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The ADAAA: Out of the Frying Pan and Into the Fire

Presented by:

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EXPAND YOUR EXPECTATIONS℠

Make Sure You Don't Get Burned!

- Understanding the new EEOC regulations
- Digesting the recent guidance & case law
- Revising/updating your employee handbook
- Developing an interactive reasonable accommodation problem solving process
- Training your managers

A Quick Review. . .

Understanding the New EEOC Regulations

The Primary Purpose: To make it easier for people with disabilities to obtain protection under the ADA.

Reoccurring Theme

The definition of "disability" shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

The New Focus

The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

The New Focus

- The question of whether an individual meets the definition of disability should not demand extensive analysis.

- The focus for employers and courts will be on engaging in the interactive process and providing reasonable accommodations not on whether the employee has a disability.

So, what does all of this mean?

- **A (Assumed)**
- **D (Disabled) and**
- **A (Act)**

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GATE-KEEPING

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What do you do when an Employee informs you that he/she has a health condition that may be an disability under the ADA?

a) Acquiesce to the EEOC's wishes and grant the employee's requested accommodation

b) Accept what the employee tells you and conclude that the employee is disabled and begin the interactive process

c) If disability is not obvious, ask for additional medical information to determine whether the individual's condition rises to the level of a disability

What Information Can You Obtain?

Disability-Related Inquiries and Medical Examinations

- Job-related and consistent with business necessity
- Employer “has a reasonable belief, based on objective evidence that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition
- Disability-related inquires and medical examinations that follow up a request for reasonable accommodation when the disability is not known or obvious also may be job-related and consistent with business necessity

What documentation can you require from an employee who requests a reasonable accommodation?

- Documentation that is sufficient to substantiate that she/he has an ADA disability and needs the reasonable accommodation
- Cannot ask for unrelated documentation – cannot ask for complete medical records!
- Documentation is sufficient if: (1) it describes the nature, severity and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and (2) substantiates why the requested reasonable accommodation is needed
- Don't forget about GINA!
- If the employee is asking for leave. . .

Other gate-keeping issues. . .

- May an employer require an employee to go to a health care professional of the employer's choice?
- Yes, if:
  - employee provides insufficient documentation from his/her treating physician to substantiate the disability and need for a reasonable accommodation
  - employer reasonably believes the employee will pose a direct threat

Remember – examinations under the foregoing situations must be limited in their scope – cannot go beyond narrow purpose of the examination

Other gate-keeping issues. . .

- If documentation is insufficient, employer should explain why and allow employee to provide missing information in a timely manner
- Per the EEOC, employer should consider consulting with employee's physician (with employee's consent) before requiring employee to go to health care professional of employer's choice
- Documentation is insufficient if:
  - does not specify existence of ADA disability
  - does not explain need for reasonable accommodation
  - health care professional does not have expertise to give an opinion about employee's medical condition and limitations
  - information does not specify functional limitations due to the disability
  - other factors that indicate the information provided is not credible or is fraudulent

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What Is A Disability under the ADA?

Definition of “disability”

- Physical or mental impairment that substantially limits one or more of the major life activities of such individual;

  or

- A record of such an impairment;

  or

- Being regarded as having such an impairment

Major Life Activities

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Sitting
- Reaching
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Interacting with others
- Working

Not finished yet…

- The operation of a major bodily function, including functions of the:
- Immune system
- Special sense organs and skin
- Normal cell growth
- Digestive
- Genitourinary
- Bowel
- Bladder
- Neurological
- Brain
- Respiratory
- Circulatory
- Cardiovascular
- Endocrine
- Hemic
- Lymphatic
- Musculoskeletal
- Reproductive functions
- Operation of a major bodily function includes the operation of an individual organ within a body system

A Closer Look at Certain Conditions...

CASE STUDIES

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LEAVE AS A REASONABLE ACCOMMODATION

How much leave is reasonable?

Starting points for consideration…

- In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities
- No question that leave can be a reasonable accommodation
- But, how long does the leave have to be?

Case Studies

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THEE EEOC ISN'T FINISHED YET...

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Recent EEOC Guidance

Lack of High School Diploma a Disability?

EEOC Informal Discussion letter issued in 2011; Q&A issued recently

- Automatically screening out applicants without diplomas discriminates against those with learning disabilities who cannot get a diploma
- Accommodation = waiving the requirement
- Accommodation not required if job-related and consistent with business necessity
- No preference required

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WHAT DO I DO NOW?

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Revising / Updating Your Handbook

A Key Part of becoming **“FIREPROOF”**

What Should You Add/Update?

- Set forth a specific ADAAA policy.
- Explain how an employee requests a reasonable accommodation.
- Identify Company's intent to engage in an interactive process to determine accommodation(s).
- Include undue hardship limitation.
- Include a prohibition against retaliation.

Develop an Interactive Reasonable Accommodation Problem Solving Process

Another **“Fire”** Protection Must

The Process

- Identify essential functions of the job
- Identify what the employee can and cannot do (either in total or partially)
- Identify all potential accommodations
- Explore effectiveness of various accommodations
- Conduct undue hardship analysis
- Select an effective accommodation or Advise employee no effective accommodations are available absent undue hardship

Document The Interactive Nature Of The Process

- Reasonable accommodation request forms
- Essential job functions worksheets
- Communications with employee's health care provider
- Emails
- Memos to file
- Talking points for meetings
- Correspondence with the employee

Training Your Managers

Make sure your managers aren't "fiddling" while your company "BURNS"

Burning Questions

Case Study #1

Chad works in the Information Technology department, and he has been with the company for six years. He is a non-exempt employee. Chad is, at best, an average employee, and over the past year, he has used all of his paid time off. In addition, last October, he was placed on intermittent FMLA leave due to a severe shoulder injury that he sustained while playing football. Also, in December of last year, his physician sent a letter to the company indicating that Chad suffered from an ongoing health condition that flares up once or twice a year, requiring Chad to be absent from work for a period of 1 to 2 days each time; however, Chad has never asked for leave due to this condition.

In April of this year, Chad was late in arriving to work, had to leave early from work or was completely absent from work on 14 separate occasions. Each time that one of these situations occurred, Chad would send you a long rambling text message offering his explanation for his absence, tardiness or early departure and begging you not to fire him. These explanations included the following: "just not feeling well"; depressed because of marriage issues with his wife; his child becoming sick while at school and no one else available to pick her up; and going to see his father who is ill.

Also, in these long, rambling text messages, Chad would throw in an occasional reference to his health condition, but in doing so, he never offered it as a reason for his attendance issues. Chad has also asked if he can work from home when needed – however, he has not indicated that his request to do so is related to his health condition.

With the recent string of attendance issues, Chad has now exceeded and surpassed his available time off. In addition, Chad's attendance problems are beginning to be noticed by everyone else in the department, and they have begun to affect morale as everyone has been forced to pick up the slack.

How should you address this situation?

How would the situation differ if the shoulder injury were work-related?

Case Study #2

Stan is a customer sales representative who has been with the company for a year and a half. For the first year, Stan's performance was excellent. However, over the past six months, Stan has had several customer complaints that he is rude on the phone. He has also had several arguments with his co-workers.

As Stan's manager, you schedule a meeting to meet with Stan to discuss these issues. During this meeting, Stan reveals to you that he has bi-polar disorder and has recently been undergoing an adjustment to his medication. During these adjustments, Stan has difficulty controlling his moods and reactions to stress. According to him, this is the reason for his recent outbursts.

What steps should you take to deal with Stan's performance?

Case Study #3

Steve works as a service technician. His job description requires him to be available after hours and on call. His typical work schedule was from 9 to 5 weekdays.

In 2008, he was diagnosed with Stage III Renal Carcinoma and underwent surgery to remove his left kidney. After taking time off for the surgery and recovery, he returns to work with no restrictions or limitations, and his cancer is in remission. Since his return to work, Steve has worked his regular schedule and has not missed any significant time from work, other than for regular doctor visits.

In order to meet customer service and business needs, CMH decides that the technicians are going to have to work significant amounts of overtime and to do a night shift once a week and to be on call on weekends.

You meet with Steve and tell him about the decision and the schedule demands. Steve tells you that he is concerned that the schedule will "put him in the grave," and he obtains a note from his doctor limiting him to 8 hours a day/5 days a week.

Can you make him work the new schedule?

Additional Facts:

The company informs Steve that he will not have to work under the new schedule, but that, instead, he will need to work out of another office location, which would involve 2 hours of commuting time. At the new office location, Steve's schedule would be a 40 hour work week.

Steve refuses to do so based on the 2 additional hours of commuting time.

At this point, Steve has, in effect, refused two assignments. Can you terminate his employment? What should the company do?

Case Study #4

You are Debbie's manager. Debbie works in the collections department, and she has been employed with the company for 7 years. Debbie has historically used, at least some, FMLA leave on a yearly basis, and she consistently maxes out her paid time off, even to the point of needing and using time off beyond her allotted PTO time. Debbie is a single mother with two small children. Throughout her employment, you have been extremely understanding of Debbie's situation and have regularly approved time off beyond her PTO time.

However, over the past 2 years, Debbie's absences have begun to put a significant strain on everyone else in the department, and her fellow team members have begun to express their displeasure with Debbie's perceived lack of work ethic. You too have become very annoyed by Debbie's inability to work on a regular basis. In February, after a period of time in which Debbie took a full week off for "personal reasons", you felt it was time to meet with her to discuss her attendance issues. During the meeting, you informed Debbie that she needed to immediately improve her attendance; that further attendance issues would result in disciplinary action, including possible termination of employment; and that any additional absences would not be approved except in extraordinary situations.

Following that meeting, though, Debbie does not come into work the next day, and HR informs you that it has received a request for FMLA leave from Debbie for "severe depression and stress" resulting from the demands of her job and her meeting with you. According to paperwork submitted by Debbie, her physician has stated that Debbie will need 12 weeks of FMLA leave to recover from her depression and stress. Based on this information, the Company grants Debbie the requested 12 weeks of leave, beginning on February 18. In addition, HR also informs you that Debbie has filed a claim for workers' compensation benefits for severe emotional trauma caused by your meeting with her.

It is now May 16, and Debbie has not yet returned to work. Also, the demands on your department have increased even more.

Can you terminate Debbie's employment?

What issues need to be addressed regarding Debbie's situation?

Case Study #5

Amy, a security guard, was diagnosed with plantar fasciitrs and ordered to wear a therapeutic boot. She requested light duty in order to allow her to wear the boot during the workday. The security manager refused the request because of a company policy limiting light duty assignments to people injured on the job. Amy was terminated after she exhausted her FMLA leave entitlement and was unable to work without the boot.

Was the termination appropriate? How do you properly analyze and respond to this situation?

Revisiting the ADAAA/FMLA/Workers' Compensation Intersection: Navigating through the Bermuda Triangle and Coming Out Alive

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Workers' Comp / FMLA / ADAAA

- Employee Leave
- Maintenance of Benefits
- Light Duty
- Intermittent Leave or Reduced Work Schedule
- Reinstatement
- Documentation

Workers' Comp Basics

Question: *What leave is an employee entitled to under workers' comp?*

Answer: While there are no *per se* leave mandates under workers' comp, leave is impliedly considered part and parcel of receiving medical treatment for injuries arising out of and in the course and scope of the employment relationship.

Basic FMLA Requirements

Question: *What leave is an employee entitled to under the FMLA?*

Answer: Under the FMLA, an "eligible" employee of a covered employer may take up to 12 workweeks of leave during any 12-month period for one or more of the following reasons:

1. The birth of a child, and to care for the newborn child;
2. The placement of a child with the employee through adoption or foster care, and to care for the child;
3. To care for the employee's spouse, son, daughter, or parent with a "serious health condition";
4. Because a "serious health condition" makes the employee unable to perform one or more of the essential functions of his or her job, or
5. For qualifying exigencies arising out of active duty status.

*26 weeks of leave for injured or ill service member

Basic FMLA Requirements

Question: *What other rights do "eligible" employees have in conjunction with FMLA leave?*

Answer: During FMLA leave, an employer must maintain the employee's existing level of coverage under a group health plan. At the end of FMLA leave, an employer must allow the employee to return to the same or an equivalent job.

Basic ADAAA Requirements

Question: *What leave is an employee entitled to under the ADAAA?*

Answer: Under the ADAAA, leave can be a reasonable accommodation unless the leave will cause an undue hardship on the employer. There is no limit on the amount of leave that may be taken; however, the leave usually cannot be for an indefinite period. There are no length of service requirements. An undue hardship is any action that is too costly, substantial or disruptive, or that fundamentally alters the nature of the employer's business.

When FMLA & ADAAA Coverage Overlap

Question: *Are all employees who are protected by the ADAAA also entitled to leave under the FMLA?*

Answer: No. Employees protected by the ADAAA must be independently "eligible" for FMLA leave.

FMLA "serious health condition" & ADAAA "disability"

Question: *Is FMLA "serious health condition" the same as an ADAAA "disability"?*

Answer: No. An FMLA "serious health condition" is not necessarily an ADAAA "disability." An FMLA "serious health condition" is an illness, injury, impairment, or physical or mental condition that requires either an overnight stay in a hospital or other health care facility, or continuing treatment by a health care provider. An ADAAA "disability" is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.

Occupational Injury or ADAAA "disability"

Question: *Does an occupational injury always result in an ADAAA "disability"?*

Answer: No. Look to the statutory guidance of the ADAAA: Does the employee have an impairment that substantially limits a major life activity? Does the employee have a record of such an impairment? Is the employee regarded as having such an impairment? If the injury results in a present condition that qualifies as a disability, employers are required to make reasonable accommodation.

Light Duty, Workers' Comp, the FMLA & the ADAAA

Question: *What are the employer's rights and obligations under the three statutes in situations involving light duty assignments?*

Answer: Assuming a particular work-related injury causes a permanent condition that qualifies as a disability, under the ADAAA, an employer may provide an accommodation that requires the employee to remain on the job instead of providing leave. However, if an employee is FMLA eligible, the employee can reject the light duty work, and his/her leave request must be granted. If an employee is offered and rejects light duty work, he/she will not receive "temporary total disability" benefits under workers' comp.

Medical Certifications, Inquiries and Confidentiality

Question: *Is there a conflict between the FMLA provision allowing employers to ask for certification that an employee has a serious health condition and ADAAA restrictions on disability-related inquiries of employees?*

Answer: No. When an employee requests leave under the FMLA for a SHC, employers will not violate the ADAAA by asking for the information specified in the FMLA certification form. The FMLA form only requests information relating to the particular SHC, as defined in the FMLA, for which the employee is seeking leave.

Comparison of ADAAA and FMLA Leave

Question: *Does the FMLA's limit of 12 workweeks of leave in a 12-month period mean that the ADAAA also limits employees to 12 weeks of leave per year?*

Answer: No. An otherwise qualified individual with a disability is entitled to more than 12 weeks of unpaid leave as a reasonable accommodation if the additional leave would not impose an undue hardship on the operation of the employer's business.

Comparison of ADAAA and FMLA Leave

Question: *How do the ADAAA and the FMLA requirements compare regarding intermittent or reduced schedule leave?*

Answer: Under the ADAAA, a qualified individual with a disability may work part-time in his current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an unreasonable hardship in the current position, the employer must see if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without unreasonable hardship while working a reduced schedule. If no equivalent position, look for a vacant position at a lower level.

Under the FMLA, employers may require employees to transfer temporarily to an available position with equivalent pay and benefits if needed to better accommodate intermittent leave.

Comparison of ADAAA, FMLA and Workers' Comp

Question: *What are the employee's reinstatement rights under the ADAAA, the FMLA and Workers' Comp?*

Answer: Under the ADAAA, the employee is entitled to return to the same job unless the employer demonstrates that holding the job open would impose undue hardship. Under the FMLA, (with three minor exceptions) an employee must be reinstated to the same position or to an equivalent position. Under workers' comp, there is no automatic right of return, but it is usually of benefit to get the employee working at his original job as quickly as possible because of the caps on recovery in Tennessee.

ADAAA Compliance When FMLA Also Applies

Question: *If an individual requests time off for medical treatment, should the employer treat this as a request for FMLA leave and ADAAA reasonable accommodation?*

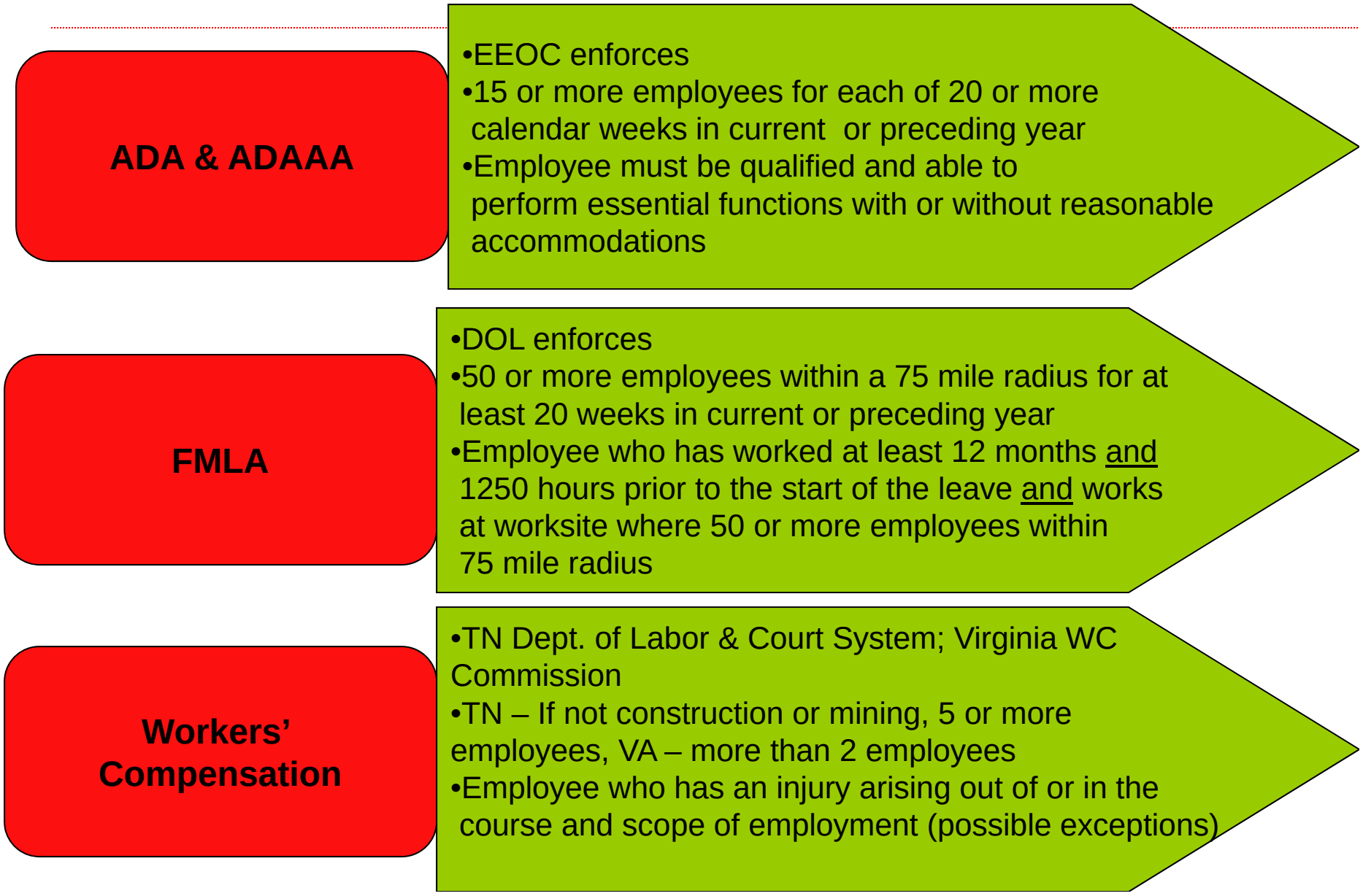
Answer: Maybe. If an employee requests time off for a reason related or arguably related to a disability (e.g., "I need 10 weeks off to get treatment for a back problem"), the employer should consider this a request for ADAAA reasonable accommodation.

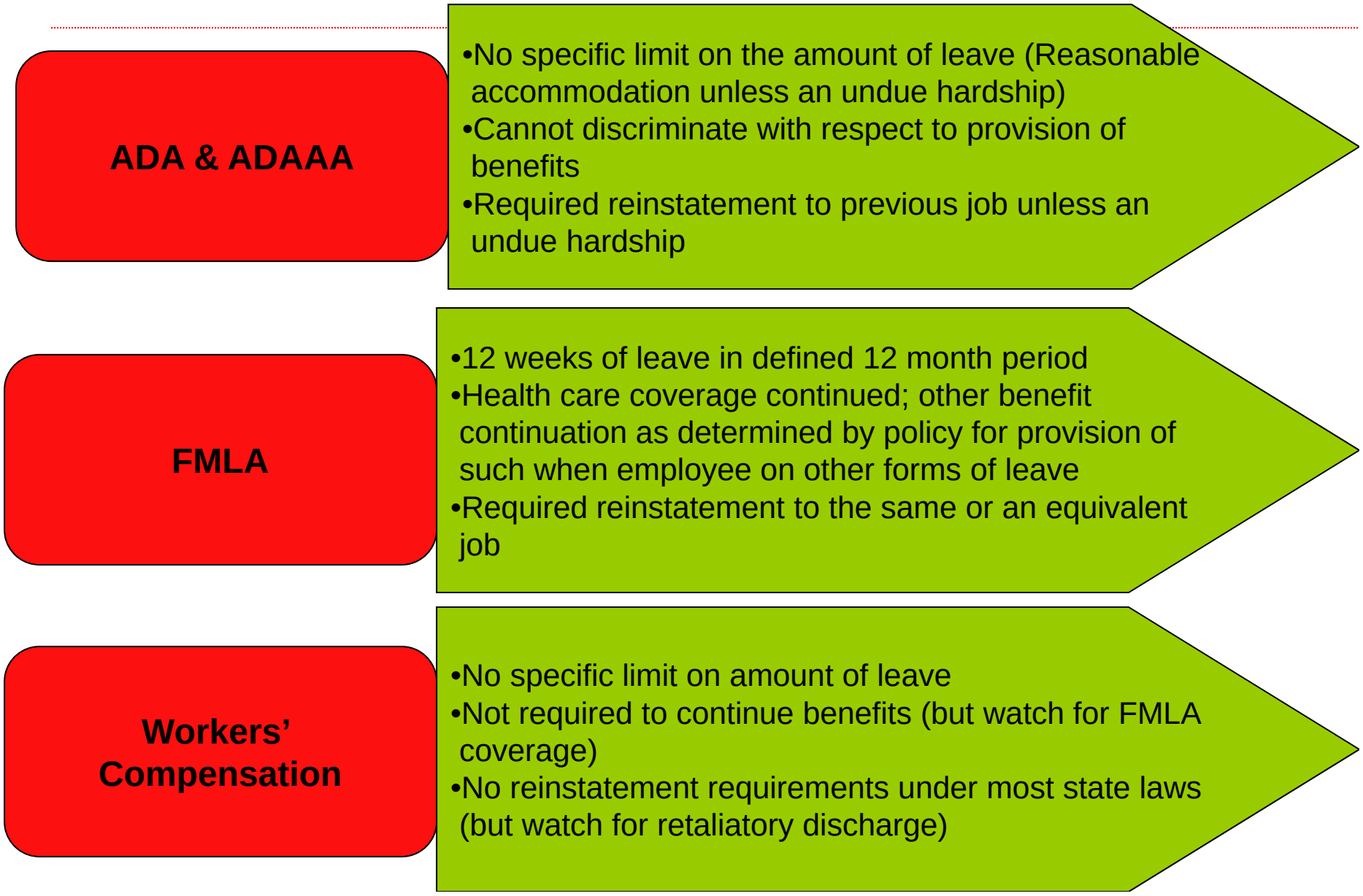
If the request is for a condition that could qualify as a SHC (construe this liberally!), then FMLA paperwork should be given to the employee.

ADAAA Compliance When FMLA Also Applies

Question: *As an alternative to a leave of absence, may an employer offer an effective reasonable accommodation that will enable an employee to continue working?*

Answer: An employer may offer an employee a reasonable accommodation other than leave, as long as it is effective. However, if the individual is "eligible" for leave under the FMLA and has a SHC that prevents her from performing an essential job function, she has the right to take a leave of absence up to 12 workweeks (assuming the presence of an appropriate FMLA certification), even if she could continue working with an effective reasonable accommodation.


ADA & ADAAA
•EEOC enforces
•15 or more employees for each of 20 or more calendar weeks in current or preceding year
•Employee must be qualified and able to perform essential functions with or without reasonable accommodations
FMLA
•DOL enforces
•50 or more employees within a 75 mile radius for at least 20 weeks in current or preceding year
•Employee who has worked at least 12 months and 1250 hours prior to the start of the leave and works at worksite where 50 or more employees within 75 mile radius
Workers' Compensation
•TN Dept. of Labor & Court System; Virginia WC Commission
•TN – If not construction or mining, 5 or more employees, VA – more than 2 employees
•Employee who has an injury arising out of or in the course and scope of employment (possible exceptions)


ADA & ADAAA
•No specific limit on the amount of leave (Reasonable accommodation unless an undue hardship)
•Cannot discriminate with respect to provision of benefits
•Required reinstatement to previous job unless an undue hardship
FMLA
•12 weeks of leave in defined 12 month period
•Health care coverage continued; other benefit continuation as determined by policy for provision of such when employee on other forms of leave
•Required reinstatement to the same or an equivalent job
Workers' Compensation
•No specific limit on amount of leave
•Not required to continue benefits (but watch for FMLA coverage)
•No reinstatement requirements under most state laws (but watch for retaliatory discharge)

CASE STUDIES


POLICE

Bulletproof Documentation

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EXPAND YOUR EXPECTATIONS℠

The Dos and Don’ts of Good Documentation

1. Performance Documentation
2. Personnel File Documentation

Performance Documentation

A. Discipline
B. Performance Evaluations
C. Investigations

A. DISCIPLINE

Discipline should be:

- **A warning and an expectation**
- **Consistent**
- **Properly documented – even verbal warnings**

You are the coach, not the mom!

Train Supervisors

Why should a supervisor care about documenting discipline?

1. **Consequences!**
2. **Change in supervisors**
3. **Progressive discipline policy**
4. **Evidence in EEOC Response / Trial / Unemployment Request**

Elements of Disciplinary Documentation

- **Date it!**
- **State the reason – FACTS ONLY - witnesses**
- **Reference policy**
- **Reference prior discipline**
- **Describe the consequences**
- **If departing from a written progressive discipline policy, state the reasons**
- **Future expectations**
- **Allow employee to respond**
- **Have employee sign it!**
- **Follow up - document improvement or failure**
- **Keep it!**

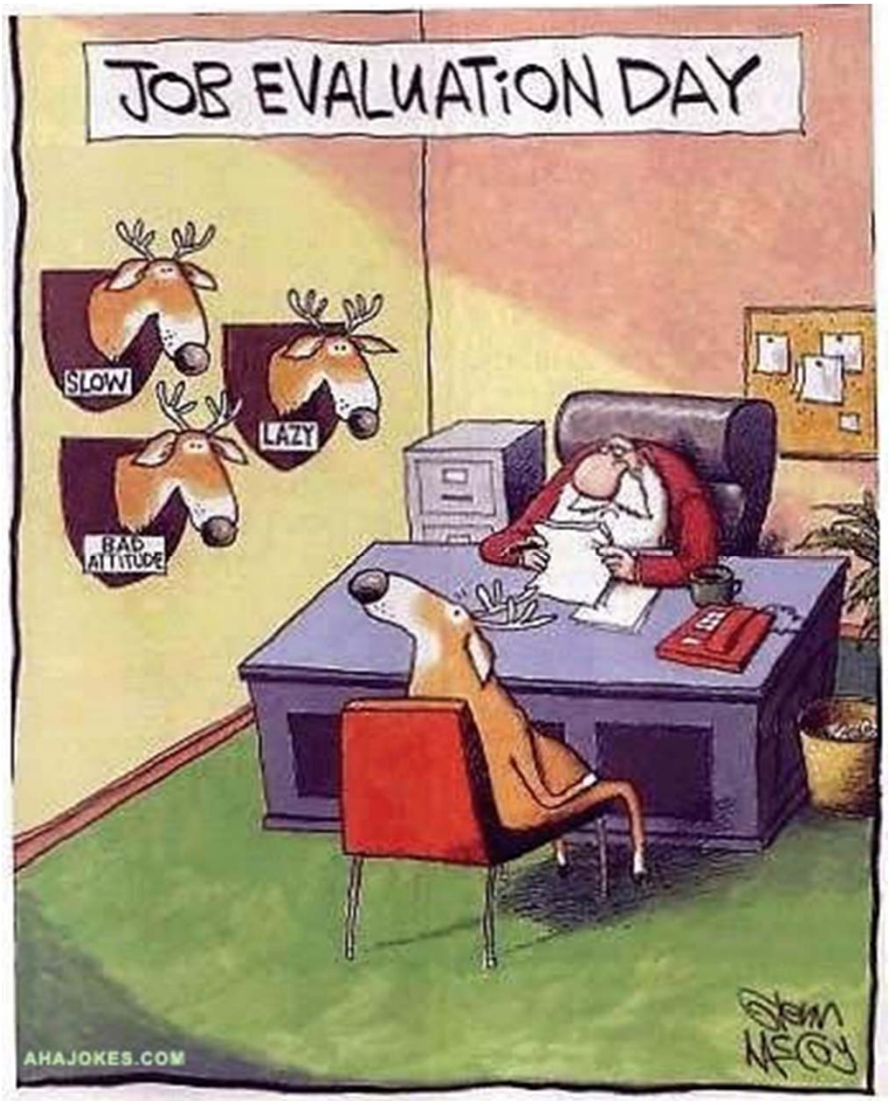

DANGER
THIN ICE

Consequences of Poor Documentation

- In *Conley v. NLRB*, 520 F.2d 629, 634-44 (6th Cir. 2008), an employee who allegedly reported for work while intoxicated, was frequently absent and often shirked his duties *prevailed* in litigation against his employer because his employer failed to document any infractions prior to his termination.

- In *Brockman v. Avaya*, No. 3:06-cv-923-J-16RK, 2008 WL 591930, at *4 (D.M.D. Feb. 28, 2008), a manager who failed to document a "coaching session" he had with an employee to discuss performance issues did not win a motion for summary judgment on the basis of poor documentation.

Don’t forget performance evaluations!



B. Performance Evaluations

- Can be primary defense in discrimination or wrongful discharge claims
- Measure of performance for determination of salary increases or bonuses
- Useful for motivating and encouraging employees

Potential Problem Issues

- Inflation

✓False sense of security

✓Deprives employees of opportunity to improve

✓Fails to provide history of poor or mediocre performance

✓Gives terminated employees incentive to sue

- Insufficient Detail

✓Not real feedback

Documentation of an employee's discipline problems is vital to employer success in employment litigation.

Lack of documentation is the PRIMARY reason for unfavorable litigation outcomes.

C. Investigations

- When any information comes to light in any way regarding unlawful discrimination or possible violations of company policy.

From sworn complaints to water fountain gossip

Goals of Effective Investigation Procedure

1. **Confidential– Mitigates the fear and likelihood of retaliation**
2. **Prompt – Evidences reasonable care to prevent future misconduct**
3. **Thorough and impartial – inspire employee confidence and help prevent lawsuits**

Note facts without conclusions/theories

**kept separate from personnel files

Beware of Surveillance;
Tape Recording Phone Conversations;
Email monitoring

1. **DETERMINE CREDIBILITY**

2. **REACH A CONCLUSION**

3. **TAKE APPROPRIATE CORRECTIVE ACTION**

- Alleged conduct **did** occur
- Alleged conduct did **not** occur
- Investigation is inconclusive

DO NOT WRITE LEGAL CONCLUSIONS IN A REPORT

He said/she said---What do I do now?

- Sensibility– Does the interviewee's story make sense when considered alone?
- Demeanor– Did the interviewee's body language and tone indicate that the interviewee was telling the truth?
- Motive to Falsify– Consider what reason each interviewee may have for lying.
- Supporting Evidence– Does the physical evidence tend to support one interviewee's account over another's?
- Past Behavior– Does alleged harasser have a history of similar behavior?

2. Personnel File Documentation

A company should maintain personnel files on each employee from the date of hire.

These files contain documentation regarding all aspects of the employee's tenure with the company.

Retention of Documents

- Once a documentation system has been put in place, an employer must also create a document retention policy.

- The most basic policy should include:
  - General types of documents to be retained.
  - Who's responsible for maintaining them.
  - Where the documents will be housed.

What to Keep

- **Basic information such as employee's name, address, Social Security number, date of birth, occupation and job classification.**
- **Job application and/or resume**
- **Offer of employment**
- **Job description for the position**
- **IRS Form W-4**
- **Work permits for minors**

What to Keep (Cont.)

- Receipt or signed acknowledgement of employee handbook
- Records of employment actions such as promotions, demotions, transfers, layoffs, recalls, performance evaluations, commendations, attendance and/or tardiness, leave records, warnings and/or disciplinary actions, and other work-related matters.
- Forms providing next of kin and emergency contacts
- Complaints from customers and/or co-workers
- Records of attendance or completion of training programs
- Any contract, written agreement (non-compete, employee contract)
- Documents relating to the worker's departure

What *not* to Keep in a Personnel File

- **Medical Records**
- **I-9 Forms and e-Verification Documents**
- **Charges of Discrimination/Harassment**

Medical Records

Medical records should be kept separate from all other non-medical records and should be kept in a locked cabinet with one person designated as having access to the files.

Confidential Medical Records File

An employer may keep a single confidential medical file, separate from the usual personnel file, containing both FMLA and ADA medical information if the employer follows the ADA confidentiality standards. This includes following the ADA interpretations of those confidentiality exceptions that are set forth in both the ADA and the FMLA regulations. For example, employers may not give supervisors and managers unlimited access to the medical files. However, employers may give supervisors and managers information concerning necessary work restrictions and accommodations.

EMPLOYER RECORD RETENTION

If a Charge has been filed or if a lawsuit has been filed, all records for the employee SHALL be retained until the "Final Disposition" of the matter.

Employer Record Retention Requirements

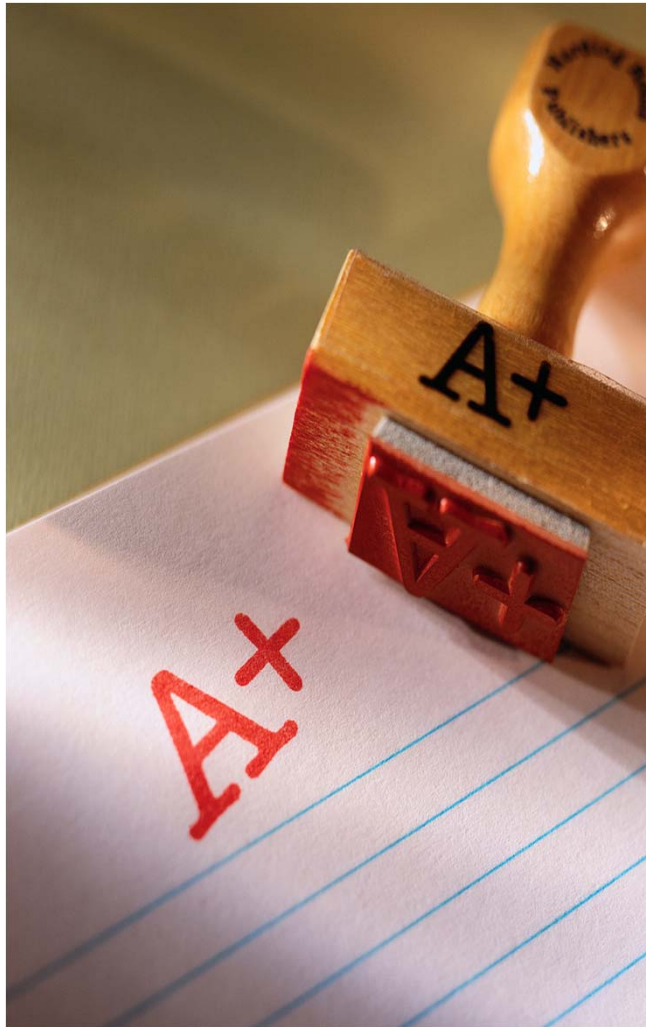
ADA	1 year from the making of the personnel record or from taking a personnel action/providing an accommodation
Title VII	EEO-1 Reports should be kept for 1 year
Equal Pay Act and FLSA	3 years

Employer Record Retention Requirements (cont.)

FMLA	3 years
FICA	4 years from the date the tax is due or is paid
ERISA	6 years

Documentation Exercise

- Describe company expectations
- Describe the behavior that must change
- Include the employee's explanation of why expectations are not met
- Detail the action plan and goals
- Describe the consequences if the unacceptable behavior continues
- Describe the nature of the follow-up
- Remember this is a professional document.



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BULLETPROOF DOCUMENTATION FACT PATTERN:

The Acme Chronicle has a standard Anti-Harassment & Non-Discrimination Policy, as well as a policy prohibiting fraternization between managers and their subordinates.

Hourly employee Mary Ann complained to HR regarding a conversation she had with her Manager in the break room. She claimed that Larry told her that he wanted to "do her." Mary Ann responded "no," but Larry told her to "think about it." Mary Ann then responded, "I've thought about it and the answer is still no." There were no witnesses to this incident. However, Mary Ann claimed that another Manager, Balki, witnessed Larry apologize to her during a meeting with the three of them a week later. Mary Ann also reported that an employee named Jennifer had complained to her about Larry getting "too friendly" with her via phone calls and text messages.

HR interviewed Jennifer as part of its investigation. Jennifer reported that Larry called her many times late at night and texted her things that she felt were inappropriate as her supervisor. Jennifer provided proof of the phone calls via cell phone records and copies of text messages. The phone logs revealed that Larry and Jennifer had 8 different conversations over a two-day period, including one call lasting 76 minutes at 1:00 a.m. The text messages provided consisted of the following:

- "Hey. I am going to call you in a minute."
- "Have a good night"
- "I went to look at the apartment. It seems fine, but not large enough for my six wives and eleven children."
- "Thanks for the info, what are you cooking for the kids tonight?"
- "Were you out having a drink?"
- "Hope you feel better."

Larry admitted to talking to Jennifer via telephone and text, but denies anything inappropriate happened. He claimed that she initially called him and he called her back. He could not recall the substance of the 76 minute phone call, but did remember that he was driving home from work that night and that they talked until he made it home. He believes it had to do with "scheduling." Larry also stated that he makes his cell phone number available to all employees, and that employees often called him to talk about their schedules, as well as other work-related and non-work related issues. He felt that his openness with his employees built morale amongst the hourly employees. Larry also denied the conversation with Mary Ann ever occurred and claimed that the meeting with her was called by Balki, who wanted to talk to Mary Ann because he noticed that she "had not been acting herself lately." Larry claims that Balki and Mary Ann are good friends.

When interviewed, Balki reported that he did not ask for the meeting with Jennifer and that it was actually Larry that had asked to meet with Mary Ann because he noticed that her "upbeat demeanor had changed." Balki claimed that Mary Ann asked him to sit in during the meeting because she did not feel comfortable meeting with Larry one-on-one. Balki reported that Larry asked Mary Ann if she had any "concerns" during the meeting, and said that if she did, he "apologizes," but that neither Larry nor Mary Ann discussed what "concerns" he was referencing. Balki stated that after the meeting, Mary Ann appeared to go back to her normal jovial self.

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INVESTIGATION SUMMARY REPORT

Date: _____ **Investigator Name:** _____

Complaining Employee(s): _____

Accused: _____

Witnesses: _____

Summary of Complaint: _____
_____
_____
_____
_____

Summary of Evidence or Explanation of Absence of Evidence:
_____
_____
_____
_____

Summary of Investigation Results:
_____
_____
_____
_____

Determination: _____
_____

Remedial Action Taken: _____
_____

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EMPLOYEE COUNSELING REPORT

Date: _____

Employee Name:_____

Document Type:_____

[Verbal Counseling/Written Warning/Final Written Warning/Termination]

Problem/Situation:

_____
_____
_____
_____

Summary of Corrective Action Plan:

_____
_____
_____
_____

Policy Review/Re-Training: _____
[yes or no; identify policy or training]

Employee Statement:

_____
_____
_____
_____

I have read and understand the above counseling.

Signature of Employee: _____ **Date:** _____

Supervisor: _____ **Date:** _____

Managing the Challenging Employee

Presented by:
Timothy McConnell, Esq.
tmmconnell@bakerdonelson.com

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EXPAND YOUR EXPECTATIONS℠

WHAT MAKES A GOOD PEOPLE MANAGER?

You are not:

- Momma
- Buddy
- Shrink

You are:

- A business leader
- A consensus builder
- A problem solver

"NOTE TO STAFF: We're A Team, Not A Family."

NOTE TO STAFF: We're a Team, Not a Family

- There are no "business lay-offs" among family
- On a team, roles are defined and respected
- "I am not your mother, I'm the division director. I have a job to do. You have a job to do."
- Being the leader everyone loves and expecting to make everyone happy is not productive.
- Being comfortable as a leader when you know everyone is not happy is the start of having the right mind set to manage the challenging employee.

✧ Managing the Challenging Employee Requires:

1. Having the Right Mind Set

2. Engaging in Productive Conflict Management

3. Reducing Legal Risks

The Mind Set

- You need this person to contribute to the work at your Company.

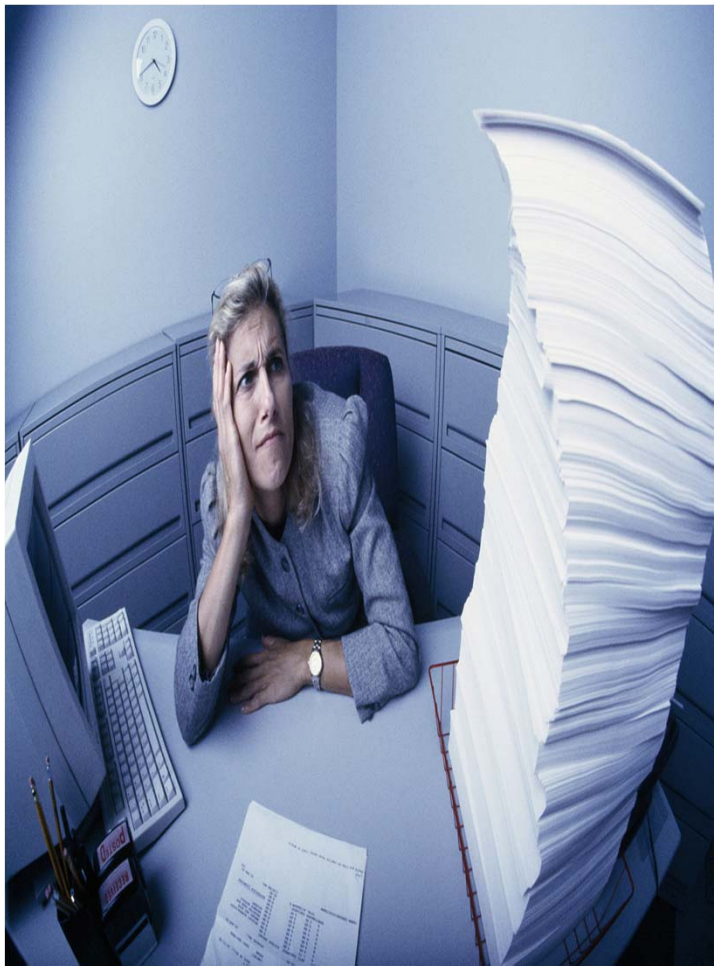
- But, you do not have to battle unacceptable performance or behavior day after day after day.

- You do not need to be social friends, you just have to work together to get the job done.

Productive Conflict Management

Step No. 1 --Assess The Source of the Problem

- Lack of skill in the job
- Misplacement
- Lack of job structure
- Incompatibility between employee and employer
- Inadequate supervision
- Emotional immaturity
- Psychological deterioration
- Poor health



Step No. 2 – Separate the employee's role in the business from his/her difficult personality or behavior

How To Make It Work

- Don’t get into arguments
- Don’t allow yourself to be goaded
- Don’t permit your buttons to be pushed
- Don’t lose your objective control over the situation
- Don’t take it personally, this is business

Step No. 3 – Do Your Homework

- Act only on the basis of identifiable facts.
- Do not act on gossip, unfounded opinions, personal biases.
- However, do not use the fact that you haven’t personally witnessed the behavior as an excuse to delay addressing the problem.

Step No. 4 –Develop A Plan

- Where and when will you address the behavior
- Who will be present
- What type of documentation will be prepared and when will it be delivered
- What are the consequences of continued poor behavior
- What are the specific expectations going forward

Step No. 5 – Rinse and Repeat

- Consequences become progressively more severe

- Try to impact what motivates the employee to change behavior

- If termination is the best avenue for the organization, then proceed according to typical procedures

Performance Evaluations Are One of the Most Important Tools of Managers and Supervisors in Managing Performance!

A Fair and Effective Performance Appraisal is an Ongoing Process of Communication Between an Employee and their Immediate Manager or Supervisor.

Employee Evaluations

- Plan for Performance
- Set realistic objectives
- Identify and correct problem areas
- Document performance problems – Partner with HR to ensure consistency
- Assess employee potential
- Improve communication
- Assist in compensation and promotion planning
- Motivate Employees – Define what rewards and recognition are most effective – all people are different!

Cardinal Rules

- Evaluations are very important for LEGAL reasons.
- Don’t provide ammunition to a disgruntled employee.
- Record any problems with the employee’s performance or conduct.
- Record **only** true, relevant and factual information. Avoid inserting personal opinions or expressing personal feelings.
- If you have questions - Partner with HR
- When evaluating attendance – do not make references to employee’s health conditions
- Cannot use FMLA leave against an employee

Evaluation Checklist

- Record all instances of misconduct or substandard performance – *there should be no surprises!!*
- Do not change ratings once they are given, unless accompanied by an explanation.
- Complete evaluations on time.
- Make sure the evaluator is the immediate supervisor of the employee being evaluated.
- Make sure any negative comments recorded are made by persons who observed the behavior first-hand or verified with the person who did.
- Make sure all negative comments are job related.

Paul & Patty Puffers

- What's the problem? Boredom on the job, lack of skill, habit, gossip etc.
- Get the facts – days, times, length, number of breaks or problems getting work done, etc.
- Give business reasons why the breaks are a problem
- Define acceptable number/length of breaks
- Explain consequences

Be Ready For Rebuttal

- No law entitles you to smoke breaks
- No constitutional right to smoke
- No, everyone else isn't doing it
- Yes, the Company has a right to limit smoke breaks
- Yes, the Company can limit breaks

Battling Bettys

Taking Charge

- What is the problem? Work related or not?
- Get specific examples of unacceptable conduct including “silent treatment” or lack of respect
- Explain why conduct is a problem for the business
- Set specific expectations for professional behavior
- Explain consequences of failure to get past personal disagreements

Bad Attitude Bob

- What is the problem? Health, boredom, family issues, resentment at work etc.
- Point out specific behavior that is not acceptable (rolling eyes in meetings, sighing, not participating in meetings etc.)
- Why is this bad for business
- Make clear change must occur
- Approach subject in a problem solving manner
- Set consequences.

Gary the Gossip

- What is the problem? Not enough work, disruptive personality, not challenged, need for attention etc.
- Emphasize harmful effects of gossip and how rumors can hurt coworkers and increase legal risks
- If the information is false, correct it asap
- Be proactive and flood the office with correct information when it comes to Company matters
- Explain consequences and stick to them

Angry Allen

- Examine potential sources of the problem.
- Empathize: "Allen, I know you were frustrated when the deadline was pushed up a week."
- Discuss specifically what is inappropriate.
- Stand your ground: "If you continue to raise your voice with me I am going to have no choice but to end this meeting."
- Set expectations: "From now on, I expect you to deal with your feelings constructively and professionally."
- Explain consequences: "If this continues, I will have to start corrective action process."
- NOTE: Consider seeking professional guidance.

Remember,

What Happens Here.

Can Always End Up Here

Managing Potential Legal Issues

- Off Duty Conduct Laws
- Inferences of Discriminatory Treatment
- Claims of Harassment Resulting From Enforcement of Standards
- ADAAA Issues & Misconduct On The Job
- Retaliation Where Adverse Actions Occur Subsequent To Protected Activity
- Common Law Torts – Intentional Infliction of Emotional Distress

✧ Managing the Challenging Employee Means:

1. Having the Right Mind Set

2. Engaging in Productive Conflict Management

3. Reducing Legal Risks


This is not high school.
It's your job.

What Questions Do You Have?

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

The Dangers of Retaliation: Avoid Making a Mountain out of What Otherwise May be a Molehill.

Matthew D. Davison, Esq.

Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.
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EXPAND YOUR EXPECTATIONS℠

Workplace Retaliation

- What is it? How has the concept changed?
- How does it occur? When is it illegal? What makes it illegal?
- How can we protect the Company?

To “Retaliate” means to. . .

- “Get even”
- “Get back at”
- “Take revenge”
- “Eye for an Eye”

Legal vs. Illegal Workplace Retaliation

- Generally acceptable to discipline (i.e. “punish”) an employee for unacceptable behavior.
- Conduct becomes “illegal retaliation” when punishment is a consequence of exercising a legally protected right.
- “Protected Activity”

Retaliation = Fastest Growing EEOC Complaint

- 2006 Supreme Court decision made it easier to prove illegal workplace retaliation.
- Employers generally know how to identify and respond to overt retaliation, but are much less familiar with subtle forms of workplace retaliation or perceived retaliation.
- Baseless claims of illegal, unsafe or unethical conduct can easily *become successful claims of retaliation* if organizations do not appropriately recognize, respond to and resolve retaliatory situations.
- Failure to prevent retaliation may result in the loss of millions of dollars in fees and damage awards.

Potential “Protected Activity”

- Expressing concerns about issues in the workplace
- Expressing concerns over, or otherwise bringing to light, potential illegalities
- Participating in or cooperating w/ investigation into workplace issues
- Filing a formal claim or complaint related to the company (internally or externally)
- Even personal life or personal conduct may constitute “Protected Activity”

Third Party Retaliation:
Thompson v. North American Stainless (2011)

Most Employment Statutes Prohibit Retaliation. . .

- Title VII
- ADA
- ADEA
- FMLA
- FLSA
- OSHA
- Workers' Compensation Laws
- Common Law
- Whistleblower Statutes

“Whistleblower” Retaliation

- Sarbanes-Oxley (“SOX”) & Dodd-Frank (“DANK”)
- Other Fed. Statutes (FCA, STAA, AHERA, ISCA, ERA, SDWA, CAA, FWPCA, TSCA, SWDA, CERCLA, AIR21, PSIA, FRSA, NTSSA, CPSIA)
- Tennessee Public Protection Act (TPPA) and Other State Statutes
- Common Law

The Sarbanes-Oxley Act of 2002

- Sarbanes-Oxley requires publicly traded companies to reshape their businesses and their attitudes toward workplace crime. Sections 806, 301, and 1107 of SOX provide additional guidance for whistleblowing.

- **Section 806**
  - Extends protection to employees of publicly traded companies who report fraud.
  - Protects “whistleblowers” who provide information or assist in an investigation from retaliation.
  - If retaliated against, employee will be “entitled to all relief necessary to make the employee whole.”

- **Section 301**
  - Requires audit committees to take a role in whistleblowing and reducing corporate fraud.
  - Audit committees must develop mechanisms for recording, tracking, and acting on information.

- **Section 1107**
  - Whistleblowing protections extend beyond public corporations.
  - Extends protection to any person who reports “to a law enforcement officer” information related to a violation of a federal law.

SOX Section 806

- "Protected Activity" under Section 806 =

  Report (Internal or External) based on *Reasonable Belief* Employer has violated

  (1) Any SEC Rule or Regulation,

  (2) Federal Criminal Provisions Relating to Securities, Bank, Mail, or Wire Fraud; or

  (3) Any Federal Law Relating to Fraud Against Shareholders.

- Under SOX, a Whistleblower has to file a complaint with OSHA within 180 days of the retaliation.

- OSHA investigates and adjudicates Section 806 SOX Claims

- Remedies = Reinstatement; back pay with interest; fees

Dodd Frank (2010)
Whistleblower Incentives and Protections

- **Bounty Provision**: If original information voluntarily provided by one or more whistleblowers leads to successful SEC enforcement action that results in sanctions exceeding $1million, the whistleblower is entitled to between 10% and 30% of collected monetary sanctions.

- **Anti-Retaliation Provision**: No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other matter discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower (i) in providing information to the SEC; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under Sarbanes Oxley, the Securities Exchange Act or any other law rule or regulations subject to the jurisdiction of the SEC.

Dodd Frank (2010)
Whistleblower Incentives and Protections

- SEC Section 922(a) Protection Provisions
  - **New causes of action:** SEC whistleblowers have a private right of action in Federal district court
  - **Statute of limitations:** 6 years from date of violation or 3 years after employee should reasonably have known of violation, but in any event no longer than 10 years after date of violation
  - **Relief:**
    - Reinstatement with same seniority status
    - 2 times the amount of back pay otherwise owed (with interest)
    - Compensation for litigation costs, expert witness fees and reasonable attorney fees
  - **Carveout:** A whistleblower is not entitled to an award if the whistleblower:
    - Knowingly and willfully makes any false, fictitious or fraudulent statement or representation; or
    - Uses any false writing or document knowing the writing or document contains any false, fictitious or fraudulent statement or entry

New Retaliation Rules From the SEC. . .

- In the wake of the SEC's new whistleblower rules, our company:

  - Has changed existing policies to address the new rules - 9.1%

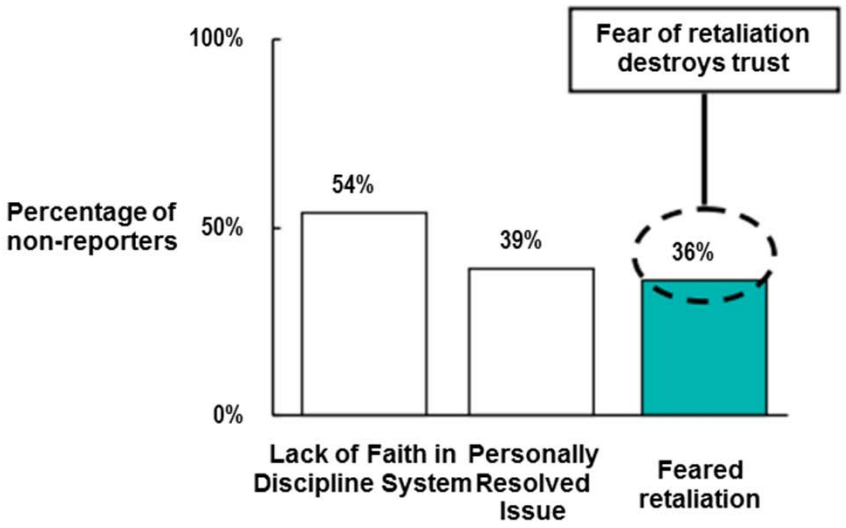
  - Hasn't yet, but intends to change existing policies to address the new rules - 27.3%

  - Not sure yet if will change existing policies - 42.4%

  - Has decided not to change existing policies because considerations under the new rules are adequately addressed by existing policies - 21.2%

Perceptions of Retaliation Limit Actual Reporting and Destroy Trust

Top Reasons for Not Reporting Misconduct

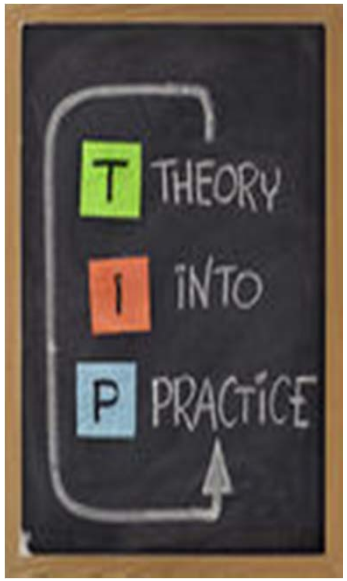


The Retaliation Trust/Fear/Reality Disconnect

Data from ERC's 2007 National Business Ethics Survey

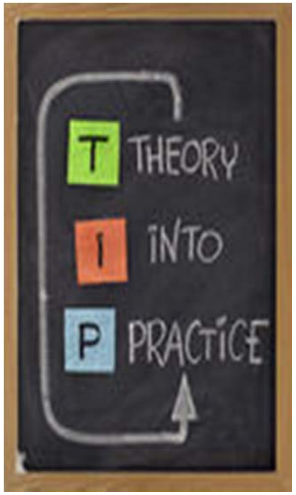
Practical Considerations

- Re-evaluate and re-align the corporate culture
- Develop comprehensive anti-retaliation polices
- Enhance policies and procedures
- Evaluate and update reporting mechanisms
- Leverage technology



Practical Considerations

- Orient, train, and retrain employees
- Develop formal procedures to rapidly respond to complaints



- Conduct prompt and thorough internal investigations
- Tighten the information flow upon formal inquiries

Questions and Comments

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EEOC and Discrimination Update: Recent Developments

Presented by:
Jennifer P. Keller, Esq.
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EXPAND YOUR EXPECTATIONS℠

Record Year for EEOC Charges

- FY 2009 – 93,277 charges
- FY 2010 – 99,922 charges
- **FY 2011 – 99,947 - the highest number of charges in the EEOC's 46-year history!!**
- EEOC secured more than $455.6 million in monetary benefits for individuals – the highest level of relief obtained through administrative enforcement in the EEOC's history and $51 million higher than FY 2010.

Private Sector Bias Charges Hit All-Time High

- Mediation program reached record levels with 9,832 resolutions up 5% from FY 2010
- This cost employers $170,053,021, $28 million more than in FY 2010
- The EEOC filed 300 lawsuits, winning more than $91 million from employers.
- Of the 300 lawsuits filed, 23 involved systemic allegations involving large numbers of people and 67 had multiple plaintiffs.
- Additionally, the EEOC filed 261 “merits” including direct suits and interventions alleging violations of substantive provisions of the statutes enforced by the Commission.

Where are the trends?

1. Retaliation – 37.4%

2. Race Discrimination – 35.4%

3. Religious Discrimination – Increased by 9%

A Renewed Sense of Enforcement

- Increase in follow-up on requests for additional information
- More on-site investigations
- The use of fact finding conferences
- New commitment to cooperation between the EEOC and the DOL
- Public disclosure of intent to pursue more detailed investigations of charges
- Use of Universal Mediation Agreements

Town Hall Meetings

- The EEOC along with the NLRB, OSHA, and in some cases, corresponding state agencies are holding joint town hall meetings.
- People who believe they have been victims of employment discrimination based on race, sex, color, religion, national origin, age, disability, wages, work conditions, pregnancy or public accommodations are invited to attend.

EEOC Regulatory Agenda

- ADAAA - Final regulations were issued on March 25, 2011.

- ADEA – On November 16, 2011, the EEOC voted to approve a rule relating to the reasonable factors other than age defense; final regulation issued March 29, 2012.

- As of April 3, 2012, employers are required to retain records to prove compliance with GINA.

New ADAAA Regulations

The Primary Purpose:

To make it easier for people with disabilities to obtain protection under the ADA.

RFOA REGULATIONS

EEOC responded to two Supreme Court decisions striking down the EEOC's business necessity requirement. (EEOC had required a business to show that an employment practice that disproportionately but unintentionally harmed older workers was a business necessity in order to escape liability.) Now, it is a defense to an age discrimination claim if the practice is based on "REASONABLE FACTORS OTHER THAN AGE."

But, BE CAREFUL!

Genetic Information Nondiscrimination Act

- Enacted and signed into law by President Bush May 21, 2008
- Became Effective November 21, 2009
- EEOC final regulations issued November 9, 2010
- May become a focus of the EEOC

EEOC Launches Small Business Task Force

- Will focus on newly established small businesses and those that are too small to afford lawyers or human resource personnel
- Commissioner Barker, the leader of the task force, states:
  - “It is appropriate that we take a fresh look at our interactions with the small business community to see if we can better serve them.”
  - “We need to make it easier for owners of small business to quickly access the information they need to understand their legal obligations so they are able to comply with those obligations.”

EEOC Examines Treatment of the Unemployed

- EEOC is investigating the impact of employers considering only those currently employed for job vacancies.
- There are concerns that such a practice may disproportionately impact the disabled, women, and racial minorities.
- While this practice may not be widespread it is doubtful that automatic exclusion of unemployed persons from consideration would constitute due diligence in the screening of job applicants.

Pregnancy Bias – EEOC Meeting Held on February 15, 2012

- EEOC states that pregnancy discrimination has increased by as much as 35% over the last 10 years.
- Governed by the Pregnancy Discrimination Act and the FMLA
- Women make up 47% of the workforce.
- Pregnancy discrimination is a vital concern for the agency.

Jacqueline Berrien, EEOC Chair

- "For the second year in a row, the EEOC received a record number of new charges of discrimination... 2011 [was] a year of extraordinary achievements for the EEOC."

National Law Firm Model

- EEOC is adopting a national law firm model.
- Its various offices will work together like a large law firm to pool talent and resource against major employers.
- Primarily used for systemic cases

EEOC Joining Forces for Aggressive Enforcement

- EEOC and the Office of Federal Contract Compliance Programs will share information relating to the employment policies and/or practices of federal contractors.

- EEOC has and will likely continue to partner and/or coordinate with private plaintiffs' class action attorneys
  - *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011)
  - *EEOC o/b/o Serrano, et al. v. Cintas Corp.*, 2010 U.S. Dist. LEXIS 18130 (E.D. Mich. Mar. 2, 2010)

Litigating Against the EEOC Presents Unique Challenges

- Far Reaching Subpoena Power
- The EEOC claims it is not subject to 300 day SOL in systemic suits in order to increase the number of plaintiffs .
- Some rules such as Rule 23 of the *Federal Rules of Civil Procedure*, applicable to class action suits, do not apply to the EEOC.
- The EEOC may take the position that other rules do not apply to it, forcing employers, at great expense, to litigate procedural issues as well as the underlying claims.

EEOC Class Action Activity

- July 6, 2011 – Verizon agreed to pay $20 million dollars to settle a class action filed by the EEOC in Maryland.

- Lawsuit alleged employees were automatically terminated after one year of leave pursuant to company policy without consideration of whether a reasonable accommodation might have allowed the employee to return to work.

Additional settlement terms

- Revised attendance policy to examine individuals on a case-by-case basis
- Prior to making suspension and termination decisions, the Company will make good faith reasonable efforts to determine whether offenses are actually chargeable under no-fault attendance policy.

EEOC to Remain Focused on Systemic Bias

- The EEOC's systemic program emphasizes the investigation and litigation of discrimination claims with large groups of alleged victims.

- The EEOC filed a record setting 261 systemic lawsuits in FY 2011.

- The EEOC is setting a yet undetermined minimum quota of systemic cases for its litigation docket.

Elements of a Discrimination Claim

1. a member of a "protected class"
2. qualified for the job
3. terminated, demoted or denied a promotion because he or she is a member of the protected class; and
4. damaged by that discrimination (i.e., lost wages or suffered emotionally)

Defendant may state a legitimate nondiscriminatory reason for the employment action as a defense. However, Plaintiff then has the opportunity to prove that the stated reason is pretextual in nature.

Evidence Plaintiff's Use to "Prove" Discrimination

Stray Remarks

- In, *Woodsmall v. Eclipse Mfg. Co.*, 249 F. Supp. 2d 918 (E.D. Tenn. 2002), Plaintiff sued for age discrimination.
- Plaintiff's boss had once told Plaintiff that he didn't know he was so old.
- While the comment was only made once, it was cited by the court in its decision to allow Plaintiff's case to go before a jury.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Perceived Lack of Best Efforts to Accommodate

- In *Jiglov v. Hotel Peabody, G.P.*, 719 F. Supp. 2d 918 (W.D. Tenn. 2010), Plaintiff requested time off for Russian Orthodox Easter.
- Due to scheduled maintenance, Plaintiff's request could not be fulfilled.
- The scheduled maintenance was postponed at the last minute
- Plaintiff was not informed of the schedule change that might have allowed him to have the day off.
- In reality, it would have been factually impossible for Defendant to reach Plaintiff.
- Plaintiff pointed to this lack of effort in convincing a court to allow his claims to proceed towards trial by jury.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Don't Overplay Your Hand

- In, *Cheng v. MINACT, Inc.*, 1996 U.S. App. LEXIS 33208 (6th Cir. Ohio Dec. 16, 1996), Plaintiff, a teacher, sued for age discrimination.
- Plaintiff had difficulties maintaining classroom discipline.
- Defendant stated that Plaintiff was terminated for this reason.
- Younger teachers, who had the same problem, were not terminated.
- Defendant spent a month before Plaintiff's termination documenting every perceived failure of Plaintiff, no matter how minute.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Poor Memory?

- In *Bartlett v. Gates*, 421 Fed. Appx. 485 (6th Cir. Ohio 2010), Plaintiff sued for alleged sex and age discrimination.
- Plaintiff was passed over for a promotion for a 39 year old woman.
- Plaintiff claimed he was more qualified and had more experience.
- Employer claimed it hired the best qualified candidate.
- Case was dismissed at the trial court level upon Employers motion.
- 6th Circuit Court of Appeals reversed, based in large part, on decision maker's lack of familiarity with the qualifications of the applicants when questioned.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Alleged Third-Party Reprisals

- In *Thompson v. N. Am. Stainless*, LP, 131 S. Ct. 863 (U.S. 2011), Plaintiff alleged retaliation under Title VII.
- Plaintiff's fiancée filed a sex discrimination charge with the EEOC against their joint employer.
- Plaintiff was terminated 3 weeks later.
- The Supreme Court ruled that Plaintiff's claim was actionable, stating, "[w]e think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired."

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Inconsistent Enforcement of Company Policies

- In *Hill v. Air Tran Airways*, 416 Fed. Appx. 494 (6th Cir. Ohio 2011), Plaintiff, who is African American, sued for discrimination based upon race and retaliation under Title VII.
- Plaintiff and his supervisor did not get along.
- Plaintiff had several complaints in his personnel file.
- Plaintiff took a break in violation of company policy
- Plaintiff claimed that the break was standard practice.
- Case was dismissed at the trial court level upon Employers motion.
- 6th Circuit Court of Appeals reversed, giving Plaintiff a chance to prove that similarly situated employees were treated differently.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Employment Law Can Be Bewildering I

- In *Bower v. Fed. Express Corp.*, 287 F. Supp. 2d 840 (W.D. Tenn. 2003), the EEOC sued on behalf of Plaintiffs under the ADA for Defendant's alleged failure to accommodate.
- Defendant only operates cargo planes.
- Defendant offers employees the privilege of free jumpseat flights.
- Plaintiffs were disabled and unable to qualify as jumpseat passengers under federal aviation regulations.
- Defendant would not allow Plaintiffs to sit in the jumpseat in violation of federal aviation regulation.
- The Court allowed this case to proceed towards trial by jury on the basis that it might be reasonable for Defendant to purchase seats on commercial carriers at its expense for Plaintiffs.

Evidence Plaintiff's Use to "Prove" Discrimination (Cont.)

Employment Law Can Be Bewildering II

- In *Freeze v. ARO, Inc.*, 503 F. Supp. 1045, 1046 (E.D. Tenn. 1980), Plaintiff sued Defendant for following the terms of a settlement regarding race discrimination with the Secretary of Labor.
- Defendant was accused of discriminating against racial minorities when hiring in years past.
- The settlement required that the Complainants' seniority be recalculated using the dates of his or her original hiring against the company and union rules.
- The additional seniority made Complainants more senior than some white employees who were not parties to the settlement.
- Plaintiffs sued claiming reverse discrimination.
- The suit was eventually dismissed.

EEOC Initial Requests For Information

- Remember, the initial request has not been tailored specifically to the detailed facts of your case. It is a general request based on the overall nature of the claim, e.g., discharge, promotion, retaliation, harassment, etc.

Responding to Requests For Information

- Consider the relationship of the request to the scope of the allegations in the Charge; consider objections.
- Consider the time frame for the request related to the time periods that are pertinent to the Charge.
- Consider confidentiality issues.
- Consider whether an explanation of your response to put it in context of your business is beneficial.
- Consider subpoena enforcement issues.

An example – Responding to a Request about Training or Communication:

- A description of the training
- Whether it was in person or computer based
- Date and place of the training
- Name of person conducting training
- Who attended the training
- The subject matter of the training

Preparing a Position Statement

- Investigation should be complete.
- These will be the defenses and the facts you will rely on throughout the case, even into litigation.
- Need both facts and law – including EEOC regulations and guidance.
- Statements should be concise, given the EEOC's case load, but they must be thorough.
- Attach supporting documentation, even if it is not specifically requested in the RFI's.
- This is the time to get your case together, if not before, so do not underestimate its importance.

Question Time

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Employment Law 101: Back to Basics

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EXPAND YOUR EXPECTATIONS℠

Agenda Overview

- ADEA
- ADAAA
- Parental Leave Act
- FMLA
- USERRA
- TITLE VII
- Workers' Compensation
- FLSA
- GINA
- Retaliatory Discharge
- Tennessee Human Rights Act
- Misc. Tennessee Employment Laws

Age Discrimination in Employment Act

- 20 or More Employees
- 42 U.S.C. 1201 et seq
- Age 40 and above
- Age may not play a factor in any employment decision
- No retaliation
- Provides for Liquidated Damages If WILLFUL

OWBPA Considerations

- A waiver must be:
  - Knowing and voluntary
  - Clearly written agreement
  - Reference specifically the ADEA
  - May not waive future claims
  - Must include consideration
  - Attorney Notice in Writing
  - Provides 21/45 days for consideration
  - Allows 7 days for revocation

Americans With Disabilities Act Amendment Act

- 15 or more employees

- Protects "**qualified individuals with a disability**" from discrimination in application & employment
  - Individual, with or without reasonable accommodation, who can perform the essential functions of the job in question
  - Employer must make reasonable accommodation for **known** disabilities if it would not impose an "undue hardship" on operation of employer's business

ADAAA (Cont.)

- To be considered “disabled” under the ADA, an individual must:
  - Have a physical/mental **impairment** that **substantially limits** at least one **major life activity**;
  - Have a record of such an impairment; OR
  - Be regarded as having such an impairment

ADAAA (Cont.)

- ADA Amendments Act recently broadened ADA protections
- “Substantially limits” now means “materially restricted”
- Those with disabilities controlled by medication or corrective devices are still considered “disabled”
  - Exception: Eyeglasses or contact lenses

Tennessee Parental Leave Act

- 100 or More Employees
- At least 12 Months of Consecutive Service
- May Be Entitled to Up To 4 Months of Leave
- Leave is Allowed For:
  - Pregnancy/Childbirth
  - Adoption
  - Nursing

Tennessee Parental Leave Act (Cont.)

- Leave May Run Concurrently With FMLA
- Job Protected Leave (Same or Similar Position)
- Multiple Parents Combined Leave

Family Medical Leave Act

- 50 or More Employees

- “Covered Employees”
  - Employed for 12 months (Not necessarily sequential)
  - Worked 1,250 Hours
  - 12 Months Preceding Leave
    - Rolling v. Calendar v. Fiscal Year

- 12 Weeks of Unpaid Qualified Leave
  - Job Protected
  - Employee May Not Work Elsewhere

FMLA (Cont.)

- Qualified Leave
  - Birth of a Child
  - Adoption/Foster Care
  - Serious Health Condition
    - Spouse, child, or parent
    - Employee’s own
- Certification Required

FMLA (Cont.)

- Intermittent Leave Is Permitted
- Certification is Required
- Employer May Designate
- Employer May Run Concurrently

FMLA (Cont.)

- Employer Must:
  - Notify Employee of FMLA Rights
  - Notify Employee That Leave Will Count Towards FMLA
  - Reinstate Employee To Same or Equivalent Position
  - Give EE 15 Days to Obtain Medical Certification
- Employer Must Not:
  - Be Counted For Disciplinary Purposes
  - Take Disciplinary Action Against EE Exercising FMLA Leave

FMLA (Cont.)

- Employer May Request Clarification of Medical Certification

- Employer May Request Re-Certification Every 30 Days

Uniformed Services Unemployment and Re-Employment Act

- Protects Employees Returning From Service
  - Active Duty
  - Training
  - Full-time National Guard Duty
  - Examination to Determine Fitness for Duty
  - Funeral Honors Duty
  - National Disaster Medical System
- Five-year cumulative limit related to re-employment

USERRA (Cont.)

Period of Service:	Reporting Back Requirements:
Up to 30 days	Must report back to work on first full calendar day following completion of service & transportation home, plus 8 hrs for rest
31-180 days	Must apply for reemployment not later than 14 days after completion of service
181 days or more	Must apply for reemployment not later than 90 days after completion of service

Title VII

- 15 or more employees

- Protects against employment discrimination based on:
  - Race
  - Color
  - National origin
  - Religion
  - Sex (including pregnancy)

Title VII

- Sexual harassment claims
  - Quid pro quo
  - Hostile work environment
- Hostile work environment claims
  - Usually based on sex, but not always
  - Workplace permeated with discriminatory intimidation, ridicule, & insult that is sufficiently **severe or pervasive** to alter the conditions of employment & create an abusive working environment

Title VII (Cont.)

- Remedies
  - Employment
  - Reinstatement or Front Pay
  - Back Pay
  - Lost Benefits
  - Interest
  - Costs
  - Attorneys' Fees
  - Compensatory Damages
  - Punitive Damages of Up to 300k

Worker's Compensation

- 5 or more employees (TN)
- Extremely easy for employee to recover for injuries "arising out of" and occurring "in the course of" employment
- No-fault rule
- Employee cannot sue employer for negligence

Workers' Comp. (Cont.)

- **Temporary Total Disability Benefits (TTD):** Paid while employee is off work until either he (1) is able to return to work under the temporary restrictions assigned, or (2) reaches Maximum Medical Improvement (**MMI**)
- **Temporary Partial Disability Benefits (TPD):** Make up difference in income during worker's recovery; payable until the employee (1) can return to a 40 hour week, or (2) reaches MMI
- **Permanent Partial Disability Benefits (PPD):** Paid pursuant to claim settlement through the DOL or a court, often a lump sum, once an employee reaches MMI

Workers' Comp (Cont.)

- Mandatory Mediation (BRC) For Contested Cases
- Limited Liability For Employers(Schedule/Caps)
- Future Medical Benefits
- Return to Work Incentives
- Reconsideration

Fair Labor Standards Act

- 1 or more employees AND engaged in interstate commerce with gross annual sales of over $500,000
- All hospitals and schools are covered
- Requires that employees be paid the federal minimum wage, plus time-and-a-half for hours worked over 40 in a work week
  - $7.25 per hour currently
- Certain executive, administrative, learned professional, outside sales, and computer-skilled workers are exempt

FLSA (Cont.)

- Also Encompasses Equal Pay Act & Lilly Ledbetter Fair Pay Act
- Both sexes working in the same establishment must be paid equal pay for equal work
- Allows unequal pay where the disparity is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any factor other than sex

FLSA (Cont.)

- Also Regulates Child Labor Laws
- Prohibits Retaliation
- Enforces Penalties

Genetic Non-Discrimination Act of 2008

- Applies to “Covered Entities” (15 or More Employees)
- Prohibits Genetic Information Discrimination
- Requires Confidentiality
- Prohibits:
  - Requesting
  - Requiring
  - Purchasing
  - Retaliation

Retaliatory Discharge

- Cannot “get back at” an employee for reporting unlawful activities or perceived discrimination, or for participating in an investigation regarding same

- Test under Title VII as to whether employer conduct was retaliatory: Would the conduct dissuade a reasonable worker from making or supporting a charge of discrimination?

- Whistleblower Actions

Tennessee Human Rights Act

- 8 or more employees

- Prohibits employment discrimination on the basis of:
  - Race
  - Creed
  - Color
  - Religion
  - Sex
  - Age
  - National origin
  - Pregnancy
  - Handicap

THRA (Cont.)

- Remedies Available
  - Employment
  - Reinstatement or Front Pay
  - Back Pay
  - Lost Benefits
  - Interest
  - Costs
  - Attorneys' Fees
  - Damages (Humiliation and Embarrassment)

EEOC / THRC

- Joint Sharing Agreement
- Charges of Discrimination
- Mediation
- Investigations

Misc. Tennessee Employment Laws

- Final Wage Payment T.C.A § 50-6-103
- Jury Duty T.C.A. § 22-4-106
- Voting Leave T.C.A. § 2-1-106
- Tennessee WARN Act
  - Applies to Employers With 50-99 Employees
  - Requires 60 Day Notice

Misc. Tennessee Employment Laws (Cont.)

- Non-Smoker Protection Act T.C.A. § 39-17-1801
- Meal Breaks T.C.A. § 50-6-103(h)
- TOSHA

Questions?

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Hiring and Firing:
Key Steps to Avoiding Litigation

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EXPAND YOUR EXPECTATIONS℠

Hiring & Firing Issues

- **Key to the success of your business**
- **Employment related litigation**
- **Exposure**

HIRING

Use an Application Form-Not Just Resumes

- **Resumes can be misleading**
- **Spin**
- **Insure uniformity and collection of necessary information**
- **Signed representations/**

Warranty that information is correct

APPLICATION LANGUAGE

- Seek only information that is job-related
- No promise of employment
- At-Will statement
- Signed consent
- Equal opportunity statement
- Drug-free workplace

CAREFUL REVIEW OF THE APPLICATION (Cont.)

- **Failure to adequately explain gaps**
- **Cross-outs or changes**

BACKGROUND INVESTIGATIONS

- **Background investigations can help to determine**
  - **an applicant's "fitness" for a particular job**
- **Potential problems – credit or criminal**

AREAS OF CONCERN

- **Balancing risk of violating the decision-making laws and the risk of incurring tort liability for negligent hiring**

FAIR CREDIT REPORTING ACT

- **Enacted in 1971 to protect consumer privacy rights and to hold consumer reporting agencies (CRAs) accountable for accuracy and fairness of credit reporting and other information**

- **Applies to both credit and consumer reports – BACKGROUND CHECKS**

FAIR CREDIT REPORTING ACT

Governs:

- **Extent of background information that can be gathered on an individual, and**

- **Procedures through which information can be gathered and disclosed**

DECISION MAKING - TITLE VII

- **Prohibits intentional discrimination in employment**

- **Also prohibits policies or practices that have the effect of discriminating against individuals because of their race, color, national origin, religion or sex= *"disparate impact"***

DISPARATE IMPACT

- **In regard to background investigations, principal concern is that employer's policy on criminal convictions will have a disparate impact on a protected group**

EEOC GUIDANCE

- **Hiring inquiries should be limited to what is essential for determining person's qualifications for job**

- **Information not relevant - race, sex, national origin, age, and religion or other protected characteristics**

EEOC GUIDANCE

- **Employer should avoid inquiries about membership in certain organizations, clubs, societies, and lodges because may reveal applicant's race, sex, national origin, disability, age, or religion, etc.**

- **Example - employer should not request photograph of applicant until after offer of employment is accepted**

SOCIAL MEDIA

- **45% of employers reportedly use social networking sites to examine profiles of job candidates**

- **Can easily lead to too much information, such as race, nationality, medical issues, sexual orientation, religion, and prior lawsuits**

- **Could expose employer to discrimination claim**

OTHER TROUBLESOME INQUIRIES

- **Genetic information – GINA restricts acquisition of "genetic information" by employers**

- **Workers compensation history – Cannot be obtained pre-offer or used to reject applicant**

THE COMPLICATED WORLD OF CONVICTIONS

- **No federal law prohibits employers from asking about arrests and convictions**
- **But, there can be issues with hiring policies involving applicant's criminal history**
- **CAREFUL- Disparate Impact toward protected groups**

CRIMINAL HISTORY SCREENING

- **Consistently apply set standards**
- **Policies must be supported by “business necessity.”**

NEGLIGENT HIRING

- **Employer either knew or reasonably should have known employee was dangerous, unfit, or unqualified**

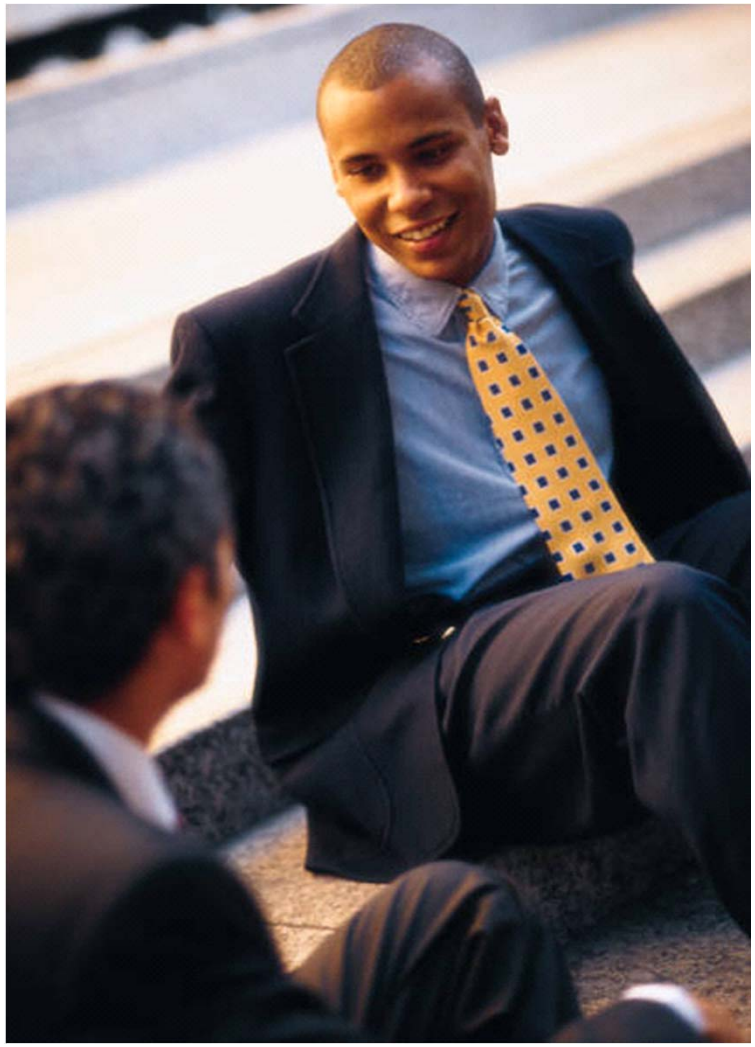
- **Courts look at whether prior crime resembled current crime such that employer should have been on notice**

AVOID NEGLIGENT HIRING:

- Check personal references
- Learn why someone left prior job
- Conduct an interview
- Check driving record (if applicable)
- Check educational references and verify prior employers
- Follow standard internal hiring/screening processes

CONDUCTING A LAWFUL INTERVIEW

- **Very important for employer and the potential employee.**
- **Interviewer's goal: is the applicant suitable for the job.**
- **Interviewers must be aware of what they can and can not legally ask.**
- **Assuming supervisors know what is appropriate is a potentially costly mistake.**



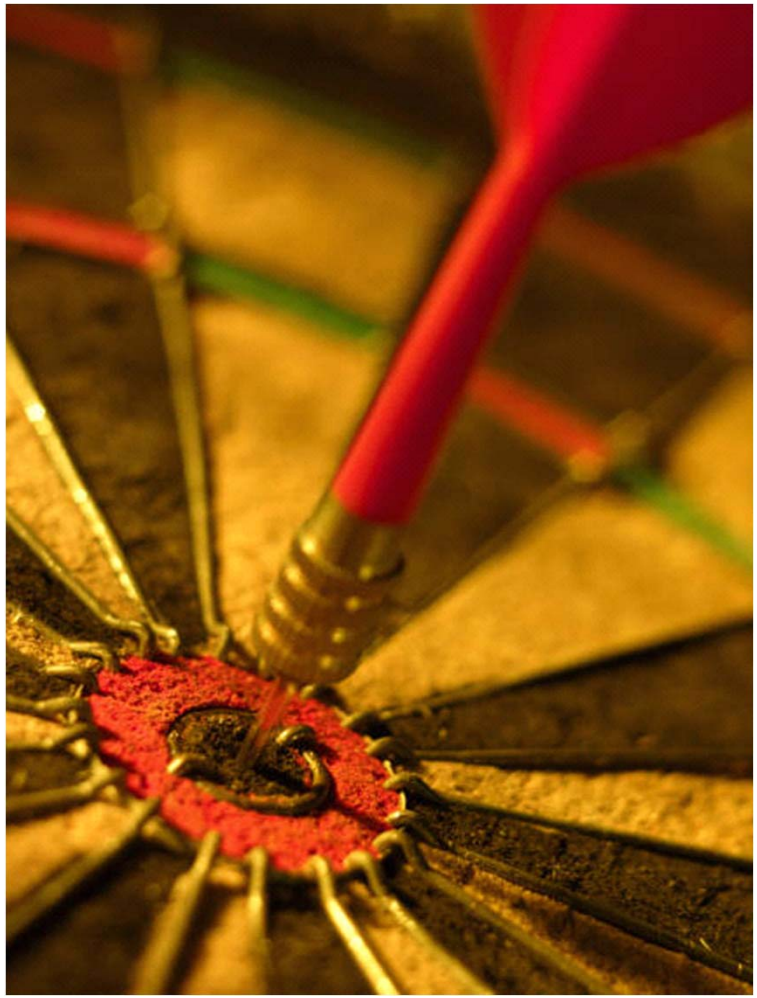
QUESTION AREAS SPECIFICALLY PROHIBITED INCLUDE:

- Marital Status
- Children
- Medical History
- Religious Affiliations
- Bank Accounts and Other Personal Financial Information
- Union or Club Memberships
- Transportation
- Arrests
- National Origin

Utilize similar questions that will supply necessary information, but without the risk

Example:

This job will require a number of weekend conferences you will need to attend. Does overnight or weekend travel present a problem for you?



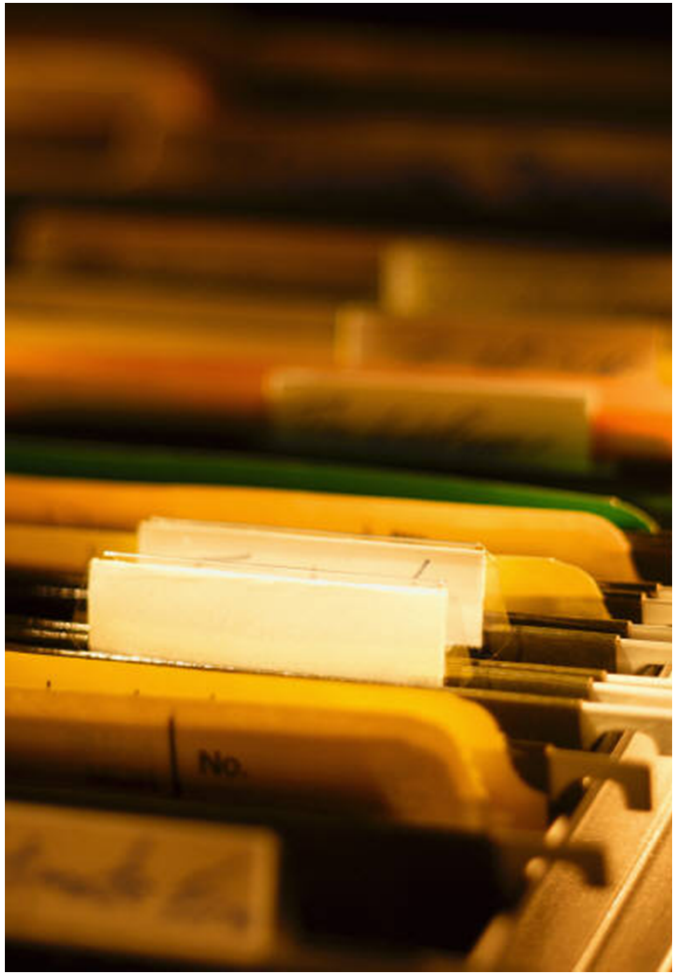
FIRING

- **Do not put off terminating an employee once a decision has been made to do so**

REASONS FOR TERMINATION

- Performing poorly on the job or refusing to follow instructions.
- Abusing sick leave.
- Possessing a weapon at work, or otherwise behaving violently.
- Violating company rules.
- Being dishonest.
- Endangering health and safety.
- Engaging in criminal activity.
- Using alcohol or drugs at work.
- Gambling at work.
- Disclosing company trade secrets to outsiders.

TERMINATING EMPLOYEES



- Discharge of employees should be handled very carefully.
- Ensure there are no oral or written promises concerning job security.
- Consistent treatment in the termination process is the key to avoiding discrimination claims.
- Do not allow some employees to engage in prohibited conduct and then discharge others for the same reasons.

THE TERMINATION PROCESS

- Give employee both oral and written notices of termination.
- Inform the employee in oral and written notices regarding the return of business property.
- Schedule an exit interview.
- In exit interview, may address possibility of separation agreement.
- Employer is given the opportunity to explain post-termination benefits such as COBRA.

THE TERMINATION PROCESS

- **Ask the employee about problems that may otherwise have gone unreported.**

- **Notify managers affected by the discharge that the employee has been terminated, but do not inform co-workers or associates who do not have a business need to know.**

- **Document the conference, including what the employee was told and how he or she responded.**

TERMINATING AN EMPLOYEE / INITIAL CONSIDERATIONS

- **In terminating an employee, an employer must first determine whether it owes any contractual obligations to the employee.**

- **Beware of your employee handbook!**

- **Employment guidelines and handbooks can become part of an employment contract if they contain language showing the employer's intent to be bound by the provisions.**

TERMINATING AN EMPLOYEE / INITIAL CONSIDERATIONS

- **If your employment handbook contains statements such as "entire agreement of employment" or "promises and agrees to abide by all its terms and conditions," you will likely be bound by the handbook's provisions.**

- **Handbook should conspicuously explain that it does not constitute a contract and should include the phrase "at will employment."**

TERMINATIONS / AVOIDING LIABILITY

- **Prevent liability by:**
- **Establishing fair work rules and policies contained in a handbook.**
  - **Enforcing those rules fairly.**
  - **Establishing a performance feedback system.**
  - **Investigating all “last straw” incidents thoroughly.**
  - **Being able to show lawful/non-discriminatory reason for termination, even in at-will employment states.**
  - **Executing written termination agreements.**

HOW TO TERMINATE

- **Tips for proper termination:**
  - **Plan what you say in advance.**
  - **Make sure you answer employee questions.**
  - **Have a checklist of company assets/property to be returned.**
  - **Evaluate the possibility of a lawsuit.**
  - **Have a written termination notice prepared.**
  - **Have an HR witness at the meeting.**
  - **Schedule an exit interview.**
  - **Consider the resignation possibility.**

THE TERMINATION CONFERENCE

- Avoid any references to employee's sex, race, religion, national origin, age, or disability.
- Two employer representatives should be present.
- Do not counsel the employee.
- Be direct.
- Let the employee speak.
- Take notes.
- Be confident and courteous.
- Fully explain benefits.
- Document the termination.

STATUTORY CONSIDERATIONS

- **Illegal Dismissals:**
  - **Based on sex, race, national origin, or religion.**
  - **Based on union membership or participation.**
  - **Based on refusal to commit an unlawful act.**
  - **Based on reporting statutory violations.**
  - **Based on performing a public obligation.**
  - **Based on non-payment of a debt (wage garnishment).**
  - **Based on pregnancy or termination of a pregnancy.**

FIRING ON THE SPOT

- **Do not fire employees out of anger.**
- **Impetuously fired employees are more likely to bring employment actions.**
- **Place employee on temporary leave until an investigation into the incident can be completed.**
- **Protect the company by:**
  - **Going through employee's file for documentation of previous violations; *or***
  - **Offering to reinstate the employee:**
    - **If he/she refuses, voluntarily quit.**
    - **If he/she accepts, watch closely and document all problem behaviors; *or***
  - **Gather and save all evidence that supports employer's version of the incident.**

LIABILITY: DEFAMATION AND EMOTIONAL DISTRESS CLAIMS

- **Defamation:**
  - **Act in a professional and respectful manner during termination.**
  - **Only discuss terminations with those in the "need to know channel."**
  - **In responding to reference checks, generally limit responses to dates worked and whether the employee was, in fact, terminated.**
  - **Do not give out more information than necessary.**
- **Emotional Distress:**
  - **Avoid "outrageous" conduct.**
  - **Maintain confidentiality.**

CHECKLIST

- **Use Application: obtain consent and review carefully**
- **Conduct Background Check: comply with law**
- **Obligations under the FCRA: notice and disclosure requirements, requirements as a furnisher of information**
- **Responsible retention and disposal of confidential information**

CHECKLIST

- **Limitations on information: Title VII, applicable state laws, EEOC guidelines**
- **Screening Policies: consistent, narrowly-tailored, supported by reliable information, "business necessity"**
- **Risk of negligent hiring: diligent investigation**
- **Practice Interview Do's and Don't's: ask job-related questions**

CHECKLIST 

- **Reasons for termination: Valid and documented**
- **Consistency: Application of rules for discipline and termination should be consistently applied**
- **Termination Process: Notice and exit interviews**
- **Beware of your employee handbook**
- **Avoid illegal dismissals**
- **Concerns: Defamation and emotional distress**

What Questions Do You Have?

How the New National Labor Relations Board Will Impact Your Business

Presented by:
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BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EXPAND YOUR EXPECTATIONS℠

I don’t have a union at my company, so why should I care about the National Labor Relations Board ?

NLRB Today

Terence Flynn
Republican
Recess Appointment

Mark Pearce
Chairman
Democrat

Richard Griffin
Democrat
Recess Appointment

Brian Hayes
Republican

Sharon Block
Democrat
Recess Appointment

NLRB Chairman Mark Pearce wants the NLRB to become “a household word” for all workers, not just those affiliated with organized labor.

Rights of Employees

Sec. 7. [§ 157.] Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Unfair Labor Practice Charges

Unfair labor practices generally concern:

- Interfering with employees rights under Section 7 of the Act
- Discriminating against employees because of union activity
- Failing to bargain in good faith with the union

Process for Unfair Labor Practice Charges

1. A charge is filed
2. Investigation by Regional Director's Office
3. Charge is withdrawn or dismissed
4. Complaint Issues
5. Hearing before an Administrative Law Judge (ALJ)
6. Decision by ALJ
7. Appeal to the Board in Washington
8. Review by a federal Court of Appeals

Process for Elections

1. Generally, a union makes a demand for recognition, and/or
2. Union files a Petition for Election with the Regional Director
3. Union must demonstrate a sufficient showing of interest (usually 30% of workforce)
4. Regional Director works with the parties to determine the appropriate “bargaining unit”
5. Regional Director schedules election
6. Employer provides list of eligible employees
7. Regional Director conducts secret-ballot election
8. Votes are tallied immediately after election (usually)
9. Regional Director or an ALJ decides any issues of alleged misconduct affecting the election or challenged votes
10. Review by Board in Washington

Use of Employer's E-mail for Union Organizing

Current Law:

- *Register Guard*, 351 NLRB No. 70 (2007)
  - Employer can legally prohibit use of e-mail for non-work related purposes.
  - Employer can allow personal use of e-mail while prohibiting solicitation on behalf of groups.

Potential Change:

- Former Chairman Liebman opined in *Register Guard* dissent that e-mail is a form of solicitation; just like verbal solicitation.
- She suggested that employers should only be able to ban e-mail solicitation if the employer can prove interference with productivity of employees.
- Chairman Pearce wants to require business to provide phone numbers and email addresses to union leaders before an election.

Right to Witnesses at Meetings that Could Lead to Discipline of Nonunion Employees

Current Law:

- *IBM Corp.*, 341 NLRB No. 148 (2004)
  - Nonunion employees ***do not*** have a right to a witness at investigatory interview that leads to discipline.

Potential Change:

- NLRB's stance has shifted on this topic over time.
  - *Epilepsy Foundation* case in 2000.
- NLRB is likely to over-rule *IBM* and return to *Epilepsy Foundation.*
- Just applies to investigatory meetings. Does not apply to pre-determined discipline. Does not apply to managers or supervisors.

Salting

Current Law:

- *Toering Electric Co.*, 351 NLRB No. 18 (2007)
  - Individuals who are not "genuinely seeking employment" are not protected by the NLRA.
  - General Counsel must prove that applicant was genuinely interested in employment.

Potential Change:

- Former Chairman Liebman's dissent in *Toering* suggests that employers must prove that applicant was not genuinely interested in employment.
- She also suggested that salts should be protected by the NLRA.

Definition of Supervisor

Current Law:

- *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006)
  - Employee is a supervisor if they assign employees to work in specific places and times.
  - Employee is a supervisor if they are held accountable for other employees' performance.

Potential Change:

- Obama Board will likely contract the definition of supervisor to limit what is meant by "assign" and "responsibly direct."
- RESPECT ACT would remove assign and responsibly direct from statutory definition of supervisor.

Retaliatory Legal Action by Employer

Current Law:

- BE&K Construction Co., 351 NLRB No. 29 (2007)
  - Employer can bring suit against individual employee or union, even if the suit complains of protected activity, and even if suit is ultimately dismissed, so long as employer is subjectively acting in good faith.

Potential Change:

- Previous Board law said that if case was not objectively reasonable, then it was a retaliatory unfair labor practice.
- Previous Board law said that dismissal of case was evidence that it was not brought in good faith.

Harassment Policy

Current Law:

- *Palms Hotel & Casino*, 344 NLRB 351 (2005)
  - Employer's policy prohibited "conduct which is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with other employees or patrons."
  - Policy was legal because NLRB will not presume that policy interferes with employee's rights under the NLRA.

Potential Change:

- Former Chairman Liebman in dissent would find the policy illegal because union activity may be offensive to other employees, and therefore, policy banned union activity.

Lowering Standards for Election Objections

Current Law:

- *Delta Brands*, 344 NLRB 252 (2005)
  - Employer's policy, by itself, is not enough to overturn an election, without some proof that the policy affected the election.

Potential Change:

- Former Chairman Liebman would overturn any election where the employer's policies were overbroad, even without proof that the policy affected the election.

Stringent Surveillance Standards

Current Law:

- *Alladin Gaming*, 345 NLRB 585 (2005)
  - Supervisors overheard employees discussing union in cafeteria and interjected into the discussion to provide employer's point of view.
  - NLRB said that this was not surveillance because it was not out of the ordinary and it was routine casual conversation.

Potential Change:

- Former Chairman Liebman said that this was an intrusion on private conversation so it was unlawful surveillance.

Use of Project Labor Agreements for Federal Construction Projects

- Sec. 7. The Director of OMB, in consultation with the Secretary of Labor and with other officials as appropriate, shall provide the President within 180 days of this order, recommendations about whether broader use of project labor agreements, with respect to both construction projects undertaken under Federal contracts and construction projects receiving Federal financial assistance, would help to promote the economical, efficient, and timely completion of such projects.

What is Protected Activity?

Current Law:

- *Holling Press, Inc.*, 343 NLRB 301 (2004)
  - Employee soliciting co-worker to give statement in support of sexual harassment EEOC charge.
  - NLRB held that this was not protected activity because it was motivated by personal, as opposed to collective, goals.
  - Personal gripes are not considered protected concerted activity.

Potential Change:

- Former Chairman Liebman said that protected activity can have personal motives, as long as one employee is seeking help from another employee.

Waters of Orchard Park – Scope of Protected Activity

- FACTS: Two nursing home employees called a state hotline to report excessive heat in the Employer's nursing home, expressing concern about the effect of the heat on patients.

- ISSUE: Whether the employees were engaged in protected, concerted activity under the Act?

Waters of Orchard Park **- cont'd**

- HELD, no. Although concerted, the employees' action did not relate to a term or condition of employment and therefore was not protected. The call was made not for mutual aid or protection of employees, but rather out of concern for elderly patients.

- IF REVERSED...disgruntled employees would be emboldened to report any potential workplace issues to State or Federal agencies, regardless of their motivation, safe in the knowledge that their activities are protected by the NLRA.

W San Diego – Union Paraphernalia

- FACTS: Pursuant to a hotel policy prohibiting all non-business uniform adornments, employees were prohibited from wearing union buttons in public areas.

- ISSUE: Whether Employer's policy violated the Act?

W San Diego - cont'd

- HELD, no. Although employees have a right to wear union insignia, Employers may lawfully restrict the right in certain circumstances. Here, Employer's interest in providing its guests with a "unique atmosphere and ambience" warranted such a restriction.

- IF REVERSED...the Board is unlikely to accept a business image rationale for Employer rules that prohibit employees from wearing union insignia in public areas.

Leiser Construction, Inc. – Union Paraphernalia

- FACTS: Construction worker employee displayed on his hardhat a variety of union-related stickers. One sticker depicted someone urinating on a rat that was designated as “non-union.”

- ISSUE: Whether Employer violated the Act by prohibiting its employee from wearing the vulgar, though union-related, sticker?

Leiser Construction, Inc. – cont'd

- HELD, no. Employers have the right to restrict the display of insignia that is vulgar and obscene.

- DISSENT: Both management and employees commonly used vulgar language in the workplace, and the employee had no contact with the public such that displaying the sticker would harm Employer's public image. Therefore, the employee should not be prohibited from wearing the sticker.

- IF REVERSED...if the dissent's position is adopted, it would restrict an employer's ability to prohibit employees from adorning themselves or their equipment with obscene paraphernalia so long as that paraphernalia has some relation to unions.

Tradesmen International – Work Rules

- FACTS: Several of Employer's work rules were challenged, including: 1) prohibition of disloyal, disruptive, competitive or damaging conduct; 2) prohibition of slanderous or detrimental statements; and, 3) requirement that employees represent Employer in a positive manner.

- ISSUE: Whether the challenged rules would reasonably tend to chill employees in the exercise of their rights under the Act?

Tradesmen International – cont'd

- HELD, no. The rules serve a legitimate business interest and reasonable employees would not construe them as intended to proscribe their rights under the Act.

- IF REVERSED...rules such as those at issue will likely be construed as intended to restrain employees' rights under the Act unless they specifically define prohibited conduct and adequately inform employees that the terms do not encompass Section 7 activity.

Ambush Elections to begin on April 30, 2012

- Rule finalized in December 2011
- Limits pre-election hearing held following the filing of an election petition
- Does away with the recommendation that 25 days elapse between the time a Regional Director directs an election and when the election is held
- This curtails the employer's ability to communicate its views before the election
- Defers litigation of most voter eligibility issues until after the election

Proposed Regulations

1. NLRB makes new “rules” by either deciding cases or proposing regulations and seeking public comment
2. NLRB issued proposed rules in June 2011
3. Highlights of proposals are:
   - Electronic filing of election petitions
   - Require timely receipt of information to help employees understand and participate in the process
   - Standardize timeframes for parties to resolve or litigate issues before and after elections
   - Resolve challenges quickly

Proposed Regulations Continued

- Voter list with telephone numbers and email addresses
- Streamline appeals
- Make Board review of post-election decision discretionary

Employee Rights

Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

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*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

This is an official Government Notice and must not be defaced by anyone.

The NLRB's General Counsel has found the following employer policies to be unlawful because they allegedly restrict activity protected by the NLRA:

- Prohibition of "disparaging remarks when discussing the company or supervisors."
- Prohibition of employees posting pictures that depict the company, the company's uniform, or the company's logo.
- Prohibition of "offensive conduct" and "rude or discourteous behavior."
- Prohibition of "inappropriate discussions" about the company, management, or co-workers.
- Prohibition of "use of the employer's logos and photographs of the employer's store, brand or product without written authorization.“

The NLRB's General Counsel has found the following employer policies to be unlawful because they allegedly restrict activity protected by the NLRA:

- Prohibition of "communication or post that constitutes embarrassment, harassment, or defamation" of the company or any of its employees.

- Prohibition of "statements that lack truthfulness or that might damage the reputation or goodwill" of the company.

- Prohibition of "talk about company business" on personal social media accounts.

- Prohibition of "posting anything that [the employees] would not want their supervisor to see or would put their job in jeopardy."

- Prohibition of "using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity."

In regard to social media, such as Facebook, the NLRB General Counsel reports:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.

- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

- Three cases involving social media questions are pending before the Board and 75 cases have been forwarded from regional offices as they are believed to be meritorious

Question Time

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

The Ever-Evolving Role of Social Media in the Workplace: Where are we and where are we going?

Presented by:

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EXPAND YOUR EXPECTATIONS℠


Trumba
eskobo
vimeo
HpCel
talk
skobsie
shadows
groovee
YouTube
Zimbra
newsgator
skype
walco
Blogniscient
TiNYFINGER
shutterfly
PodDater
Feedster
favoor
ups
gliffy
ZAZZLE
Tailrank
TagWorld
nuvvo
dogear
yokolike
grouper
ODDPOST
qoop


You
Tube


Lexxe alpha
PXN8
Netvibes
Technorati
Gmail
yelp
magnolia
ShoZu
feedmarker
askeet!
MusicSearch
Meet With Approval
Spin
messenger
Megite

Everyone's Doing it . . .

- Social media accounts for **one** out of every **six** minutes spent online.
- Instagram currently has a user base of **30 million;** One **billion** photos have been uploaded; 5 million + photos a day; it has been downloaded on every **10th** iOS device
- Businesses are paying **Twitter $120,000** to sponsor a promoted **trending topic** for a day.
- **Facebook** is approaching **800 million** users and **Google** handles over **11 billion queries** per **month**.
- Every **two** days there is **more information** created than between the **dawn** of **civilization** and **2003**.

. . . Especially Employees

- Network Box reported that **7 out of 100 URLs** accessed by businesses were directed to **Facebook** and **32%** of Internet **bandwidth** (during peak hours) went to **NetFlix.**

- **22%** of all mobile bandwidth goes to **YouTube** and it accounts for **52%** of all global mobile streaming.

- A research by Convergys Corp. has shown that **one negative** customer **review** on YouTube, Twitter, or Facebook can **cost** a company about **30 customers**.

What should really amaze us. . .

- How few companies have come to terms with the implications of the social media era now that we are several years into it.

- It’s time to get with the program and acknowledge and address what is happening in society at large and in our workplaces.

Social Media Basics

- Employers CAN use social media in the hiring process, unless use of social media is done only for protected classes or otherwise used for discriminating/improper purposes.

- Employers CAN limit the use of social media during work time or on the employer's equipment.

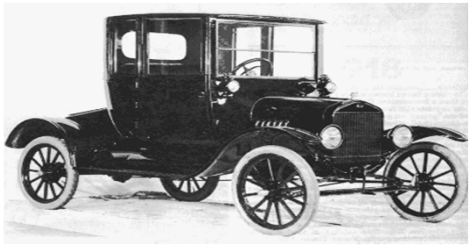
- Employers CAN maintain a policy prohibiting CERTAIN TYPES of conduct by employees on social media.

- Employers CAN terminate employees for what they say or do on social media sites in most situations.

Social Media Basics

- Employers CAN monitor employee use of its information technology systems, including communications on social media, if the employee is given notice.
- Personal social media accounts are discoverable in litigation.
- Employers may be liable for monitoring social media if the monitoring goes beyond the scope of the consent given.
- Some employees' use of social media is protected.

Some Oldies But Goodies (an alphabet soup of laws)



- ADEA
- ADA
- PDA
- Title VII
- FLSA
- FMLA
- Uniformed Services Employment & Reemployment Rights Act

Not So New Laws with Some New Tricks

- 1st & 4th Amend.
- Stored Communications Act
- Wiretap Act
- FTC Guidelines on Advertising
- Whistleblower Protections
- NLRA

National Labor Relations Act ("NLRA")

-Applies to ALL employers, unionized or not;

-Violation determined on a case by cases basis;

-The first factor to consider in making this determination is whether the posting can be considered "concerted activity"

-Secondly, if the posting is protected by the NLRA, if the message is patently offensive the employee *may* lose his or her protection under the statute.

Protected Concerted Activity

Under the NLRA, an employee's conduct is protected concerted activity if:

a. When he or she acts "with or on authority of other employees";

b. When the individual activity seeks to initiate, induce, or prepare for group action; or

c. When the employee brings "group complaints to the attention of management".

The “Helpful” Employee

Employee complains to several other employees and was critical of the services employer was providing. One employee posted on Facebook that she did not believe the Employer helped its clients enough and asked for input. Four employees commented. Another employee saw this post and complained that it was “cyber-bullying.” All four employees who commented on Facebook were fired.

Is the "concerted activity" protected?

4 Factors:

1. The place of the discussion, i.e. do they interrupt the work of any other employees;

2. The subject matter of the discussion, i.e. discussion of the supervisor's action;

3. The nature of the employee's outburst, i.e. whether the name calling was accompanied by any physical threat or similar activity; and

4. Whether the outburst was, in any way, provoked by an employer's unfair labor practice, i.e. supervisor's unlawful refusal to provide for the union representative for completion of the incident report.

The “Helpful” Employee (cont’d)

What if the employees’ comments included cursing, sarcasm, and criticism of the employer?

It does not remove the Act’s protections. Only extreme “opprobrious” comments would cause the comments to lose protection.

Employer's Policies

The NLRB has long held that general workplace rules tending to chill employees from exercising their rights to the NLRA are *per se* unlawful. To make this determination one of the following must occur:

a. Employees would reasonably construe the language to prohibit Section 7 activity

b. The employer promulgated the rule or policy in response to union activity; and

c. The rule or policy has been applied to restrict the exercise of Section 7 rights.

The Nosy Nun

Facts: A fiendishly clever Nun guesses an Employees' GMail password & accesses his account! Nun terminates Employee.

Result: Violation of the Secured Communications Act. *Fisher v. Mount Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914 (W.D. Wis. 2002).

The Pregnancy Proclamation

Facts: Supervisor "likes" Employee's Facebook Post: "I love my boss, my job, & I'm pregnant!" Next day Supervisor terminates Employee.

Result: Supervisor will soon be defending a Pregnancy Discrimination Act claim.

The Drunken Pirate

Facts: University warns about postings on social media, then denies teaching certificate because of MySpace photo.

Result: No problem. "Drunken Pirate you were 'warned.'" *Snyder v. Millersville Univ.*, 2008 WL 5093140 (E.D. Pa. 2008).

The Food Critic Employee

Facts: Sales employee terminated after posting: "Sales event food: wieners and stale chips! Sucked! Miniature apples & caramel were good."

Result: Could be protected NLRA "concerted activity" because "food" relates to Employee's earnings. *Knauz BMW*, NLRB Case No. 13-CA-46452.

The "Wonderful" Employee

Facts: B.D. Employee anonymously posts on a product review site: "B.D.'s Power Points are the most reliable. I only buy B.D.!!"

Result: Failure to disclose "material connection" could violate new FTC Guidelines on Advertising, Employer could be liable.

The Ingenious Interviewer

Facts: Male Manager creates female Facebook account to view male applicant's profile.

Result: *Could* lead to a criminal violation, Section 1030 of the CFAA. Male Manager is "exceeding" Facebook's terms of use: the little "I agree" box.

The Mischievous Manager

Facts: Manager "strong-arms" Employee for username & password to Employee-run "gripe site" with "let the sh*t talking begin" motto. It began & Employees terminated.

Result: Federal jury verdict for Employees, violation of the Stored Comms. Act. *Pietrylo v. Hillston Rest. Group.*, Case No. 06-5754 (D.N.J. 2009).

The Timely Tweeter

Facts: Following interview, Employee Tweets: "Cisco just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to San Jose and hating the work!"

Result: Cisco Manager Tweeted Back: "Who is the hiring manager? I'm sure they would love to know that you will hate the work. We here at Cisco are versed in the web."

The Path to a Policy

Step 1: The Basics of Creation

Step 2: Implementation and Education

Step 3: Monitor and Stay Vigilant

Step 4: Stay Current: Update, Update, Update

Step One: Basics of Creation

- Prohibitions on all uses of social media that are disrespectful, inflammatory, offensive, dishonest, or damaging to the company's reputation and business interests

- Content and posts should not include slurs, personal insults, obscenity, or anything likely to tarnish the image of the company and its brands.

- Prohibitions on disclosure of company trade secrets, customer identities, company financial details and business performance, private information about company personnel, and information regarding planned acquisitions and future product launches.

Step One: Basics of Creation

- Requirement that employees who express their opinions after identifying themselves as company employees include disclaimers

- Example: "The views expressed here are mine alone and do not necessarily reflect the views of the company."

- Time, place, manner restrictions.

- Prohibition on uses of trademarks and logos without advance approval.

- Caution: Any restrictions should be **narrow**!

Step Two: Implementation & Education

- All the standard procedures still apply, e.g., written, well disseminated policies and signed acknowledgments.
- Update other policies, such as any harassment or discrimination policies, to fit with new social media policies.
- Encourage employees to use common sense in how they use and even think about social media.
- Train Employees in the social media platforms the policies are designed for.

Step Two: Implementation & Education

Specifically tell Employees:

- "Don't say anything you wouldn't say (or shout) on a street corner." [Remember the billboard quote.]
- "You, Employee, are not anonymous in cyberspace. Period."
- "Don't mislead people about your identity. Ever."
- "Be careful about whether and how you speak about **your** company."
- "Workspace and cyberspace are separate spaces. Think about the impact that "friending," "poking," "mentioning," or "liking" a co-worker can have."

Step Three: Monitoring & Vigilance

- All the standard procedures still apply, e.g., articulate infractions, discipline consistently, and document appropriately.

- Monitor communications about your company that appear on *public* sites.
    - Google Alerts. It's free.

- Determine the extent that internal monitoring systems, such as spam filters, web traffic monitors, and firewalls, are needed.

- Discuss and learn from employees.

Step Four: Update, Update, Update

- Review and critique your policies.
- Are they effective?
- Are they still current?
- Are they still lawful?
- What has their effect been on productivity, morale, etc.?

Best Practices

- Social media is here. And staying. Get over it.
- Identify a company philosophy before taking any steps.
- Avoid one-size-fits-all policies. The policy should be unique as the company.
- Get someone knowledgeable involved. Is it you?
- **Social media is easy. If you have to "try" or "scheme" to reach a goal, you probably shouldn't be doing it.**

Employer use of social networking sites- best practices

- Screen applicants uniformly
- Have a neutral party screen information
- NEVER create a false persona to gain access
- Do not “friend” applicants to gain access to non-public profiles

Employer use of social networking sites- best practices

- Remember public on the web is public (i.e. no privacy settings in place)

- Employers can look but remember you must be able to point to a legitimate, non-discriminatory reason for hiring, termination and other employment decisions with documentation to support each decision

Employer use of social networking sites- best practices

- Internal Issues and Considerations
  - Blocked Access
  - Policing Issues (more work for IT personnel and HR)
  - Storage of Data
  - Departing Employees

Employer use of social networking sites- best practices

- External Issues and Considerations
  - Brand Management/ Representation of Company Image
  - Departing Employees
  - Privacy Concerns
  - Legal Considerations

THANK YOU!

Employee Benefits Primer, Or When To Call The Lawyers

April 12, 2012

Presented by:
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BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EXPAND YOUR EXPECTATIONS℠

How to Recognize ERISA/Employee Benefits Lawyers

What ERISA Lawyers *Don't* Do

We Don’t Do Murders…

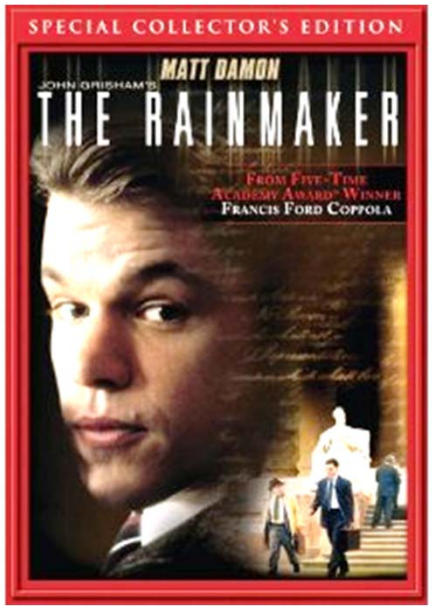
So You’re Not Looking for a Lawyer Like This:

We Don’t Do Divorce…

So You’re Not Looking for a Lawyer Like This:

We Don’t Go After the Big Bad Corporations…

So You’re Not Looking for a Lawyer Like This:



What We *Do* Do is...

ERISA, A Federal Statute That…

- Covers most types of employer-sponsored pension and benefit plans
- Consists of over 80 sections of the United States Code spread out over two Titles
- Has hundreds of pages of regulations in the Code of Federal Regulations
- And is designed to create headaches for everyone, but mostly employers

How do you recognize an ERISA Lawyer? Your're looking for:

- "Back-office" types that like to deal with complexity
- Someone who sounds like they're speaking a foreign language
- Someone who's able to interface with (and understand) actuaries and accountants
- Someone who looks like they don't get out of the office much: Today being an exception

So, It's Probably an ERISA Lawyer if...

- They're wearing one of these...

- Or one of these...

- Or they're using one of these...

The Complete ERISA Lawyer:

Topics

1) When and why are benefits subject to ERISA?

2) What reporting requirements and deadlines are imposed on your benefit plans by ERISA?

3) How have cost of living adjustments affected dollar limitations for pension plans and other retirement-related items for 2012?

4) What do you do when faced with a lawsuit over employee benefits?

Are Benefits Subject to ERISA?

Are Benefits Subject to ERISA?

- Formal arrangements, such as retirement plans and group medical insurance programs, are subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA).

- ERISA *can* also apply to small employers or even to benefits where there is no formal written document or other typical documentation.

- So, how do you know if a benefit is covered by ERISA?

Are Benefits Subject to ERISA?

A benefit program is subject to ERISA if the following four requirements are met:

(1) There is a plan, fund, or program;

(2) That is established or maintained by an employer;

(3) For the purpose of providing the type of benefits enumerated in ERISA;

(4) To participants or their beneficiaries.

Are Benefits Subject to ERISA?

1) Do you have a “plan, fund, or program”?

Yes, if a reasonable person could determine: (1) the intended benefits; (2) a class of beneficiaries; (3) the source of financing; and (4) the procedures for receiving benefits.

Generally, ongoing program covering similarly situated employees, but, based on all the facts and circumstances surrounding provision of the benefit, need not be in writing but may be determined from how the benefit is administered.

Are Benefits Subject to ERISA?

2) Is it established or maintained by an employer?

Yes, if employer contributes funds to provide a benefit.

Example: Employer provides employees with a set dollar amount to purchase private insurance However, certain voluntary, fully-insured, employee-pay-all programs may not be subject to ERISA under a safe harbor established by the Department of Labor.

Yes, if plan is sponsored by employer, or if employer is involved in plan administration.

Are Benefits Subject to ERISA?

3) Does it provide a benefit specifically covered by ERISA?

Benefits subject to ERISA *generally* include:

A) Medical, surgical, or hospital care or benefits—including, but not limited to, major medical, dental, vision, and prescription drug benefits; healthcare flexible spending accounts (Health FSAs); health reimbursement arrangements (HRAs), including premium reimbursement plans; and certain employee assistance programs (EAPs), wellness programs, disease-management programs, and cancer policies;

B) Benefits in the event of sickness, accident, disability, death, or unemployment—including insured disability income plans, insured sick-pay plans, accidental death and dismemberment (AD&D) plans, and life insurance plans;

Are Benefits Subject to ERISA?

3) Does it provide a benefit specifically covered by ERISA?

C) Funded vacation benefits;

D) Funded apprenticeship or training benefits;

E) Day-care centers;

F) Funded scholarship benefits;

G) Certain prepaid legal service arrangements;

H) Severance and holiday benefits; and

I) Certain housing assistance benefits.

Are Benefits Subject to ERISA?

4) Are benefits provided to participants or beneficiaries?

A participant is any employee or former employee of an employer who is or may become eligible to receive a benefit from the plan (including retirees).

A beneficiary is a person designated by the participant, or the terms of a benefit plan, who is or may become entitled to benefits under the plan (such as a spouse or child of an employee). Since self-employed individuals and partners are not considered employees, a plan covering only those individuals would not be covered by ERISA. However, if the plan covers both employees and self-employed individuals, the plan could be subject to ERISA.

Are Benefits Subject to ERISA?

5) Does a regulatory exclusion apply?

There are a number of exclusions from part or all of ERISA's rules for plans that would otherwise be subject to ERISA.

These exclusions include, but are not limited to, governmental plans; church plans; plans maintained solely to comply with worker's compensation, unemployment compensation, or disability insurance laws; plans maintained outside the U.S. for non-resident aliens; and certain payroll practices (salary continuation plans). If an exclusion does not apply, then your benefit is likely an ERISA-covered welfare plan.

Are Benefits Subject to ERISA?

6) What does it mean if my benefits are subject to ERISA? You are responsible for, among other things:

A) Maintaining a written plan document (with an ERISA-compliant claims procedure);

B) Filing annual returns (Form 5500s), when required;

C) Responding to participant requests for documents in a timely manner (statutory penalties); and

D) Maintaining and distributing summary plan descriptions.

Are Benefits Subject to ERISA?

7) Are there any benefits to being covered by ERISA? Yes!

ERISA preempts state law, which is advantageous for you because state laws generally provide more expansive remedies than the remedies available under ERISA.

ERISA also allows you to further limit your potential liability by setting time limits in the plan on when participants may file a lawsuit for benefits.

Benefit denials under an ERISA plan are generally entitled to deferential treatment in federal court.

Reporting and Disclosure

Reporting and Disclosure

- ERISA Welfare and Pension Plans are subject to a number of reporting and disclosure requirements that can have stringent deadlines and significant consequences for lack of compliance.
- There are a number of governmental websites with additional information to assist you with compliance, including the following:

- http://www.dol.gov/ebsa/compliance_assistance.html#section5

- http://www.irs.gov/retirement/sponsor/index.html

Reporting and Disclosure

1) Basic disclosure requirements for pension and welfare benefit plans:

A) Plan Documents – Plan Administrator must furnish copies of certain documents upon written request and must have copies available for examination, including the latest updated Summary Plan Description ("SPD"), latest Form 5500, trust agreement, and other plan operating documents.

i) Must be provided to participants and beneficiaries;

ii) Copies must be furnished within 30 days of written request and must always be available at your principal office.

Reporting and Disclosure

B) Summary Plan Description ("SPD") – Must be written for average participant and be sufficiently comprehensive to apprise covered persons of their benefits, rights, and obligations under the plan.

i) Must be provided to participants and pension plan beneficiaries receiving benefits;

ii) Must be given automatically to participants within 90 days of becoming covered under the plan and to pension plan beneficiaries within 90 days of receiving benefits (or within 120 days of plan becoming subject to ERISA);

iii) Must be updated every five years if plan is amended, or every ten years if not.

Reporting and Disclosure

C) Summary of Material Modifications ("SMM") – Describes material modifications to a plan and changes in the information required to be in the SPD. Distribution of an updated SPD satisfies this requirement.

i) Must be provided to participants and pension plan beneficiaries receiving benefits;

ii) Must be given automatically to participants and to pension plan beneficiaries no later than 210 days after the end of the plan year in which the change is adopted;

iii) Designed to avoid having to completely update the SPD every time the plan is amended.

Reporting and Disclosure

D) Notice of Benefit Determination – Information regarding benefit claim determinations. Adverse benefit determinations must include required disclosures (e.g., the specific reasons for denial of a claim, reference to specific plan provisions on which the benefit determination is based, and a description of the plan's appeal procedures).

i) Must be provided to claimants, who can include participants, beneficiaries, or authorized claims representatives such as attorneys;

ii) The timing requirements of such notices vary depending on the type of plan and benefit claim involved.

iii) See 29 C.F.R. § 2560.503-1 for more details.

Reporting and Disclosure

2) Form 5500

It is an Annual Return/Report of Employee Benefit Plan that is intended to assure that employee benefit plans are properly managed and to provide participants, beneficiaries, and regulators with sufficient information to protect their rights.

Starting in 2009, all Forms 5500 must be filed electronically on the website of the Department of Labor.

For additional information, go to
http://www.dol.gov/ebsa/5500main.html

Reporting and Disclosure

2) Form 5500

Must be filed by all pension benefit plans (defined benefit or defined contribution) covered by ERISA, but the filing requirements vary depending on whether the plan is a large or small plan, with the distinction typically being whether the plan has 100 or more participants at the beginning of the plan year.

Employer must file the Form 5500 and all required Schedules by the last day of the seventh calendar month after the end of the plan year (i.e., if you have a calendar year plan year, then the 2011 5500 is due by July 31, 2012), but an automatic 2.5 month extension can be obtained by filing a Form 5558 with the IRS.

Reporting and Disclosure

3) Form 5300 Series (5300, 5307, 5310, etc.) – Used to request a determination letter from the IRS stating that a pension plan, *as written*, is a qualified plan, including all amendments since the plan's last determination letter.

A) Form 5300 is for individually designed plans and must be filed every five years based on the last digit of the plan sponsor's Employer Identification Number ("EIN"). For example, Cycle B (EINs ending in 2 or 7) is currently open and will close on January 31, 2013. Benefits include:

i) Considerably shorter time to receive determination letter;

ii) Significant protection if plan is audited.

Reporting and Disclosure

B) Form 5307 is for pre-approved prototype and volume-submitter plans and must be filed every six years (during the two-year window established by the IRS) based on the type of plan involved. For example, the two-year period for defined contribution plans ended on April 30, 2010, and the two-year period for defined benefit plans will end on April 30, 2012.

C) Form 5310 is for a plan administrator that desires a determination letter for a terminated plan.

D) Do NOT submit such a request if you know the plan is deficient. Make use of the IRS' voluntary correction program (EPCRS) before filing.

2012 Dollar Limitations

2012 Dollar Limitations

Each year, many pension plan limitations will change because the increase in the cost-of-living index meets the statutory thresholds that trigger their adjustment.

2012 Dollar Limitations

The elective deferral (contribution) limit for employees who participate in 401(k), 403(b), most 457 plans, and the federal government's Thrift Savings Plan is increased from $16,500 to $17,000.

The catch-up contribution limit for those aged 50 and over remains unchanged at $5,500.

The limitation for defined contribution plans is increased from $49,000 to $50,000.

The annual compensation limit is increased from $245,000 to $250,000.

The limitation on the annual benefit under a defined benefit plan is increased from $195,000 to $200,000.

2012 Dollar Limitations

The limitation used in the definition of highly compensated employee is increased from $110,000 to $115,000.

For married couples filing jointly, in which the spouse who makes the IRA contribution is covered by a workplace retirement plan, the income phase-out range is $92,000 to $112,000, up from $90,000 to $110,000.

For an IRA contributor who is not covered by a workplace retirement plan and is married to someone who is covered, the deduction is phased out if the couple's income is between $173,000 and $183,000, up from $169,000 and $179,000.

2012 Dollar Limitations

The AGI phase-out range for taxpayers making contributions to a Roth IRA is $173,000 to $183,000 for married couples filing jointly, up from $169,000 to $179,000 in 2011. For singles and heads of household, the income phase-out range is $110,000 to $125,000, up from $107,000 to $122,000. For a married individual filing a separate return who is covered by a retirement plan at work, the phase-out range remains $0 to $10,000.

The deduction for taxpayers making contributions to a traditional IRA is phased out for singles and heads of household who are covered by a workplace retirement plan and have AGI between $58,000 and $68,000, up from $56,000 and $66,000 in 2011.

You’ve Been Sued. Now, What?

You've Been Sued. Now, What?

1) Do NOT panic.

Plaintiffs can (and often will) ask for anything and everything. This does not mean that they will (or even can) get what they ask.

You've Been Sued. Now, What?

2) Notify your legal department and/or outside counsel.

You should never attempt to respond to a lawsuit on your own, even if your intentions are good, without the advice and guidance of counsel.

You've Been Sued. Now, What?

3) Watch the right clock.

There are a number of deadlines that are triggered by the filing of a lawsuit AND the service of that lawsuit on your company.

a) Statute of Limitations;

b) Accrual of Claim;

c) Response/Removal deadline.

3(a) Watch the right clock – Statute of Limitations.

i) Governs how long a plaintiff may wait to bring a lawsuit after his or her claim has accrued;

ii) Courts typically look to state breach of contract limitation (Tenn. – six years), but you can shorten in your plan document (6th Cir. – three years found reasonable).

3(b) Watch the right clock – Accrual of Claim.

i) Governs when the statute of limitations clock begins running and when a plaintiff can first bring a lawsuit;

ii) Typically accrues once claim has been denied, but Sixth Circuit has held that plan can provide for an earlier accrual date (i.e., when proof of loss is due).

3(c) Watch the right clock – Response/Removal deadlines.

i) Your response deadline does not commence until you have been formally served with the complaint;

ii) The date of service may not be obvious, so always consult with your legal counsel.

You've Been Sued. Now, What?

3(c) Watch the right clock – Response/Removal deadlines.

iii) If you are sued in Tennessee state court, you have 30 days to respond, but this time varies from state to state;

iv) If you are sued in Federal court, you have 21 days to respond;

v) Always consider removal.

You've Been Sued. Now, What?

4) Document everything.

This should already be, and hopefully is, your standard practice, but every document and communication can be crucial in the course of a lawsuit.

Never assume that something is unimportant.

Thank You!

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