Motivations

a) What motivates you most of all on a job?

b) What do you feel this position can give you that your other positions have not?

c) In the next five or ten years, where would you like to be career-wise?

d) How does this company and this position fit into that goal?

e) What attracted you to this kind or work?

f) What specifically do you hope to gain from this position?

4. Attention to Detail

a) Describe an instance to me where you worked on a very detailed project. Tell me what your role was, how you handled the situation and what was the outcome.

(1) Is there anything you would now do differently?

(2) What if we called your former supervisor or co-workers and asked them about this instance? What would they tell us?

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5. Flexibility

a) Describe to me a specific instance where you had your plans at work changed by your supervisor or a co-worker that disrupted your agenda. What was your reaction and what was the result?

(1) Is there anything you would now do differently?

(2) What if we called your former supervisor or co-workers and asked them about this instance? What would they tell us?

6. Work Ethic

a) Describe to me the worst aspect of your current job?

b) When do you do your best work? Why?

c) What is your greatest accomplishment in your life? Why?

7. Managing Multiple Priorities

a) Describe to me how you organize your day.

b) We have all had an occasion when we were working on something that just "fell through the cracks" and did not get done. Can you think of an instance where this has happened to you? How did you handle it and what was the result?

(1) Is there anything you would now do differently?

c) If not, what would you do if I gave you a project that needed to be done in two days, another manager gave you another that needed to be done in two days, and a third manager gave you a project due by the end of the day?

8. Computer Skills

a) Tell me specifically what computer software systems have you operated?

b) What work specifically have you done with these systems? Formatted documents? Created tables? Etc.?

c) If we were to call your supervisor and ask about you computer skills, what would he/she say?

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9. Communication Skills

a) Describe to me an instance when you had to communicate bad news to another employee (person). How did you handle the situation and what was the final result?

(1) Is there anything you would now do differently?

(2) What if we called your former supervisor or co-workers and asked them about this instance. What would they tell us?

b) If you cannot think of an instance, how would you communicate bad news to another person, such as telling the person he is not doing well in his job?

10. Perceptions:

a) What do you suppose your co-workers would say about you if we were to contact them?

b) What would your supervisor say about you if we contacted him/her?

c) Do you have a particular reason to believe he/she would give such a reference?

11. Likes/Dislikes:

a) Which position did you like the best?

b) Why?

c) Describe the perfect atmosphere or environment in which you would like to work.

d) Describe an ideal co-worker.

e) Describe the ideal supervisor.

f) Describe the perfect job for you, no matter how imaginative.

12. Attitude/Ethics

a) What do you feel your obligations are to the company for which you work?

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b) What do you think a company's responsibilities are to you as an employee?

13. Honesty

a) Situations arise in life where we are asked to bend or even break the rules…or to even lie. Describe an instance to me where you were placed in such a situation, what did you do and what was the final result?

(1) Is there anything you would now do differently?

(2) What if we called your former supervisor or co-workers and asked them about this instance? What would they tell us?

14. Miscellaneous

a) What is the most challenging hurdle you have ever had to face and how did you go about overcoming it?

b) What is the most difficult decision you have ever had to make in a job and how did you go about dealing with this situation?

c) We all have regrets in life, but what is your greatest regret?

d) What is your greatest accomplishment?

e) What is your greatest fear in your career?

f) Hobbies? Interests?

g) Which subjects did you like best in school? Least?

h) What other field did you consider before you chose this one?

i) What does it take to be a good supervisor?

j) Would you make a good supervisor? If so, why?

15. Final Question:

a) If I were to make you an offer of employment, what could I tell my supervisor in trying to justify this decision to him/her so he/she would think I was doing a good job in recommending you?

*This is a **much** better way to ask an applicant:

"Why should we hire you?"

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Once the manager has reviewed the applicant's materials, assembled a list of interview questions, and has become familiar with the particulars of the position, the manager is then ready to begin the interview.

XVIII. OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970 (OSHA)

A. Purpose Of OSHA

The Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq.) was passed in order to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." This Act applies to all employers, with a few exceptions in the federal government and any state agency or political subdivisions, although every such excluded agency is covered by some other similar program. The Occupational Safety and Health Administration, or "OSHA," is the federal agency empowered with enforcing the Act, which is a division of the U.S. Department of Labor.

One of the primary responsibilities of OSHA is to develop and enforce the minimum and mandatory job safety and health standards to general industry, maritime, agriculture, and construction, which covers such areas as the workplace itself, its machinery and equipment, the materials used by the firm, its power sources, the protective clothing required, the processes used in the production of the firm's product, first aid standards, as well as various administrative and record keeping requirements.

Employers covered by OSHA should therefore become familiar with the OSHA standards that apply to their industry. A principal source of this information can be found through the OSHA Subscription Service, which updates employers on the various safety and health standards adopted by OSHA.

B. OSHA's Authority

OSHA is also empowered to conduct workplace inspections, and, as determined by these inspections, has the authority to issue citations and penalties against employers found to be in violation of its standards. (29 U.S.C. §§ 657, et seq.) Of course, since OSHA cannot inspect everyone at the same time, OSHA has established a system of priorities for determining workplace inspections. Therefore, in the following order of priority, OSHA will generally:

1. Inspect areas of imminent danger situations,
2. Investigate areas of catastrophes, fatalities, and accidents resulting in the hospitalization of five or more employees,
3. Investigate valid employee complaints of an alleged violation of OSHA's standards or of unsafe or unhealthy working conditions, and
4. Conduct programmed inspections, with special emphasis on high hazard

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industries, occupations, or substances that are injurious to health, with follow-up inspections to determine if previously cited violations have been corrected.

If an employer is found to be in violation of a standard, OSHA may issue a citation to that company outlining the regulations and standards that firm has broken. The employer is then required to post a copy of each citation at or near the site where the violation occurred. (29 U.S.C. § 658.)

C. OSHA's New Penalty Structure

Section 17(j) of the Act allows for civil penalties to be imposed against employers for committing various violations.

In November 2015, Congress enacted legislation requiring federal agencies to adjust their civil penalties to account for inflation. The Department of Labor has adjusted penalties for its agencies, including the Occupational Safety and Health Administration (OSHA).

The new penalties took effect August 2, 2016. Any citations issued by OSHA on or after this date will be subject to the new penalties if the related violations occurred after November 2, 2015.

Type of Violation	Current Maximum Penalty	Current Maximum Penalty
Serious Other-Than-Serious Posting Requirements	$7,000/violation	$12,471/violation
Failure to Abate	$7,000/day beyond abatement day	$12,471/day beyond the abatement day
Willful or Repeated	$70,000 per violation	$124,709 per violation

If an employer willfully violates any standard, rule or order promulgated by OSHA that results in the death of an employee, the employer can be imprisoned for up to six months and fined. If the employer had been convicted of such a violation previously, then the employer can be fined and be imprisoned up to one year upon conviction (29 U.S.C. § 666).

D. Retaliation

Just as with Title VII, it is also illegal for an employer to take any retaliatory action against an employee for bringing a safety or health violation to the attention of OSHA under § 11(c)(1) of the Act. Employees who feel they have been discriminated against may file a complaint with OSHA within 30 days of the alleged discrimination. If the charge is found to be valid, then OSHA and the Secretary of Labor have the authority to bring action against that employer in the U.S. District Court in an effort to obtain relief, including reinstatement of the

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employee’s job and back pay.

Of course, in order to protect employees from potential retaliation, they are permitted to file complaints with OSHA anonymously.

E. OSHA Reporting Requirements

In a step that will have a significant impact on employers throughout the country, the Occupational Safety and Health Administration, or “OSHA” has issued its final revised recordkeeping rule, 29 C.F.R. 1904. This event marks the first truly comprehensive overhaul of OSHA's recordkeeping provisions in 30 years. These final rules went into effect as on January 1, 2002.

Form 200, the *OSHA Injury and Illness Log and Summary*, is replaced by form 300, the *Log of Work-Related Injuries and Illnesses*. Form 101, the *OSHA Supplementary Record*, is replaced by form 301, the *OSHA Injury and Illness Incident Report*. An entirely new form, 300A the *Summary of Work-Related Injuries and Illnesses*, is added for use as the Annual Summary.

Under the new recordkeeping standard, employers are required to use the OSHA Form 300 logs to record new injuries and illnesses as of January 1, 2002. This is the last year that employers are required to post the summary for only one month. Under the new rule starting in 2002, employers will have to post the new OSHA Form 300A (summary) for three months beginning on February 1, 2003, and concluding on April 30, 2003. Employers do not have to transfer the 2001 injury and illness information from the OSHA Form 200 to the new OSHA Form 300 log when posting the summaries on February 1, 2002. Under the new rules, employers will not have to post the new OSHA Form 300 log at any time.

F. Privacy Concerns

Employers must withhold employee names from the OSHA 300 Log for injuries and illnesses that meet the definition of this new recordkeeping concept.

G. Annual Summary

There are three notable changes:

1. An executive must certify the completed form;

2. The Log must state the annual average number of employees and the total hours worked by all covered employees; and

3. The Log must remain posted for *90 days*.

H. Record Access

Unions now have access to a portion of the supplementary records.

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I. Recording Criteria

A few examples of changes affecting recording criteria are:

1. Aggravation of a Pre-Existing Condition: Recordable only if "significant."

2. Parking Lot Vehicle Accidents: Recordable when occurring during a work-related task.

3. Common Colds or Flu: Not recordable, even if contracted at work.

4. Mental Illness: Recordable only with a written professional opinion of work-relatedness.

J. Days Away from Work

Replaces the term "lost work days." The employer must record the number of calendar days away from work and may stop counting at 180 days.

K. Defining Restricted Work

Work is "restricted" if the employee cannot perform any job activity he or she would have regularly performed on at least one day per week.

L. First Aid

The final rule provides the following defined, EXCLUSIVE list of 14 first aid treatments that are NOT to be recorded on the OSHA Logs.

(b)(5)(ii)(A)

Using a non-prescription medication at nonprescription strength (for medications available in both prescription and non-prescription form, a recommendation by a physician or other licensed health care professional to use a non-prescription medication at prescription strength is considered medical treatment for recordkeeping purposes);

(b)(5)(ii)(B)

Administering tetanus immunizations (other immunizations, such as Hepatitis B vaccine or rabies vaccine, are considered medical treatment);

(b)(5)(ii)(C)

Cleaning, flushing or soaking wounds on the surface of the skin;

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(b)(5)(ii)(D)

Using wound coverings such as bandages, Band-Aids™, gauze pads, etc.; or using butterfly bandages or Steri-Strips™ (other wound closing devices such as sutures, staples, etc., are considered medical treatment);

(b)(5)(ii)(E)

Using hot or cold therapy;

(b)(5)(ii)(F)

Using any non-rigid means of support, such as elastic bandages, wraps, non-rigid back belts, etc. (devices with rigid stays or other systems designed to immobilize parts of the body are considered medical treatment for recordkeeping purposes);

(b)(5)(ii)(G)

Using temporary immobilization devices while transporting an accident victim (**e.g.**, splints, slings, neck collars, back boards, etc.).

(b)(5)(ii)(H)

Drilling of a fingernail or toenail to relieve pressure, or draining fluid from a blister;

(b)(5)(ii)(I)

Using eye patches;

(b)(5)(ii)(J)

Removing foreign bodies from the eye using only irrigation or a cotton swab;

(b)(5)(ii)(K)

Removing splinters or foreign material from areas other than the eye by irrigation, tweezers, cotton swabs or other simple means;

(b)(5)(ii)(L)

Using finger guards;

(b)(5)(ii)(M)

Using massages (physical therapy or chiropractic treatment are considered medical treatment for recordkeeping purposes); or

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(b)(5)(ii)(N)

Drinking fluids for relief of heat stress.

(b)(5)(iii)

This is the <u>exclusive</u> listing of first aid treatments cited in OSHA's regulations.

M. Hazard Communication Requirements

OSHA has also adopted the "Hazard Communication Standard" as part of its regulations. Basically, these standards outline a system for communicating information to the employees regarding the health hazards associated with any chemicals which they may come into contact with at work. This "hazard information" may be found on the Material Safety Data Sheets (MSDS's) provided by the supplier of the chemical. Every hazardous chemical found on the employer's premises should have its own MSDS made available to employees, which should contain the following information:

1. The chemical name of the hazardous substance,
2. All of the risks and potential health risks involved with coming into contact with it,
3. Safe handling practices,
4. Any personal protective equipment needed,
5. First aid instructions, should anyone come into contact with it, and
6. Information identifying the chemical's manufacturer.

XIX. OSHA's NEW ACCIDENT REPORTING RULES

A. Overview of New Rule

Thousands of employers implement post-accident drug and alcohol testing policies to promote workplace safety. However, the legal landscape shifted on May 12, 2016, when the Occupational Safety and Health Administration published its **final rule** on electronic reporting of workplace injuries and illnesses.

Specifically, effective 90 days after publication of the rule, on August 10, 2016, employers must establish "**a reasonable procedure**" for employees to report work-related injuries and illnesses promptly and accurately. The rule prohibits this procedure from **deterring or discouraging a reasonable employee from accurately reporting a workplace injury or illness.**

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The rule also prohibits any retaliation for reporting an injury or illness.

The new rule became effective DECEMBER 1, 2016.

More specifically, OSHA's new a final rule that amended 29 C.F.R. 1904.35 to add two new provisions:

- Section 1904.35(b)(1)(i) makes explicit the longstanding requirement for employers to have a ***reasonable procedure*** for employees to report work-related injuries and illnesses, and

- Section 1904.35 (b)(1)(iv) incorporates explicitly into Part 1904 the existing prohibition on retaliating against employees for reporting work-related injuries or illnesses under section 11(c) of the OSH Act, 29 U.S.C. § 660(c).

B. Reporting Injuries, Illnesses and Accidents As Soon As "PRACTICAL" … *Not Immediate*

To establish a violation of section 1904.35(b)(1)(i), OSHA must show that the employer either ***lacked a procedure for reporting work-related injuries or illnesses***, or that the employer had a procedure that was ***unreasonable***. The employer must establish a ***reasonable procedure*** for employees to report work-related injuries and illnesses. An employer's reporting procedure is reasonable if it is not unduly burdensome and would not deter a reasonable employee from reporting.

For example, OSHA explained that it would be reasonable to require employees to report a work-related injury or illness ***as soon as practicable*** after realizing they have the kind of injury or illness they are required to report to the employer, such ***as the same or next business day*** when possible.

However, it would not be reasonable to discipline employees for failing to report an injury ***before they realize they have a work-related injury*** they are required to report or for failing to report "immediately" when they are incapacitated because of the injury or illness. A rigid prompt-reporting requirement that results in employee discipline for late reporting even when the employee could not reasonably have reported the injury or illness earlier would violate section 1904.35(b)(1)(iv).

It would also be reasonable to require employees to report to a supervisor through reasonable means, such as by phone, email, or in person. However, it would not be reasonable to require ill or injured employees to report in person if they are unable to do so. Likewise, it would not be reasonable to require employees to take unnecessarily cumbersome steps or an excessive number of steps to report.

For a reporting procedure to be reasonable, and not unduly burdensome, it must allow for reporting of work-related injuries and illnesses ***within a reasonable***

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timeframe after the employee has realized that he or she has suffered a recordable work-related injury or illness and in a reasonable manner.

WHAT DOES THIS MEAN TO HR?

First, all employers must have a process for employees to follow in reporting accidents, injuries and illnesses.

Next, the days of requiring employees to report all accident and injuries "**IMMEDIATELY**" are gone. Instead, policies should now say something like:

> In the case of accidents, injuries or illnesses, employees must promptly notify their supervisor or some company official as soon as practical.
>
> Incident Report Forms are provided for this purpose and may be obtained from _______________. The supervisor will then complete a "____________ Form." These reports should be sent to ________________. Failure to report an injury or illness as required by organization policy could result in loss of compensation benefits and possibly lead to disciplinary action, up to and including termination.

C. Safety Incentives

OSHA says Section 1904.35(b)(1)(iv) does not prohibit safety incentive programs.

Instead, according to OSHA, it ***does*** prohibit taking any adverse action against employees simply because they report work-related injuries or illness. Withholding a benefit, such as a cash prize drawing or any other substantial award, simply because an employee reported an injury or illness would likely violate section 1904.35(b)(1)(iv) regardless of whether such an adverse action is taken pursuant to an incentive program.

Penalizing an employee simply because the employee reported a work-related injury or illness ***without*** considering the circumstances surrounding the injury or illness ***is not objectively reasonable*** and therefore not a legitimate business reason for taking adverse action against the employee.

OSHA then gave the example of where an employer promises to raffle off a $500.00 gift card at the end of each month if no employee sustains an injury that requires the employee to miss work. If the employer cancels the raffle in a particular month simply because an employee reported a lost-time injury without also considering the circumstances of the injury, such as the cause of the accident, this would likely violate section 1904.35(b)(1)(iv) because it would constitute adverse action against an employee for reporting a work-related injury ... ***not*** for violating a safety rule.

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However, OSHA says if an employer conditions the raffle on complying with legitimate safety rules or participating in safety-related activities for that month, that ***would not*** violate section 1904.35(b)(1)(iv).

In this previous example, suppose an employer raffles off a $500.00 gift card each month **if** all of the employees have universally complied with legitimate workplace safety rules, such as using required hard hats, fall protection and following lockout-tagout procedures, would not violate the rule.

Likewise, rewarding employees for participating in safety training or identifying unsafe working conditions would not violate the rule.

On the other hand, OSHA encourages employers to find creative ways to incentivize safe work practices and accident-prevention measures that do not disproportionately penalize workers who report work-related injuries or illnesses. If OSHA determines that an employer withheld a benefit from an employee simply because the employee reported a work-related injury or illness without also considering the circumstances surrounding the injury or illness, OSHA may issue a citation under section 1904.35(b)(1)(iv).

WHAT DOES THIS MEAN TO HR?

Penalizing employees for not following safety rules or for not attending safety training or events is permissible under OSHA. However, penalizing employees for having an accident or for missing work due to an accident will most likely be an OSHA violation.

D. Post-Accident Drug and Alcohol Testing

Section 1904.35(b)(1)(iv) does not prohibit employers from drug testing employees who report work-related injuries or illnesses so long as they have an ***objectively reasonable basis for testing***, and the rule does not apply to drug testing employees for reasons ***other*** than injury-reporting.

Further, OSHA will not issue citations under section 1904.35(b)(1)(iv) for drug testing conducted under a state workers' compensation law or other state or federal law, such as under DOT regulations.

In order to issue a violation against an employer under 1904.35(b)(1)(iv), OSHA will need to establish the three elements of retaliation:

- A Protected Report of an Injury or Illness;
- Adverse Action and
- Causation.

When evaluating whether an employer had a reasonable basis for drug testing an employee who reported a work-related injury or illness, the **central inquiry** will

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be whether the employer had a reasonable basis for believing that drug use by the reporting employee ***could have contributed to the injury or illness*.**

If so, it would be objectively reasonable to subject the employee to a drug test. When OSHA evaluates the reasonableness of drug testing a particular employee who has reported a work-related injury or illness, it will consider the following factors:

- Whether the employer had a reasonable basis for concluding that drug use could have contributed to the injury or illness (and therefore the result of the drug test could provide insight into why the injury or illness occurred),
- **Whether other employees involved in the incident that caused the injury or illness were also tested or whether the employer only tested the employee who reported the injury or illness**, and
- Whether the employer has a heightened interest in determining if drug use could have contributed to the injury or illness due the hazardousness of the work being performed when the injury or illness occurred.

OSHA will only consider whether the **drug test is capable of measuring impairment at the time the injury or illness occurred where such a test is available**. **Therefore, at this time, OSHA will consider this factor for tests that measure alcohol use, but not for tests that measure the use of any other drugs**.

The general principle here is that drug testing may not be used by the employer as a form of discipline against employees who report an injury or illness, but may be used as a tool to evaluate the root causes of workplace injuries and illness in **appropriate circumstances**.

OSHA then cites to the example of a crane accident that injures several employees working nearby but not the operator. The employer does not know what caused the accident, but there is a reasonable possibility that it could have been caused by operator error or by mistakes made by other employees responsible for ensuring that the crane was in safe working condition. In this scenario, OSHA says it would be reasonable to require all employees whose conduct ***could have*** contributed to the accident to take a drug test, whether or not they reported an injury or illness. Testing would be appropriate in these circumstances because there is a reasonable possibility that the results of drug testing could provide the employer insight on the root causes of the incident. **However, if the employer only tested the injured employees but did not test the operator and other employees whose conduct could have contributed to the incident, such disproportionate testing of reporting employees would likely violate section 1904.35(b)(1)(iv).**

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Furthermore, OSHA cites that drug testing an employee whose injury ***could not possibly*** have been caused by drug use would likely violate section 1904.35(b)(1)(iv).

For example, OSHA cites where drug testing an employee for reporting a repetitive strain injury would likely ***not*** be objectively reasonable because drug use could not have contributed to the injury. Also, OSHA cites that Section 1904.35(b)(1)(iv) prohibits employers from administering a drug test in an unnecessarily punitive manner regardless of whether the employer had a reasonable basis for requiring the test.

WHAT DOES THIS MEAN TO HR?

According to OSHA, the real key here for employers lies in bullet #2:

> **Is the employer testing EVERYONE potentially involved in the accident … or just the person who reported it?**

Therefore, employers should consider using wording similar to the following:

> Post-accident testing will be conducted whenever an accident occurs as defined below:
>
> 1. A fatality of anyone involved in a workplace accident,
> 2. Anyone involved in a vehicular accident causing damage in apparent excess of $750, as determined by the Company, (You may decide on this amount) or
> 3. Anyone involved in a non-vehicular accident causing damage in apparent excess of $500, as determined by the Company, (You may decide on this amount) or
> 4. Anyone involved in reportable work-related accident wherein someone is injured and management believes off-site medical attention is required.
>
> When any such accidents occur, any employee the Company believes may have contributed to the accident will also be tested for drugs or alcohol use or both.

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XX. POLICIES vs. CONTRACTS

A. What Is The Difference?

Although it might sound obvious, it is absolutely ***critical*** that anyone who in HR must understand the difference between "policies" and "contracts." Far too often, the two are used incorrectly and interchangeably.

"Policies" basically tell the employees how the organization is going to operate and how the employees are to conduct themselves while they are employed there. However, once the employment relationship dies, the policy dies. Policies are not enforceable against former employees.

For instance, employers are perfectly able to enforce their "Dress Code Policy" with their current employees. Of course, once these people are no longer working for the organization, then the "Dress Code Policy" is no longer enforceable. Obviously, that makes sense.

However, all too often employers adopt "Confidentiality Policies," which is all well and good. Unfortunately, once the employee leaves the company and the former employee starts revealing this information to others, all too often, there is very little the organization can do about it. The policy has "died" along with the employment relationship … and more often than not there is not any substantive legal protection for the employer to protect itself ... and trying to prove that something is a genuine "trade secret" protected under the law by is no easy task. Even if the organization is able to prove that state or federal law has been broken, the organization will spend thousands of dollars in attorney's fees to stop the former employees from divulging these secrets.

"Contracts," on the other hand, survive the employment relationship. As a result, an employer can enforce a contract ***AFTER*** the employee leaves its employ.

Therefore, if an employer wants to keep its confidential information private and if it wants to keep its former employees from trying to sabotage its client relationships and its public image even after the employment relationship ends, then these protections should be put into ***contracts,*** preferably at the beginning of the employment relationship.

Additionally, contracts are enforceable in court … while policies are not. For instance, if an employee breaches a confidentiality policy, the employee will most likely be terminated. That is the ultimate penalty for breaking a policy.

If the employer then takes this policy into court and asks the judge to order the employee to stop revealing this information, the judge will most likely refuse do enforce your policy. While policies can be used as evidence to support a claim

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against an employee or former employee, the courts typically do not enforce policies with court orders. The courts enforce contracts.

As a result, if an employer has a "Confidentiality Contract" with an employee, and that employee later goes out and starts revealing this confidential information to others, all the employer has to do is take the contract into court, demonstrate to a judge that the employee, or former employee, is in breach of the contract, then it is much easier to obtain an order from the court telling the person to stop revealing this information. The judge can also order the individual to pay damages and even attorney's fees, if that is what the contract says.

(HINT: Employers should very seriously consider including a clause in their contracts that requires the employee to pay attorney's fees if they breach or even threaten to breach a contract. Remember, we want people to abide by our contracts. We do not want to have to pay attorney's fees. The threat of attorney's fees is often a significant motivator for people to "voluntarily" not to breach your contracts.)

Therefore, every employer in every state needs to consider which protections it wants to reserve for itself under not just its policies, which only protect the employer **during** the employment relationship, but it also needs to decide which protections it wants to continue **after** the employee leaves the organization, as well as which protections the employer may want to have enforced by a court of law.

Additionally, certain protections are only really preserved under a contractual obligation with employees.

For instance, certain jurisdictions allow employers to limit the statute of limitations for filing a lawsuit against employers under Title VII of the 1964 Civil Rights Act to ***six months***. This can ***greatly*** limit an employer's exposure to lawsuits by requiring employees to file such charges early in the process so the employer will have a better opportunity to defend itself. Moreover, in some situations, employees "sit" on their rights and wait beyond the six-month time frame for filing their claims. As a result, such claims will be lost, which is clearly to the employer's advantage.

Also, employers can contractually limit the liability they have when their supervisors make promises or give assurances to their employees that would otherwise be enforceable.

Another issue that arose a few years ago involved the doctrine of "Promissory Estoppel," which basically relates to the binding promises made by the organization's managers and supervisors. ***Yes***, the promises made by an organization's managers and supervisors ***are*** enforceable under the law and in some instances, they trump can an employer's policies.

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In one such case, in order to calm down an employee who was upset with her supervisor, the president told an employee that she could come and see him whenever she wanted. The employee insisted that her supervisor would fire her if she ever came to see the president. The president reassured the employee that the organization had an "Open Door" policy and that she could in fact come and see him again if she needed to talk.

Unfortunately, within the month, the employee was given a warning from her supervisor. The employee was so upset that she walked out of the warning session and went to see the president. Of course, the president fired the employee for walking out of the warning session with her supervisor, so the employee sued the organization.

The employer argued that the employee was employed "at-will," so it could terminate her for any reason at any time.

However, the court found for the employee on the basis of "Promissory Estoppel." Basically, if a supervisor makes a promise to an employee, and that employee relies on that promise, a reasonable person would have relied on that promise, and that promise is later broken and the employee is harmed by the broken promise, then the employer may be "estopped" from breaking that promise. In other words, that employer will be bound to fulfill that promise made to the employee.

Unfortunately, in many jurisdictions, mere policies will not protect an employer from an employee's "Promissory Estoppel" claim. In other words, in many jurisdictions, a claim of Promissory Estoppel by an employee will actually trump the employer's policies.

That is why we use contracts to restate the employment at will doctrine and reserve the following rights:

> "No representative, manager, supervisor, or other representative of the Company has any authority to enter into an Agreement for employment for any specified period of time or to make any agreement for employment other than at-will. The only Company representative who has the authority to make any such agreement contrary to this employment at will status is the president of the Company and then only in writing."

This wording the same as is used in a policy, but when it is placed into a contract, it is given much greater force and can be used to trump a claim of Promissory Estoppel.

Contracts can also be used to protect an employer when someone in management inadvertently provides a bad reference about an employee or a former employer or simply makes some less than "flattering" comments about that person. The

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contract employees sign upon hire should also state that the employee releases the employer from any and all liability regarding the release of reference information.

Actually, I advise my clients to use a "Reference Release Contract" whenever they release reference information regarding a former employee or whenever they are trying to gather reference information on a potential employee. This way, employers have the protections offered under the contract for whatever they might say about the individual. Using such a contractual release of liability will not only protect the employer from potential lawsuits, but it will also make getting references on potential employees much easier. Employers are much more likely to release reference information when their protections come in the form of a contract rather than under a mere policy.

Remember: Employers can include in their contracts a clause that requires the other individual, such as a potential employee or a former employee to pay its attorney's fees if that person breaches or threatens to breach the contract. This provides the employer with a great advantage in trying to secure its rights.

Therefore, employers need to seriously consider which rights they need to reserve for themselves that they can enforce in court and that will survive the employment relationship. That is when the employer needs to use a contract.

B. What Is A Handbook?

It is also important for employers to understand the true function of a handbook.

First and foremost, a handbook is ***not*** a reservation of rights for employees. Instead, a handbook is a reservation of rights for the ***employer***.

A properly written handbook places employees on notice as to what the company's rights are and what the company expects from its employees. A handbook is therefore a **tool** for management to use in reserving the rights it will need to run its operations as it sees fit.

Unfortunately, ***most*** handbooks are not written correctly. This is why you hear so many CEOs say that they do not want a handbook because "all a handbook does is tie their hands." If a handbook ever ties a company's hands, it was written incorrectly. It was probably written to reserve rights for the ***employees.*** Writing policies in such a way will surely rear up to "bite" the employer one day because such policies often place a higher standard of care on the employer than what it can live up to or even what they law requires.

For instance, I once had a client who included in its policy manual that it would provide a **written response** to any employee who requested a reasonable accommodation under the Americans With Disabilities Act, or ADA. While providing a written response to the employee is possibly a good idea in some cases because it documents the fact that the employer did in fact address the employee's request, putting such a response in writing is not required under the ADA. However, because the employer included in its policy manual that it would

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respond in writing, it had placed a higher standard of care on itself than the law required.

Sure enough, one day the unthinkable happened. An employee made a request for a reasonable accommodation under the ADA … and the employer failed to respond to the request in writing. While the employer did verbally respond to the request, there was no written response ever given to the employee.

When the employee later sued the employer under the ADA, the employee argued that the employer never engaged in the "Interactive Process," which means the employer never sat down with the employee and seriously addressed her requests for reasonable accommodations. Even though the ADA did not require the employer to respond in writing, the employer was ***now*** required to respond to such requests in writing because its policy said it would.

In the end, the employer did not meet the standard it had set for itself, so it had to settle the case with the employee.

The moral of the story: You do not write handbooks and policies to tell employee what their rights are or to give them more rights than they are entitled to under the law … even when your intention is to help the employee as much as possible. You write policies to reserve rights for yourself.

In this case, the employer could have tried to put all ADA responses in writing as a good practice, but by putting such a requirement into the policy manual, it then had no choice but to respond in writing every time such situations arose.

Actually, employees do not need to have their rights reserved for them or expounded upon in a handbook. They have Congress and the Department of Labor doing that for them already.

Companies should think of retaining their legal rights in a policy manual like a big buffet. They can go to the buffet and get whatever "legal" food they want. If they want steak, they can get steak. If they want dessert, they can get dessert. ***However***, if they ***do not*** get a certain item from the buffet table … then they might not have it to use later.

It is an employer's choice as to how it runs its business. As long as the employer does not **illegally discriminate** against employees, then the employer usually has every right to conduct itself however it chooses.

What is "illegal discrimination"? Basing employment decisions on someone's protected class status, such as age, race, religion, race, etc.

What is "legal discrimination"? **Everything else,** such as awarding more vacation time to employees who have more seniority. Awarding more vacation time to employees with more seniority is a form of discrimination, since the employer is drawing clear distinctions between two different classes of people … but it is legal. It also has a sense of fairness to it.

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Again, it all depends on how you decide to run your business.

For instance, if you work at certain Coca-Cola facilities and you go out on your own time and drink a Pepsi … and your boss sees you, **YOU ARE FIRED**! Fair or not, drinking Pepsi is not a protected class like age, race, sex, etc., so terminating employees for drinking a Pepsi is not illegal. Some Coca-Cola facilities have reserved this right and have placed their employees on notice that such a rule exists. As a result, that is how certain facilities have chosen to run their businesses. Whether that is fair or not is not a matter for the courts to decide. **THAT** is an employee relations issue ... which actually means it is a much **bigger** issue than the law.

Employers need to start thinking of their Employment Applications, Employee Handbooks, their Standards of Conduct and their Substance Abuse Policies as a reservation of **THEIR** rights…tools to use if and when the need arises.

Again, employers must also decide when the correct tool is a "policy" or a "contract."

It is a lot like going to the dentist. When a dentist starts to examine and work on your teeth, the dentist has the tools he/she needs within reach if needed. Dentists **NEVER** sit down to go to work on a patient without their tools ready to go.

Why would a company **EVER** try to run its business … try to manage the biggest part of its budget, its **LABOR**, without the proper tools in place? It shouldn't…but the vast majority of companies do this on a daily basis…making Employment Law one of the fastest growing areas of the law.

Reserving a company's rights is where managing the biggest part of the employer's budget begins.

A tactically designed handbook **UNTIES** the organization's hands, which allows the organization to later accomplish what it wants to do legally. A good way to see if your policies have "untied" your hands as opposed to tying them is to answer these simple questions.

Do your **POLICIES** and **STANDARDS OF CONDUCT…**

- Place employees on notice that all of your policies will be **SUBJECTIVELY** interpreted as **MANAGEMENT DEEMS APPROPRIATE**?

- Require **EMPLOYEES** to stay abreast of all the various changes made to Company Policy? (Having employee sign an acknowledgement every time a change in policy occurs is **RIDICULOUS.** It is not possible, so it is only a matter of time until you are not in compliance.)

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- **REQUIRE EMPLOYEES TO SIGN** all Company Documentation, such as I-9 forms, Tax Forms, **WARNING FORMS,** etc., and failure to do so may result in the employee's immediate termination?

- Comply with all of the recent NLRB interpretations?

- Define **"REASONABLE SUSPICION" SUBSTANCE ABUSE TESTING** as being "**REASONABLE**" according to **MANAGEMENT**?

- Define "**WORKPLACE VIOLENCE**" to include verbal and nonverbal abuse…as interpreted by management?

- Does your handbook include restrictive **PROCEDURES** that the organization will not be able to meet?

Have you considered the difference between "**POLICIES**" and "**CONTRACTS**"?

- Has your organization examined which rights and protections it wants to reserve for itself that are only enforceable under a contract?

- Has your organization examined which rights and protections it wants to be able to enforce ***after*** the employment relationship ends?

All of these considerations should be made before adopting any handbook.

C. Failure To Include "NOT A CONTRACT DISCLAIMER" Costs Employer

In Staschiak v. Certified Logistics, 2016-Ohio-897, John Staschiak worked as a commercial truck driver for Checkered Express from May 2003 to 2009. Checkered Express was then acquired by Certified Logistics. So, from 2009 to April 2011, he worked in the same capacity for Certified Logistics. He asserted that his employment with both entities was governed by an employee handbook issued to him by Checkered Express.

The employee handbook stated that after five years of service, Staschiak would be paid 30% of the gross income received by his employer for the loads he hauled and $15 per hour for detention and layover pay. The handbook also stated that after he completed 90 days of service, the employer would pay 70% of his health insurance.

In 2012, Staschiak filed a lawsuit against Certified Logistics and Checkered Express in the Court of Common Pleas of Trumbull County. His complaint included breach of contract claims against his former employers in which he asserted that he hadn't been paid in accordance with the 30% of the load policy in their handbook. He also alleged breach of contract claims based on the employers' failure to compensate him for detention, layovers, and other time or pay 70% of his health insurance as promised in the employee handbook.

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Checkered Express and Certified Logistics filed separate motions to have the case dismissed (Summary Judgment). They argued that there was no written contract, Staschiak was an at-will employee, and the handbook didn't constitute an employment contract. Certified Logistics also noted that the handbook was issued and written solely by Checkered Express, and Staschiak therefore couldn't rely on it to assert breach of contract claims against Certified Logistics.

The trial court granted both the companies' motions for summary judgment, finding that Staschiak failed to establish that there was a sufficient "meeting of the minds" to make the handbook a contract. Staschiak appealed to the Ohio 11th District Court of Appeals.

The court of appeals noted that an employee who asserts the existence of an implied contract must establish each element necessary for the formation of a contract, including offer, acceptance, consideration (the exchange of something of value), and mutual assent. The court concluded that there was at least an issue of material fact on each of those elements for Staschiak's breach of contract claims.

The court noted that the handbook, which explicitly stated the companies' compensation policy, was given to Staschiak at the time of his hire, and he remained an employee after receiving it. The court observed that several other Ohio appellate courts have found that continued employment under an employee handbook constitutes adequate consideration to support an implied contract of employment, and continued work constitutes acceptance.

The court noted that the compensation and benefits provisions of the handbook used clear and definite terms to describe compensation and insurance benefits (e.g., "You will be . . .") and carried ***no explicit disclaimer indicating that the employers didn't intend to be bound by the specific provisions***.

The court acknowledged that the handbook given to Staschiak was accompanied by a cover letter that stated the handbook included "guidelines." However, the court ruled that the letter didn't otherwise claim that the handbook couldn't constitute a contract or counteract the handbook's clear language in describing specific benefits offered to Staschiak.

The court distinguished other cases cited by Checkered Express and Certified Logistics in which Ohio courts rejected employee handbooks as contracts. The court found that in each of those cases, **the handbook contained specific language stating that it was not a contract.**

Lastly, the court rejected Certified Logistics' argument that Staschiak had no breach of contract claims against it because the handbook on which his claims were based was issued to him solely by Checkered Express. The court ruled that Staschiak's allegations that the terms and conditions of employment that existed when he was employed by Checkered Express remained in effect after Certified Logistics became his employer. As a result, his breach of contract claims against Certified Logistics could proceed to trial.

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WHAT DOES THIS MEAN TO HR?

This case serves as a reminder for employers that it is critical to include a clear contract disclaimer language n their handbook. Further, if you want to avoid breach of contract claims based on a predecessor employer's policies, you should clearly and unequivocally disavow your predecessor's policies at the time control is transferred.

XXI. PREVAILING WAGE LAWS

A. The Davis-Bacon Act Of 1931

The Davis-Bacon Act of 1931 (40 U.S.C. § 276a, et seq.), or the "Prevailing Wage Law," states that any employee working on a federal public work construction project worth more than $2,000 must be paid at least the prevailing wage and benefits for that geographic area for each class of laborer. The Secretary of Labor is responsible for determining what the prevailing wage shall be for each class of laborers, which includes fringe benefits such as retirement plans, health plans, disability, accident insurance, and vacation and holiday pay.

If a covered contractor violates the Act, the contractor may lose its government contract, as well as possibly be barred from receiving other federal contracts for up to three years. The government may also choose to complete the work itself or the government may choose to withhold the necessary amount from the employer and instead pay the workers their prevailing wages directly. Employees may also sue their employers directly under the Miller Act (40 U.S.C. § 276a - 2(a)).

B. The Service Contract Act Of 1965 (Or The O'Hara-McNamara Services Contract Act)

The Service Contract Act of 1965, or the "SCA," (41 U.S.C. § 351, et seq.) covers employers holding federal contracts and subcontracts of more than $2,500 whose principal purpose is to furnish services to the United States through the use of service workers. The SCA is administered and enforced by the Secretary of the Department of Labor. Penalties for violating the SCA include payment of wages to employees and loss of present and future contracts. No private cause of action exists.

The SCA requires covered employers to pay their employees, except for bona fide executive, professional, and administrative employees, as defined under the Fair Labor Standards Act, or the "FLSA," the prevailing wage rate for such employees in each locality, including benefits, as defined by the Secretary of Labor. Covered employers must still pay their employees at least the minimum wage rate as established under the FLSA. Under the SCA, the predecessor employer's wage rates apply to its successor even if the successor does not hire any of its predecessor's employees.

The SCA also requires covered successor employers to pay their employees wages that are no lower than those contained in their predecessor's collective

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bargaining agreements, including future increases. An exception to this rule exists if the Secretary of Labor determines after a hearing that those wages vary substantially from those in the local area.

This provision of the SCA is directly contrary to the general rule under the National Labor Relations Act, or the "NLRA." Under the NLRA, successor employers are only required to bargain with their predecessor's union if a majority of the successor employer's workforce previously worked for the predecessor. On the other hand, the SCA applies even if the successor does not hire any of the predecessor's employees.

C. The Walsh-Healey Public Contracts Act Of 1936

The Walsh-Healey Act of 1936 (41 U.S.C. § 35, et seq.), or the "Public Contracts Act," requires employers holding federal contracts of $10,000 or more for the manufacture or furnishing of materials, supplies, articles or equipment to pay their employees at least the prevailing wage for that area as determined by the Secretary of the Department of Labor.

Additionally, Walsh-Healey prohibits the use of convict and child labor, although the child labor provisions of the Act have been replaced by those of the Fair Labor Standards Act.

XXII. PRIVACY ACT OF 1974

A. Coverage

The Privacy Act of 1974 (5 U.S.C. § 552a) applies to all public employers (i.e., local, state, government, etc.). Under the Privacy Act, public employers are required to allow their employees, as well as anyone these employees care to have accompany them, to review their personnel records, as well as any other records the employer maintains on the employee requesting the review. Public employers may require any employees wishing to review their records to make such a request in writing. Public employees may also have such records copied for their use and inspection in a "comprehensible form."

If an employee discovers an error in the public employer's records, the employee may request the public employer to make an appropriate correction. When such a correction is requested, within ten (10) business days, the public employer must either:

1. Make the correction, or

2. Inform the employee that no such correction will be made, the reason for the refusal, the procedures the employee must follow in order to have this refusal reviewed by the head of the public agency, or an officer thereof, and the name and business address of the appropriate official. After such a review is requested, a final determination must be rendered within 30 business days of such a request, unless the head of the agency or its

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appointed official shows "good cause" to extend its period of time allotted to respond.

B. Private Employers And State Laws

No federal law grants similar rights to private sector employees. Therefore, as far as federal law is concerned, private sector employees have no legal right to demand access to their personnel records or any other records their employer maintains on them. In many instances, state law provides no such right to private sector employees either.

Many states have their own "sunshine" laws in place that grant public employees the same right of access to their personnel records as are found under the Privacy Act. However, where the Privacy Act does not permit members of the general public to gain access to a public employee's personnel information in a manner that identifies the employee, some state laws do make such allowances. Therefore, under some states' "sunshine" laws, a public employee's personnel information may be obtained by any individual as a matter of law.

C. Penalties

If a public employer fails to comply with the Privacy Act, the employer may be liable to the individual employee for the sum of the actual damages sustained, but no less than $1,000 and the cost of bringing the civil action, including attorneys' fees. Criminal penalties of up to $5,000 may also be imposed for willfully violating the provisions of the Privacy Act.

XXIII. SARBANES-OXLEY ACT OF 2002

A. Who Is Covered?

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002. This law was designed primarily to end the recent scandals involving corporate "book-cooking." The Sarbanes-Oxley Act applies to all public companies, as well as all private companies that have filed a registration with the Securities and Exchange Commission ("SEC") regarding a pending initial public offering. Sarbanes-Oxley also includes "whistleblower" provisions to protect individuals who report suspected violations of federal law.

B. Financial Specifics Of The Law

Specifically, the Sarbanes-Oxley Act of 2002:

1. Requires covered CEOs and CFOs to certify the corporation's financial statements,

2. Prohibits personal loans or extensions of credit to executive officers and directors,

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3. Requires that guidelines be established for audit committees, and

4. Requires reimbursement by CEOs and CFOs of bonus and stock option profits upon certain restatements of financial statements.

For instance, under Section 402(a) of the Act, "bridge loans" to relocating executives would be illegal. Previously, it was quite common to give executives who were relocating to a certain area a loan that would help them with the various personal expenses they might incur. Under the Sarbanes-Oxley Act of 2002, such loans are now illegal.

C. Whistleblower Protection: Reporting Or Participation Provision

The Sarbanes-Oxley Act actually contains **three** "Whistleblower" provisions.

The first whistle blower provision of the Sarbanes-Oxley Act of 2002 is the "Reporting or Participation Provision." In short, this provision states that employers who are subject to the provisions of the SEC may not "discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee" who provides information or assistance for investigations into corporate conduct that the employee "reasonably believes" are a violation of the SEC rules or federal laws relating to fraud against shareholders. Under this provision of the Sarbanes-Oxley Act, employees are protected **ONLY** when they provide information or assistance to certain groups …. specifically:

1. A federal regulatory or law enforcement agency,

2. Any member or committee of Congress, or

3. Any person who holds supervisory authority over the employee, or the authority to investigate or to discover or terminate the misconduct.

D. Whistleblower Protection: Fraud Against Shareholders

The second whistleblower provision of the Sarbanes-Oxley Act is the "Fraud Against Shareholders" provision. This provision prohibits employers from retaliating against employees who **either file or assist in proceedings** related to alleged violations of the SEC Rules or violations of federal laws regarding **fraud against shareholders**.

However, unlike the "Reporting Or Participation" provision" of the Sarbanes-Oxley Act, no requirement that the employee must have a **"good faith belief"** when reporting suspected irregularities under this "Fraud Against Shareholders" provision. In other words, employees are protected from any type of retaliation by their employers when they fall under the protection of the "Fraud Against Shareholders" … regardless of whether the employee's charge has any validity or not. In short, employees who **either file or assist in proceedings** relating to any type of fraud against shareholders have absolute protection against any type of retaliation.

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E. Whistleblower Protection: Informant Protection

Finally, the Sarbanes-Oxley Act contains the "Informant Protection" provision. This whistleblower provision protects **anyone** who is classified as a **"government informant" under any federal law**. Basically, a "government informant" is anyone who delivers what **that individual believes** to be "truthful information relating to the commission or possible commission of **any** federal offense."

Also, "retaliation" under this provision of the Sarbanes-Oxley Act is defined as occurring whenever a covered organization **interferes** "with the lawful employment or livelihood of any person." This new level of federal whistleblower protection is therefore **VERY** broad.

First, this Informant Protection provision applies to not only employees, but it also applies to non-employees. Therefore, independent contractors, vendors, etc. are covered.

Secondly, a "government informant" is anyone who reports violations under **ANY** federal law. Therefore, this provision of the Sarbanes-Oxley Act provides whistleblower protection for **ALL FEDERAL LAWS**.

Penalties for violating this provision are steep. Violators can receive up to 10 years in prison and heavy criminal fines.

F. Preventative Requirements: Code of Ethics

Under the Sarbanes-Oxley Act, covered employers are required to:

1. Develop and adopt an "Ethics Code" policy for senior financial officers,

2. Distribute this Code of Ethics policy to all employees and

3. Train all employees regarding the organization's Code of Ethics and their rights under the Sarbanes-Oxley Act.

G. Preventative Requirements: Disciplinary Policy Additions

Covered organizations should also include in their existing "Disciplinary Policy" provisions of their newly adopted Code of Ethics, which is largely based upon Sarbanes-Oxley Act. First and foremost, each covered organization should specifically state that violating the organization's Code of Ethics may be cause for immediate discharge.

NOTE: It is important to understand that human resource professionals should **NEVER** make it a terminable offense for violating a specific law. This way, the organization will be forced to admit that it violated the law. Terminable offenses

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should be based upon violating the organization's policies, which includes the newly adopted Code of Ethics.

H. Preventative Requirements: Employee Protection For Reporting Federal Offenses

Covered organizations should also include in their policy manuals the fact that employees are protected from retaliation for reporting perceived federal offenses.

As part of this Code of Ethics and the organization's disciplinary policy, covered employers should also state that it is an immediately terminable offense to retaliate against anyone exercising their rights/obligations under the Code of Ethics, which would include reporting financial irregularities and federal law violations.

Further, covered organizations should also state that it encourages employees to report such financial irregularities and federal law violations. Covered employers should also provide employees with "multiple avenues" in which employees can report such perceived violations. (Such requirements almost identical to those governing "Sexual and Illegal Harassment" policies under EEOC guidelines and U.S. Supreme Court decisions.)

I. Training Requirements

The Sarbanes-Oxley Act also requires covered organizations to train their supervisors in the various provisions of the Act, and in particular, in the anti-retaliation provisions.

J. Documentation Requirements and Penalties

If an investigation takes place under the Sarbanes-Oxley Act, all documentation relating to the investigation must be retained for the duration of the investigation and subsequent proceedings … regardless of its length.

Further, anyone who intentionally "alters, destroys, mutilates, conceals, covers up [or] falsifies" and record or documentation in an attempt to "impede, obstruct, or influence the investigation or proper administration" of an investigation is subject to fines and up to 20 years of imprisonment.

K. Concern For Private Employers?

Many states have adopted what is referred to as a **"the public policy doctrine."** The public policy doctrine comes into play whenever an employment-at-will employee is disciplined or discharged **for a reason that is prohibited** by statute, Constitution, rules or regulation. (Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228)

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Therefore, it is most likely that employees of privately held companies will also be protected by the "whistleblower" provisions of the Sarbanes-Oxley Act. Therefore, if an employee of a privately held employer turns his employer into the IRS, for instance, for alleged fraud, that employee will probably be protected by the Sarbanes-Oxley Act through the state's "public policy doctrine"

As a result, it is probably accurate to assume that a new federal whistleblower act now exists for everyone.

XXIV. UNIFORM SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)

A. Coverage

Beginning October 13, 1994, the Uniform Services Employment and Reemployment Rights Act (USERRA) of 1994 (38 U.S.C. § 4301, et seq.) made it illegal for all employers to discriminate against anyone due to their participation in or application to join any "uniformed service," which includes discriminating against a person's initial employment, reemployment, retention, promotions, or any other aspects of employment. USERRA defines "uniformed services" to include all branches of the military, the Commissioned Corps of Public Health and anyone else designated by the President of the United States in time of war or national emergency.

B. Reemployment Rights

Section 4313 of USERRA states that if a covered individual is called away or volunteers for duty and is absent from work for less than 91 days, the employer must reinstate the individual into his same position upon his return from service. However, if the individual is absent from work for more than 90 days, then the employer must give the individual the same or a similar position with similar seniority, status and pay upon his return.

If the individual becomes disabled during his service, or if a previous disability becomes aggravated as a result of this service, then the employer is expected to reasonably accommodate the individual's disability, which includes considering the employee for other positions that may better suit the individual.

In order to obtain these reemployment rights, § 4312 of the Act says that:

1. Employees must give their employer notice of their impending service, if possible,

2. The cumulative length of the employee's absence and all previous absences cannot exceed five years, and

3. The employee must reapply for employment with the employer within the established time frames.

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Section 4312 of the Act also states that if the employee is absent from work due to uniformed service for:

1. Less than 31 days, the employee must reapply for employment on the first "regularly scheduled work period" following the completion of his service **and** after returning home. (The employee is also given at least eight hours after returning home before he is required to reapply.)

2. More than 30 days but less than 181, the employee has 14 days after completing his service in which to reapply.

3. More than 180 days, the employee must reapply within 90 days of completing his service period.

Unless meeting these deadlines is unreasonable or impossible, the employee will lose his reemployment rights under the USERRA if he does not act within these time frames. If the individual is recovering from an illness or injury resulting from or aggravated by his service, two additional years may be added to these reemployment deadlines.

However, if after such a period of time has passed and it is unreasonable or impossible for the individual to reapply for employment due to a service-related or service-aggravated injury or illness, then the period of time allotted for application may be extended.

Additionally, while the employee is on leave, both his vesting and accrual of benefits for pension purposes must continue as if he had not been absent.

For leaves lasting longer than 30 days, § 4317 states that employers must allow the employee to continue his health insurance at his own cost, which may also include up to an additional charge of two percent for the administrative costs incurred by the employer, for up to 18 months.

Section 4316 states that employees covered by the Act retain and continue to accrue all of their seniority and the benefit rights associated with such seniority while on covered leave (i.e., vacation accrual, seniority rights, etc.). Covered employees must also be permitted to use their accrued time off with their employer during their period of service if requested.

Section 4316 also states that if an employee was on covered leave for more than 180 days, that employee may not be terminated for any reason other than "for cause" for the period of one year after reemployment. If the employee's covered leave was more than 32 but less than 181 days, the returning employee may only be terminated "for cause" for 180 days after reemployment. In other words, an employer's employment-at-will policy is invalid during these periods of time for these covered employees.

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C. Employer Defenses

An employer may be released from its obligations under the Act if:

1. The employer's circumstances have changed so much that reemploying the individual is impossible or unreasonable,

2. It would place an undue hardship on the employer to retrain or rehire the employee, or

3. The employee's job was only temporary.

Of course, the employer bears the burden of proving any one of these defenses.

D. Remedies

Sections 4322 and 4323 state that violations of the USERRA should be reported to the Secretary of the Department of Labor. USERRA also allows plaintiffs to be awarded lost wages and benefits, attorneys' fees and court costs, and liquidated damage awards (Two times the employee's damages.) if the employer's violation was deemed "willful." The courts may also order employers to comply with USERRA.

XXV. DOL REGULATIONS UNDER USERRA

A. General

On December 16, 2005, the U.S. Department of Labor (DOL) announced its final regulations for the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA is the federal law that governs military service members' workplace rights while they are on active duty and after they return to civilian life.

These new regulations interpret the USERRA and clarify employers' obligations under the Act.

The following are some of the more important topics addressed under the final regulations:

❖ Clarified that returning service members must be "promptly" reemployed, which, in most cases, means within **two weeks** of reporting back to their employer,

❖ Established that returning service members must be restored to the same seniority, status and pay they would have attained if they had been continuously employed, which is referred to as the "**escalator principle,**"

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- ❖ Explained the timetables and procedures that returning service members must follow when reporting back to their employers,
- ❖ Established the reinstatement rights of returning disabled employees,
- ❖ Established that supervisors and managers have personal liability under USERRA,
- ❖ Established that the escalator principle be applied to allow returning employees the opportunity to take **promotional examinations or skills tests**, and to receive the **merit pay increases and performance bonuses they would have received if not on military leave.**
- ❖ Explained the law's requirements with respect to health and pension plan benefits—during the employee's service and upon return.

Moreover, the regulations provide that service members are to be treated as though they are on a furlough or leave of absence, even though other employees not only military leave may not be granted these benefits.

As detailed and complex as they are, the U.S. Department of Labor's (DOL) final regulations, effective January 18, 2006 leave many benefits-related issues open to interpretation. DOL intentionally avoided delving into each and every possible contingency. When the rules do not expressly address a particular situation, they advise employers to make a "reasonable judgment and document the process."

B. Retirement Plans

The broad principle of the pension section of the rules [sections 1002.259-1002.267] is that employees who are away on military duty are to be treated as if the military leave had not occurred and just as if they were still with the employer. In other words, they keep accruing pension benefits, and the level of the employer's contribution does not drop to the level of the employee's military salary.

C. Contributory Plans

For employees that contribute to an employer-sponsored retirement plan (such as a 401(k)), the rules grant a generous time frame:

> **The greater of three times the period of military service, or five years, to make up the contributions that they otherwise would have made during the period of service.**

The rules also provide guidance on whether to count differential pay for purposes of employee pension contributions. "Differential pay" refers to the employers' voluntary payments made to an employee who is away on military leave, which is usually the difference between military and civilian pay. In addressing this issue,

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the DOL followed the direction given by the IRS, which allows employees in military service to continue to contribute to their employer's retirement plan while on duty. Therefore, if an employer offers discretionary payments to its employees on military leave, employees who receive this pay are entitled to contribute to their retirement plans based on their **total pay received**, which includes any differential pay.

D. Noncontributory plans

USERRA also requires employers to make retroactive contributions to defined benefit pension plans on behalf of those employees on military leave. ("Noncontributory Plans are those retirement plans that provide a "formula-based benefit" to employees that are not dependent on employee contributions.)

The deadline for making those contributions on behalf of the employee is the later of 90 days after an employee's return to work, or the date on which the contributions otherwise would have been due for this period of time spent out on military service.

E. Duration of Return To Work

One issue that the rules did not address is how long the employee must remain at work for the retirement plan rights to apply. Quite frankly, if an employee comes back to work from military leave, has a cup of coffee, and then quits and leaves, the employer still has to pay out the retirement benefits.

F. Health Care Benefits

USERRA offers those employees on military leave rights that extend beyond typical COBRA rights.

For example, USERRA covers all employers, regardless of the number of employees the employer has, while COBRA covers only employers of 20 or more. USERRA and its health care provisions (sections 1002.163 to 1002.171) grant employees who leave work for military service the right to continue their employer-based health coverage for up to 24 months while they are in the military. (VIBA amended USERRA to extend coverage for up to 24 months.) Further, if they do not elect continuation, the employer must still reinstate them in the plan upon their reemployment, without waiting periods or exclusions.

G. Healthcare Election Issues

In contrast to COBRA, there is no set timetable for electing continuation of healthcare coverage under USERRA. The DOL said it decided to allow employers and health plan administrators to **develop their own reasonable rules**, rather requiring employers to follow COBRA's timetables. But, the DOL noted, employers may adopt to follow the COBRA timetables if they like, or they may establish either shorter or longer timeframes, as long as those requirements are "**reasonable**."

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According to its regulatory preamble, the DOL decided to adopt the more flexible approach because it did not want to impose rigid deadlines on the **smaller firms** that are covered by USERRA but not by COBRA.

Also, USERRA healthcare election rights are available only to *employees* who enter military service, not to retirees or their dependents who enter military service, or to dependents of employees who enter military service. COBRA election rights, on the other hand, are available to both employees and retirees *and* to their dependents.

Additionally, employers must offer employees who are out on military leave both USERRA and COBRA healthcare continuation options. An employer should treat an election for continuation coverage by an employee who enters military service as a "concurrent election" under both COBRA and USERRA. Therefore, the employees on military leave get the best of either COBRA and/or USERRA.

It is important for employers to either develop their own "reasonable rules and time frames" for electing coverage under USERRA or adopt COBRA's guidelines. Establishing such election timeframes lets employees know when and how to make a timely election and when to notify the employer of their decision.

For example, if an employer establishes reasonable USERRA rules that follow COBRA's election rules, the employee must elect USERRA coverage within 60 days after the employee receives a USERRA election form from the employer. If the employee elects after that 60-day period ends, the employer is not required to provide USERRA continued coverage.

If, however, an employer *doesn't* establish reasonable USERRA election rules, employees have until the end of the **24-month** USERRA coverage period to elect continuation. If the employee so elects, and pays the required premiums at any time before the end of the 24-month period, the employer must provide coverage retroactive to the date the employee entered military service until the end of the 24-month period.

If the employer's insurer won't reinstate coverage for the employee retroactively, the employer must self-insure that retroactive coverage.

The interplay between USERRA and COBRA also adds complexity to issues surrounding the duration of continued coverage. Whenever USERRA gives a more favorable result than COBRA, the employer has to follow USERRA.

For instance, under COBRA, the employee and the employee's dependents are entitled to receive a maximum of 18 months of continued coverage. However, under USERRA, the employee and the employee's dependents are entitled to receive a maximum of 24 months of continued coverage.

But under COBRA, if the employee or the employee's dependents experience a second qualifying event during the first 18 months of COBRA coverage, the COBRA coverage period can be extended to 27 or 36 months, depending on the

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nature of the second qualifying event. USERRA, on the other hand, does not offer an extension of the maximum coverage period for a second qualifying event occurring during the 24 months of USERRA coverage.

For example, if an employee goes out on military service, which is a qualifying event under COBRA, and dies within the first 18 months of combined USERRA and COBRA coverage, the maximum coverage period for the employee's dependents can be extended for an additional 18 months under COBRA, which is a total of 36 months from the date the employee's military service began. However, if the employee dies *after* the first 18 months of coverage ends, and *before* the end of the 24-month USERRA coverage period, or if no other second qualifying event occurs during the first 18 months of continued coverage, there is no extension of the 24-month maximum USERRA continuation coverage period available."

H. Employee Healthcare Contribution

Under USERRA, the employee's contribution for continued coverage depends on the duration of the employee's military service. If it is fewer than 31 days, the employee must pay his/her regular employee share of the premium.

However, if the employee's leave is 31 or more days, the employee may be required to pay up to 102 percent of the full premium, which represents both the employer's and the employee's share plus a 2 percent administrative cost. If an employee elects but fails to pay for continuation, the employer or plan may develop reasonable rules to permit termination of coverage.

I. Reinstatement

Employees who don't elect continuation coverage must be reinstated immediately upon re-employment, without the imposition of exclusions or waiting periods. However, employees may be allowed to delay the reinstatement of the healthcare benefits until a date later than the employment start date.

XXVI. USERRA CLAIMS MAY BE WAIVED IN SEVERANCE AGREEMENTS

In Wysocki v. IBM, No. 09-5161 (6th Cir. June 16, 2010) George Wysocki was employed by IBM as a data administrator when he was called to military service in Afghanistan. He returned from his military service and reported back to IBM in July 2007. He told his supervisor that his data administrator skills had diminished while he was away and asked that he be provided with time and assistance to update his skills.

IBM declined to give Wysocki the time and assistance he requested and, instead, terminated his employment on October 15, 2007. The same day his employment was terminated, he signed a general release in exchange for $6,023.65 as part of an Individual Separation Allowance Plan he negotiated with IBM. The general release included a waiver of claims relating to "veteran status" but didn't reference USERRA specifically.

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Seven months later, Wysocki filed a complaint in federal court alleging that IBM discriminated against him in violation of USERRA. The lower court enforced the release of claims he had signed and dismissed his lawsuit. He appealed the lower court's judgment to the Sixth Circuit, relying on language in Section 4302(b) of USERRA that provides:

> **[USERRA] supersedes any . . . agreement . . . that reduces, limits, or eliminates in any manner any right or benefit provided by [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit.**

Wysocki argued that the release was an agreement that eliminated his rights and benefits under USERRA; therefore, it was automatically superseded by Section 4302 and unenforceable for any USERRA claim he might make.

The Sixth Circuit disagreed with Wysocki's argument, citing the language of Section 4302(a) of USERRA, which it found limited the application of the language he cited. Section 4302(a) exempts any agreement that is "more beneficial to, or is in addition to, a right or benefit provided" in USERRA from the operation of Section 4302(b). As a result, the court turned its attention to determining whether the rights Wysocki received (the $6,023.65 severance payment) were more beneficial that the rights he gave up (the potential USERRA claim).

In concluding that the severance payment Wysocki received was more beneficial than the USERRA claim he gave up, the court found it important that:

1. The agreement used clear and unambiguous language informing Wysocki that he was waiving his USERRA rights (the language referencing "veteran status").

2. He received a valuable amount of consideration (the $6,023.65 severance payment).

3. He understood that he was waiving his USERRA rights.

4. He believed the severance payment he received was more beneficial than his USERRA rights.

5. There was no evidence of mistake, incapacity, fraud, misrepresentation, unconscionability, or duress with regard to the agreement.

6. Wysocki was encouraged to seek the advice of an attorney and had ample time to consider the agreement before he signed it.

As a result, the court found that the agreement was exempted from the provisions of Section 4302(b) by Section 4302(a) and that Wysocki had indeed waived any claim he might have had under USERRA when he signed the severance agreement. The Sixth Circuit therefore affirmed the decision of the lower court.

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WHAT DOES THIS MEAN TO HUMAN RESOURCES?

This case underscores the importance of making sure that any severance agreement is signed knowingly, voluntarily, and not under duress. A terminated employee should be given ample opportunity to review the agreement (Wysocki was given 21 days) and be encouraged to consult with an attorney if he chooses. At a minimum, the language of the release should include a waiver of claims relating to "veteran status," but for an employee who is a member of the military reserves, employers should consider specifically referencing USERRA to ensure the waiver is effective.

XXVII. VIETNAM-ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974

A. Coverage of Individuals

The Vietnam-Era Veterans Readjustment Assistance Act of 1974 (38 U.S.C. § 4211, et seq.) requires federal contractors and subcontractors with annual contracts of $10,000 or more to take affirmative action in employing qualified “special” disabled veterans and Vietnam-era veterans. In order to qualify for coverage under the Act, the individual must meet the requirements of one of the following categories:

1. **Special Disabled Veteran**

    a) A veteran who is entitled to disability compensation, or who but for the receipt of military retired pay would be entitled to disability compensation, under the laws administered by the Department of Veteran Affairs for a disability:

    (1) Rated at 30 percent or more, or

    (2) Rated at 10 or 20 percent in the case of a veteran who has been determined to have a serious employment handicap, or

    (3) A person who was discharged or released from active duty because of a service-related disability.

2. **Vietnam-Era Veteran**

    b) A person who served more than 180 days of active military any part of which was during the period of August 5, 1964, through May 7, 1975, and

    (1) Was released from the service with any classification other than a dishonorable discharge, or

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(2) Was released from active duty because of a service-related disability.

B. Employer Requirements

Covered employers are required to immediately list all of their suitable employment openings with the local employment service. The local employment service must then give qualified veterans priority referrals for these job openings.

Covered employers must also complete the Form VETS-100 annually and submit it to the Secretary of Labor. This report includes:

1. The number of workers employed by the contractor by job category and hiring location who are Vietnam-era veterans or disabled veterans, and

2. The total number of new employees hired by the contractor for that year and how many of these new hires were disabled or Vietnam-era veterans.

This Act is enforced by the Secretary of the Department of Labor.

XXVIII. WHISTLEBLOWER LAWS

A. Federal Law

Under the federal Whistleblower Law (5 U.S.C. §§ 2303(b)(8),(9)), the government is prohibited from taking, failing to take, or threatening to take or failing to take any employment action against a federal civil service employee because the employee disclosed information that he "reasonably" believed to be a violation of law, gross mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to public safety or health.

In order to establish a case under this law, the employee must show that:

1. He made a disclosure that was protected under the Act,

2. The official accused of taking the retaliatory act against the employee knew of the disclosure,

3. The employee received an adverse employment action, and

4. There was a causal link between the adverse employment action and the employee's disclosure.

In "mixed motive" cases, where the employee received the adverse action due to his protected disclosure as well as because of an independent legitimate reason, such as poor job performance, the courts have tended to hold for the employee. The underlying reasoning used in such cases is that these employers were unable to show that the adverse actions taken against these employees would not have occurred without this protected activity, the employers lose. Consequently, the

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courts have tended to place upon the employer the burden of showing that the employee would have received the adverse action even if he had not made a protected disclosure.

B. State Laws

Many states are now enacting "whistleblower" protection laws which protect employees who "blow the whistle" on their employer's misconduct. Such laws prohibit employers from taking any retaliation against any employee for reporting to the proper authorities what he reasonably believes to be a felony committed by his employer or a criminal act that is likely to cause an imminent risk of physical harm or a hazard to public health and safety.

These Acts also commonly require an employee to first report this violation to his employer in writing, in order to verify that the report was in fact made to the employer, before reporting the violation to anyone outside the organization. Such laws also frequently allow the employer a certain period of time, such as 24 or 48 hours, to respond to the employee's report or to correct the violation. If appropriate corrections are made, then the employee is not protected for reporting the violation to outside authorities.

On the other hand, many such statutes authorize the employee to report the employer's offense directly to the appropriate officials when the violation relates to the state's pollution control laws without first requiring the employee to report the incident to the employer.

Additionally, it is common for such laws to afford protection to employees who have a reasonable belief that their employer is engaging in some illegal activity covered by the state's whistleblower law. Even if the employee is mistaken and the employer is not engaging in the illegal activity, as long as it was reasonable for the employee to form this opinion, the employee will be protected for "blowing the whistle" on his employer.

Of course, such laws vary from state to state. Therefore, as always, it is best for employers to check the laws of each state in which they do business to determine the appropriate requirements before inadvertently violating an employee's rights.

XXIX. WORKER ADJUSTMENT AND RETRAINING NOTIFICATION (WARN) ACT OF 1988 (PLANT CLOSING LAW)

A. Coverage

In an attempt to ease the emotional and economic burdens placed on employees and local municipalities whenever an employer engages in a mass shutdown, layoff or relocation, Congress passed the Worker Adjustment and Retraining Notification Act of 1988, or "WARN" (29 U.S.C. § 2101, et. seq.). The final regulations for WARN were issued by the Department of Labor in April of 1989 (20 C.F.R. § 639, et seq.).

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Section 2101 of the Act states that WARN covers those employers that employ:

6. One hundred or more full-time employees, or

7. One hundred or more employees who collectively work at least 4,000 hours on a weekly basis.

Consequently, the hours worked by part-time employees may be counted in this "4,000-Hour Test." (Part-time employees, as defined under WARN, are those employees who either average less than 20 hours of work each week or have worked less than six out of the last 12 months for the employer.)

B. When The Requirements Of WARN Are Initiated

8. Employment Loss

The requirements of WARN are only initiated when employees experience an "employment loss," as that term is defined under the Act. Section 2101 of WARN defines three instances when employees experience an "employment loss" under the Act, which include:

a) Whenever employees are terminated for any reason, other than for just cause, voluntary separations, or retirements, or

b) Whenever it is reasonably foreseeable that an employee layoff will exceed six months in duration, and

c) Whenever employees' work hours are reduced more than 50 percent for each month of any six-month period.

If the requisite number of employees experience an "employment loss" for the requisite period of time, then the covered employer must comply with the requirements of WARN. However, the situations when the requirements of WARN are triggered occur primarily in plant closings, or shut downs, and when an employer must engage in a mass layoff.

9. Plant Closings (or Shut Downs)

The regulations (20 C.F.R. § 639.3) state that a plant closing, or a shut down, occurs under the Act whenever:

d) 50 or more employees, excluding parttime employees, experience an employment loss due to the **shut down of a work site** during any 30-day period, or

e) Whenever an employment action is taken that results in the "effective cessation" of production or the work being performed by one of the employer's **units (or departments)** which in turn

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directly results in 50 or more employees experiencing an employment loss.

A temporary plant closing or shut down will also trigger the requirements of WARN if 50 or more employees experience an employment loss, as that term is defined under the Act.

10. Mass Layoffs

Section 2101 of the Act states that the requirements of WARN are triggered whenever an employer engages in a "mass layoff," which is defined as occurring:

f) Whenever at least 33 percent and at least 50 of the employer's active employees, excluding part-time employees, at the same facility experience an employment loss during any 30-day period, or

g) Whenever more than 500 employees experience an employment loss.

Section 2102 of the Act states that whenever an employer engages in two or more different layoffs within any 90-day period at the same facility, and any of the previously mentioned threshold amounts are met regarding the number of employees experiencing an employment loss, then the requirements of WARN will apply. However, if an employer can show that these separate layoffs were indeed independent of each other and not a mere ploy intended to circumvent the requirements of WARN, then the employer will not be required to comply with the Act.

11. Relocation or Consolidation Exception

A "plant closing" or "mass layoff" will not meet the definition of "employment loss" under WARN if the plant closing or mass layoff is really part of a relocation or a consolidation of the facility where the employer either:

h) Offers to transfer its employees to the new site if the new location is within a reasonable commuting distance, with employees experiencing no more than a six-month break in employment, or

i) If the employer offers to transfer these displaced employees to another facility, regardless of its location, and no more than a six-month break in employment occurs, and these employees accept such an offer within 30 days of the offer, the plant closing, or the layoff, which either comes later.

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12. Other Exceptions

Section 2103 of the Act states that the requirements of WARN do not have to be met every time a qualifying plant closing or mass layoff exists. Instead, certain exceptions to WARN exist.

For instance, if an employer establishes a temporary facility, hires temporary employees or engages in a temporary project, and the employees are aware of the fact that their employment was merely temporary, then the requirements of WARN need not be met by the employer.

Additionally, if a layoff or a plant closing results from a lockout with the union, which is not intended to circumvent WARN, or if an employer permanently replaces economic strikers, then, again, the requirements of the Act need not be met.

C. Requirements Of WARN

If a covered employer is going to experience a qualifying event under WARN, then § 2102 outlines the requirements employers must meet in order to comply with the Act. First, when such a qualifying event occurs, the employer is required to give a 60-day advance written notice of the plant closing or mass layoff to each employee affected by this employment loss or to the appropriate union representative if any affected employees are represented by the union. If the employer sends this notice to each employee affected by this impending employment loss, then the notice must be sent to the employee's last known address or it may be enclosed with the employee's paycheck.

Additionally, the employer must send notice to the appropriate dislocated worker agency of the state under the Work Opportunity Tax Credit, formerly known as the Job Training Partnership Act (JTPA), and to the chief elected official of local government. If more than one local government is affected by the impending employment loss, then the employer must send the appropriate notice to the local government official where the employer paid the highest amount of taxes in the previous year.

The U.S. Department of Labor has also outlined in its regulations what employers must include in this written notice (20 C.F.R. § 639.7). First, the regulations state that this notification must include the date when the first employee is expected to be displaced, as well as the expected schedule for all future separations. This notification must also include the name and phone number of the appropriate company official to contact in order to obtain any further information.

If the employer sends this notification to its individual employees, then these notices must include the employee's date of separation and whether the employee

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has any "bumping" rights. If the notification is sent to the employees' union representative, then the notice must state the name and location of the affected facility, all of the job titles affected, and the names of those employees currently holding these affected jobs.

If, however, the employer's plant closing or layoff is postponed for less than 60 days, the employer is required to provide each party with another notice that references the first notice. This second notice must indicate the new date when the affected employees will experience a "loss of employment." This new notification must also cite the reason for the delay. On the other hand, if the delay goes beyond 60 days, the employer must send entirely new notices to all parties (20 C.F.R. § 639.10).

As for the notification that must be sent to the chief local official, this notice must also provide the name and location of the affected facility, all of the job titles affected, as well as the number of employees affected, whether bumping rights exist for employees, and the name and address of the chief officer for each union representing the affected employees. However, WARN also allows employers to simply notify the chief local official that this information is available upon request (20 C.F.R. § 639.7).

If an employer fails to comply with these requirements, then WARN allows plaintiffs to pursue their own private civil suits against the offending employer. As in Title VII cases, the courts are to attempt to make damaged parties "whole" again. Consequently, back pay awards of up to 60 days are common, as are attorney's fees. Local governments may also file suit and receive up to $500 per day in damages.

D. Exceptions To WARN's 60-day Notice Requirement

WARN allows employers to forego complying with its 60-day notice requirement under certain conditions. First, § 2102 of the Act allows for the "faltering company" exception, which states that if an employer was actively pursuing additional capital or business that would have either postponed or eliminated the need for a plant closing or a mass layoff, and the employer reasonably believed in good faith that complying with WARN's 60-day notice requirement would have seriously harmed its ability to obtain this additional capital or business, then the employer will not be forced to comply with the full 60-day notice requirement.

Secondly, § 2102 of the Act also allows for a "business exigency" exception. The business exigency states that whenever a plant closing or mass layoff is caused by factors that were not reasonably foreseeable at the time the 60-day notice should have been given, such as in the case of unexpectedly losing a client, or an unforeseen dramatic drop in orders occurs, then again, the employer will not be required to fully comply with WARN's requirements.

And finally, § 2102 of the Act states that if the employer is stricken by a natural disaster, such as a flood, tornado, typhoon, or earthquake, then the employer will

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not be required to comply. Instead, as is the case with each of these three exceptions, the employer is still expected to give as much notice as possible.

XXX. NONBINARY GENDER REPORTING

Rather than identifying their genders as being male or female, more employees have identified their gender as being nonbinary. This presents a problem for employers regarding how they should report these workers' gender on the EEO-1 form provided to the Equal Employment Opportunity Commission (EEOC). The EEOC recently has said that employers may report this information in a comments section of the form. But some experts think this won't solve the problem of not including a box designated for nonbinary individuals on the EEO-1 form.

"Nonbinary is an umbrella term for anyone who doesn't identify as exclusively male or female," said Helen Friedman, Ph.D., a clinical psychologist in St. Louis. "This includes genderqueer, agender, bigender and intersex individuals."

A. EEO-1 Form Filing Requirement

Businesses with at least **100 employees** and **federal contractors with at least 50 employees** and a contract with the federal government of **$50,000.00** or more must file the EEO-1 form. The EEOC uses information about the number of women and minorities companies employ to support civil rights enforcement and analyze employment patterns.

Component 1 of the form, which asks for the number of employees who work for the business listed by job category, race, ethnicity and sex, was due May 31, 2019. Component 2 data, which includes hours worked and pay information from employees' W-2 forms listed by race, ethnicity and sex, was due September 30, 2019.

B. Dilemma for Employers

The EEOC traditionally has given employers only two options for reporting their employees' gender on the EEO-1: male or female.

Therefore, employers have faced "the uncomfortable option" of either:

- Underreporting any employee who did not identify as a man or woman.
- Forcing all employees into two categories, regardless of how the employees identified themselves.

These options were becoming increasingly difficult given the growing number of states that are now issuing state identifications and driver's licenses with a nonbinary gender marker to anyone who requests one. Visconti said these jurisdictions include **Arkansas, California, Colorado, Hawaii, Indiana, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Washington, D.C., and Washington state**. Most of these states

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also require employers to recognize nonbinary individuals' preferred gender markers.

For example, California generally requires that employers permit employees to self-designate as gender nonbinary. The California Fair Employment and Housing Council regulations state:

- If an employee requests to be identified with a preferred gender, name and/or pronoun, including gender-neutral pronouns, an employer must comply with the employee's stated preference.

- An employer is permitted to use an employee's gender or legal name as indicated in a government-issued identification document only if it is necessary to meet a legally mandated obligation; otherwise, it must identify the employee in accordance with the worker's gender identity and preferred name.

- It is unlawful for employers and other covered entities to ask about or require documentation or proof of an individual's sex, gender, gender identity or gender expression as a condition of employment.

WHAT DOES THIS MEAN FOR HR?

The whole idea of employees identifying as "nonbinary" is not a fad. It is here to stay. So, employers need to be making a space available for reporting this form of gender identification on their various documents.

Also, however employees identify themselves, whether it be genderqueer, agender, bigender or intersex, they typically would be included within the umbrella term "nonbinary."

Hopefully, the EEO-1 form will have a space for that type of gender identification next year.

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Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott's "**Employment Law Videos**" on the ADA, FMLA, FLSA and Harassment, **"The Human Resource Professional's Complete Guide To Federal Employment And Labor Law"** **&** Scott's **"Do It Yourself HR Department"** are favorites for anyone wanting to learn Employment Law and run an HR Department.

Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

Scott has also received the Human Resource Association of Central Ohio's Linda Kerns Award for Outstanding Creativity in the Field of HR Management and the Ohio State Human Resource Council's David Prize for Creativity in HR Management.

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