

Is Your Organization A Target?

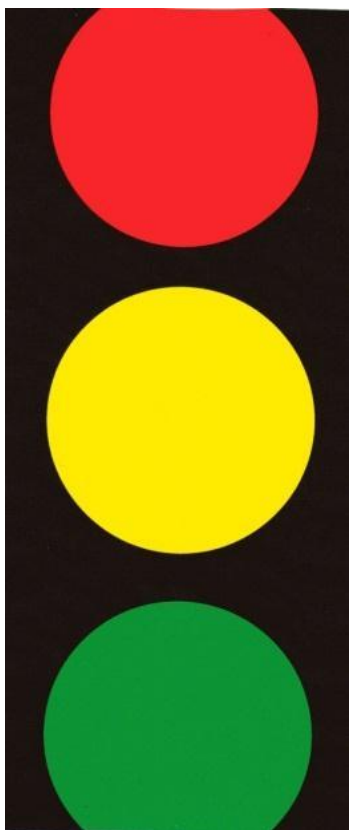
HR & EMPLOYMENT LAW

COMPLIANCE GUIDE

for Arizona Employers

revised: JANUARY 2015

INTRODUCTION



DRIVER'S GUIDE
INCLUDING THE
RULES OF THE ROAD
PUBLISHED BY THE
**MOTOR
VEHICLE
DEPARTMENT**
YOUR STATE

In order to get a driver's license, your state requires you to know the "*rules of the road*" and the expectations it has of drivers. Your state even publishes a "**Driver's Guide**" so that you can know what those "*rules*" and expectations are and how to comply with them.

What federal or state agency provides you with a similar "**Guide**" regarding the "*rules of the road*" for the multiple federal and state employment laws with which your organization must comply? How does your organization avoid being a target for claims of discrimination or harassment?

Without such a "**Guide**", how is your business expected to know how to comply with:

- ◆ the Fair Labor Standards Act (FLSA)?
- ◆ the Family and Medical Leave Act (FMLA)?
- ◆ OSHA?
- ◆ Title VII of the Civil Rights Act?
- ◆ the Arizona Civil Rights Act?
- ◆ the ADA & the ADAAA?
- ◆ the Arizona Medical Marijuana Act (AMMA)?
- ◆ the Arizona Crime Victim Leave Act?
- ◆ Child Labor Laws?
- ◆ the Genetic Information Non-Discrimination Act (GINA)?
- ◆ The Age Discrimination in Employment Act (ADEA)?
- ◆ other such state and federal laws?

This document was created and is provided to help you know (by threshold numbers of employees) the employment laws with which your organization is expected to be in compliance, notice/poster requirements, and other "*rules of the road*" regarding those laws AND to help you not be a target for claims of discrimination or harassment.



The first version of this **GUIDE** was created in 1990. Back then, I purchased a number of “how-to-start-a-business-in-Arizona” books to learn what, if any, information was provided in them regarding employment laws and the compliance requirements of the laws. Most of those books had some information about the employment laws; but, the information only gave a brief description of each. Little, if any, compliance guidance was provided.

The information did not identify which businesses (by threshold numbers of employees) had to comply with which laws. There was no information about required notices/posters, recordkeeping/ documentation requirements, or other such information to help a business be able to meet the compliance requirements of the laws.

Since the initial 1990 version, this **GUIDE** has been updated periodically as new federal and/or state employment laws have become effective, as court cases have been decided that give new understandings on how to comply with the employment laws, or as compliance regulations and expectations have been added or revised.

There is an old saying: ***IGNORANCE IS BLISS***. While that statement may be true, I have always told employers that ignorance is NOT a good defense to a non-compliance violation of any of the employment laws. All of the laws presume the employer knows what its compliance requirements are and is in compliance with those requirements. “*Oh, we didn’t know that we were supposed to be doing this.*” or “*Oh, we didn’t know we were not supposed to be doing this.*” are NOT appropriate responses to non-compliance charges/claims/allegations OR to charges/ claims/allegations of discrimination, harassment, or wrongful employment practices.

This **GUIDE** is a resource for you to know (by threshold numbers of employees) the employment laws with which your organization is expected to be in compliance, notice/poster requirements, and other such information, so that your organization can avoid being “*blissfully ignorant.*”

At any time you have questions about the information in the **GUIDE**, about employment laws, and/ or about specific HR situations, feel free to contact me. There is never any cost, commitment, or obligation for answers to your questions.

If you want to be on the email distribution list for **HR Alerts** (periodic emails regarding HR and/or employment law issues), please send an email to hrhelp@cox.net; in the Subject line, please enter: ***subscribe.***

John Perkins, SPHR
602.464.3553
hrhelp@cox.net
www.hr-help.info

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IMPORTANT NOTICE – PLEASE READ

The information and data provided and discussed in this document are designed to be accurate and informative regarding human resource (HR) policies and practices appropriate for meeting the compliance requirements of federal and state (AZ) laws and regulations. The compliance requirements of many, but not all, federal and state (AZ) laws are identified.

NOTE: This document is not intended to and does not provide a complete or full description, discussion, or analysis of any law, topic, or issue included herein.

Information and data in this document has been compiled from federal and state (AZ) employment laws and regulations, court decisions, and established HR management policies and practices, but should not be construed or relied upon as legal advice on specific facts.

Information and data in this document has neither the effect of law or regulation, nor constitutes the rendering of legal counsel by Human Resource Partners, LLC (dba HRHelp) or John Perkins.

Business owners or managers and other interested parties should seek the advice of a competent employment law attorney concerning specific legal questions or specific situations to ensure that all legal obligations are addressed or fulfilled.

It is strongly recommended that every business bring its HR policies and practices into compliance with all the applicable federal, state, and local laws with which that business or organization is required to comply.

PART 1: The Doctrine of Employment At-Will

The doctrine of employment at-will, which was established in the courts, means:

When the employment relationship is of no specific duration (no employment contract exists), the employment relationship can be terminated at the whim or will of either party (employee or employer) with or without notice, with or without cause/reason, and without liability to the other party.

Corollary: if an employee can resign or quit with or without notice, with or without cause/reason, and without liability, then the employer can discharge the employee with or without notice, with or without cause/reason, and without liability.

While it may seem that employment at-will will allow you to fire an employee at any time, with or without notice, and with or without cause/reason, the reality is that many laws exist that restrict or limit employment at-will. Also, many court decisions have the effect of restricting or limiting employment at-will.

The wise employer is the one who makes him/herself aware of these laws with which his/her organization must comply and the compliance requirements of each. Then, the wise employer should ensure that the human resource (HR) policies and practices of his/her organization are consistent with the compliance requirements of these laws to minimize the possibility of legal or administrative action against the organization.

NOTE: “Right to work” is not employment at-will. Many employers believe that when a state is a “right to work” state, as is Arizona, it means the employment relationship can be ended with or without notice, with or without cause/reason, and without liability (i.e., employment at-will).

Instead, “right to work” is a legal principle from the Labor-Management Relations Act (Taft-Hartley Act). “Right to work” refers to an employee’s right to work without having to be a member of a labor union in order to be hired or without having to join a labor union (or pay union dues) post-employment.

STATUTORY EXCEPTIONS TO EMPLOYMENT "AT-WILL"

A. Federal Laws

- discrimination on the basis of race, sex, national origin, religion, or age
- union activities
- pregnancy (with regard to disability benefits)
- handicapped status, disability status
- veteran status
- garnishment of wages
- assertion of statutory rights (FLSA, OSHA, ERISA, ADEA, etc.)

B. Arizona laws/statutes

- A.R.S. 23-425 -- safety and health
- A.R.S. 41-1463 -- civil rights, which includes handicapped status
- A.R.S. 21-236 -- jury duty
- A.R.S. 16-402 -- time off to vote
- A.R.S. 26-167 & 168 -- national guard duty

JUDICIAL EXCEPTIONS TO EMPLOYMENT "AT-WILL"

A. Public Policy exceptions

- discharge for exercise of rights
- discharge for performance of civic duty
- discharge for whistle-blowing
- discharge for refusal to commit unlawful or unethical act
- violation of anti-discrimination statutes

B. Implied good faith and fair dealing

C. Implied Contract; promise of job security (written or oral)

- Employee Handbooks/Manuals, Human Resource (HR) Policies and Procedures Manuals, or other written representations
- oral representations

"PRACTICAL" EXCEPTIONS TO EMPLOYMENT "AT-WILL"

- A. Your former employee files a claim for unemployment benefits. In order for the employee to be denied benefits, the employer must prove that the person committed an act(s) that disqualify the former employee from receiving benefits.

Will *"employment is at will; we didn't have a reason to fire the former employee"* be a response that will result in the former employee being disqualified from receiving benefits?

- B. Your former employee files a claim of discrimination or files a wrongful discharge lawsuit.

Will *"employment is at will; we didn't have a reason to fire the former employee"* be a response that will result in the EEOC finding that discrimination did not occur or a jury finding that the employee was not wrongfully discharged? Will the EEOC or a jury really believe that the employer had absolutely no reason for the discharge? Or will they believe the former employee's claim that the discharge was based on a discriminatory motive or was wrongful?

- C. The attorney for the former employee asks you the following questions during a deposition or when you are in the witness chair as part of a trial:

"In the past 10 years, how many employees did your company discharge/fire?"

"How many of those employees were discharged/fired without any cause/reason?"

"How many of those employees were discharged or fired without any counseling, verbal warnings, written warnings, suspensions, last chance agreements, or other disciplinary actions?"

"How many times, in the past 10 years, has a manager/supervisor gone out into the workplace and, for no reason/cause and without any notice, discharged/fired a worker just because he/she (the manager/ supervisor) could?"

While it may seem that employment at-will will allow you to fire an employee at any time, with or without notice, and with or without cause/reason, the reality is that many laws exist that restrict or limit employment at-will. Also, many court decisions have the effect of restricting or limiting employment at-will.

Given the multiple statutory and judicial exceptions to employment at-will, the wise employer will:

- ✓ have a specific reason(s)/cause(s) to explain any discharge/firing; and,
- ✓ have sufficient documentation to explain and justify the reason(s)/cause(s) for the discharge/firing; and,
- ✓ be sure that the information on warning/disciplinary action documentation is consistent with information on the person's performance evaluation/review documents.

NOTE: The Arizona Employment Protection Act provides that employment in Arizona is "at-will" (terminable by either the employee or the employer without cause/reason, without notice, and without liability) except when there is:

- ♦ a written contract of employment signed by both parties;
- ♦ an agreement signed by both parties restricting the right of either to terminate the employment relationship; or,
- ♦ a Handbook/Manual distributed to the employee and the Handbook/Manual states that it is intended to be a contract.

Thus, claims of "implied contract" based on language in a handbook/manual/guide will not be able to proceed unless one of the three listed exceptions exist. This legislation overruled the *Leikvold v. Valley View Community Hospital* case (1984) in which the AZ Supreme Court said a terminated employee could make a breach of implied contract claim based on the language in the employer's handbook. Also, the statute of limitations for filing a wrongful discharge claim was reduced to one year.

Wrongful discharge claims tort claims may proceed when the employee was discharged in violation of state statute or in retaliation based on one or more of the following:

- ♦ refusal to commit an act that violates state statutes or the state constitution;
- ♦ whistleblowing;
- ♦ exercising rights under worker's comp law;
- ♦ serving on a jury;
- ♦ exercising voting rights;
- ♦ service in the armed forces or national guard;
- ♦ refusing to join a labor union; or,
- ♦ refusing to give kickbacks to the employer.

TIPS, based on the Arizona Employment Protection Act, for ensuring that employment is at-will and remains at-will:

- include a disclaimer or notice in your business/organization's Employee Handbook that employment is at-will AND that the Handbook itself is NOT an employment contract;
- do not sign the Employee Handbook; and,
- use at-will language on the Employment Application form and in offer letters that is consistent with the at-will language in the Employee Handbook.

Probation Periods – A Risky Practice

The following is an edited blend of two articles published by BLR (Business & Legal Resources).

COMMENTS by HRHelp regarding probationary periods follow the information below.

Probationary Periods

Many employers start new employees off with a "probationary period" during which the employer can let the new employee go without worrying about just cause and lawsuits. Sounds good, but there's a downside, says attorney Sandra Rappaport.

The use of "probationary hiring" has been confusing for employers and employees alike, Rappaport says. Originally, it was a way for an employer subject to a collective bargaining agreement (CBA) to carve out a short, introductory period that would **not** be governed by the same termination requirements as the regular employment period under the agreement

Generally, that meant that during the probationary period, a union employee could be let go without concern for just cause or other rules governing termination.

Probationary periods have since been adopted by many employers who aren't unionized, says Rappaport.

Must You Have a Probationary Period?

No particular law requires employers to have a category of probationary employees or governs termination during a probationary period, says Rappaport. Essentially, the answer to how one should treat a probationary hire depends on the nature of the particular employment relationship.

If an employment contract sets forth the requirements for termination – e.g., employment can only be terminated for cause – the employer obviously must comply with those requirements. Similarly, if the employment relationship is governed by a CBA negotiated between the employer and a union representing its employees, the CBA likely will specify the grounds for termination and the required procedures for discharge. In both an employment agreement and a CBA, the contract's language governs the requirements for lawful termination during a probationary period.

If there is no employment contract saying otherwise, the presumption in many states is that all employment is at-will, which means that either party can terminate it with or without cause.

If an employer has an at-will employment relationship with all of its employees, a probationary period is really not needed. A new hire can be terminated at any time in his or her employment without cause; setting aside a special introductory period does not change that.

No Guarantee

However, says Rappaport, most employers understand that the at-will presumption does not necessarily mean that they will be immune from a wrongful termination suit. Even in an at-will state, an employer cannot terminate a person for any reason barred by state or federal law; employment decisions based on prohibited grounds like race, age, gender, national origin, religion, disability, or for reporting illegal conduct ("whistleblowing") can subject the employer to liability, even if the discharge is during a probationary period.

Therefore, it is helpful to document the legitimate bases for a termination decision, regardless of when it occurs.

Don't Create an Implied Agreement

In addition, says Rappaport, at-will employers need to avoid creating implied agreements – through actions, policies, verbal commitments, and the like – that an employee will not be terminated except for cause.

To avoid wrongful termination lawsuits based on a claim that an implied agreement exists, employers must be careful not to behave in ways inconsistent with at-will employment. **Using a probationary period may imply some increased level of job security after the period ends – an implication that is completely inconsistent with at-will employment.**

Probationary Period? Get Rid of It!

Attorney Hunter Lott says that any "probationary period" or "introductory period" (or as one company calls it, "comfort time") is a threat to the employer's at-will status because it suggests that after the probationary period, employees have greater rights.

What you really want, he says, is to eliminate the probationary period entirely. Then, he says, "*Your employees are on probation forever.*"

COMMENTS by [HRHelp](#):

If employment is truly at-will, then employment will be at-will during an employee's first 30 days of employment, first 90 days of employment, first 4 years of employment, first 25 years of employment, and forever.

But, a probationary period implies that employment at-will only applies for a certain time period and, that if the employee is allowed to continue working after that time period expires (as stated in CBA's), the employee becomes a "for cause" employee.

The contradiction between employment at-will as a forever concept versus employment at-will only during a probationary period is one that a former employee's attorney will exploit with a jury.

The jury will be told about the history of probation periods (stemming from CBA's) and that if employment truly were at-will at your organization, there would be no need for a probation period since "probation – the ability to discharge an employee without cause" would always be in effect.

And, the jury will be told that your organization really doesn't practice employment at-will because it has a probationary period and, even during the probationary period, has never discharged an employee without cause (or "good cause") because you document everything in order to defend against a claim of discrimination or wrongful termination by justifying (showing "good cause") for every discharge that has occurred during an employee's probation period.

PART 2: Federal, State, and Local Laws with which Employers Must Comply

Federal Laws

- ADA – Americans With Disabilities Act
- ADAAA – Americans With Disabilities Amendments Act
- ADEA – Age Discrimination in Employment Act
- Civil Rights Act of 1964
- Civil Rights Act of 1991
- COBRA – Consolidated Omnibus Budget Reconciliation Act
- Drug Free Workplace Act
- Employee Polygraph Protection Act
- Equal Pay Act
- ERISA – Employee Income Retirement Security Act
- FACT – Fair and Accurate Credit Transactions Act
- FCRA – Fair Credit Reporting Act
- FLSA – Fair Labor Standards Act
- FMLA – Family and Medical Leave Act
- GINA – Genetic Information Non-Discrimination Act
- IRCA – Immigration Reform and Control Act
- LMRA – Labor-Management Relations Act (Taft-Hartley Act)
- NLRA – National Labor Relations Act (Wagner Act)
- OSHA – Occupational Safety and Health Act
- OWBPA – Older Workers Benefit Protection Act
- PDA – Pregnancy Discrimination Act
- Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (New Hire Reporting)
- USERRA
- Vietnam Veterans Readjustment Act
- Vocational Rehabilitation Act
- WARN – Worker Adjustment and Retraining Notification Act

Arizona Laws

- Arizona Child Labor Laws
- Arizona Civil Rights Act
- Arizona Crime Victim Leave Act
- Arizona Employment Protection Act
- Arizona Medical Marijuana Act
- Arizona Minimum Wage Act
- Arizona Wage Laws
- Arizona Workers Compensation Statutes
- Legal Arizona Workers Act
- Smoke-Free Arizona Act

Local Laws

- County Ordinances and Acts (e.g., Maricopa County Trip Reduction Legislation)
- City Ordinances and Acts (e.g., Affirmative Action requirements of contractors to the City of Phoenix; City of Phoenix Smoking Ordinance)

PART 3: The Basics of Employment Law Compliance, by Threshold Numbers of Employees

ALL EMPLOYERS

Some businesses/organizations may be exempt from provisions of the laws listed under **ALL EMPLOYERS** depending upon: the nature of the business/organization; whether it engages in interstate commerce; its annual gross revenues/sales; and/or other factors.

Any questions about whether a specific business/organization does or does not have to comply with a specific law should be addressed to a competent labor law attorney or to the agency that administers the law. It is recommended that, unless the business/organization has determined through a labor law attorney or the agency that it does not have to comply with a specific law, it should meet the compliance requirements of that law.

- **New Hire Reporting (Personal Responsibility and Work Opportunity Reconciliation Act of 1996)**

Employers are required to report new hires within 20 days of employment. In Arizona, new hires must be reported to the Arizona New Hire Reporting Center. New hires can be reported by sending a copy of the employee's completed W-4 form or by sending a completed Arizona New Hire Reporting Form.

For additional information, contact them at: <https://az-newhire.com/>

- **Fair Labor Standards Act (FLSA)**

The FLSA establishes the minimum wage employers must pay. The federal minimum wage was raised to \$7.25/hour on July 24, 2009.

NOTE: The Arizona minimum wage became \$8.05/hour as of January 1, 2015. Employers must pay the Arizona minimum wage since it is higher.

A poster, "*Employee Rights Under The Fair Labor Standards Act*" must be posted; see **PART 4**.

Employers are to establish a 168 consecutive hour (7 days x 24 hours/day) work week for purposes of calculating and paying overtime. Employers are required to pay overtime wages (at a rate of at least 1.5 times the employee's regular hourly rate) to non-exempt employees for all hours worked over 40 in a work week. Payment for overtime must be in the paycheck for the work week in which the overtime is worked. Non-exempt employees are NOT allowed to be given "COMP" time in lieu of payment for overtime.

- **Immigration Reform and Control Act (IRCA)**

The IRCA requires that an I-9 form be completed for each new employee within the first 3 days of employment in order that the employer verify the identity and the employment eligibility of the new employee. **NOTE: the employee, by law, MUST complete Section 1 of the form on his/her first (1st) day of employment.** Section 2, can be completed up to the 3rd day (not counting the first day of employment).

To obtain the current version of the form I-9 (rev. 03/08/13), go to: <http://www.uscis.gov/files/form/i-9.pdf>

A **Handbook for Employers** (M-274, Rev. 03/08/13) is available from the Bureau of Citizenship and Immigration; go to: <http://www.uscis.gov/files/form/m-274.pdf> to download it.

The **Handbook** provides instructions for completing the I-9 forms, includes the current version of the I-9 form, and includes color photos of the documents that are acceptable for proof of identity, employment eligibility, or both.

- **Legal Arizona Workers Act (LAWA)**

Employers in Arizona must use the federal E-Verify system to verify the employment eligibility of each person hire on or after January 1, 2008. This requirement is **IN ADDITION TO** the federal I-9 requirement (proof of identity and proof of employment eligibility).

Information regarding E-Verify and how to register as an employer is available at:
http://www.dhs.gov/files/programs/gc_1185221678150.shtm

To obtain a copy of the *E-Verify User Manual for Employers* (M-775, September 2012), go to:
http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf

- **Worker's Compensation Laws of the state of Arizona**

All employees, whether full-time, part-time, or temporary, **MUST** be covered by worker's compensation insurance. For specific information regarding the Arizona Worker's Compensation Law and its compliance requirements, contact the Arizona Industrial Commission.

The State Compensation Fund (SCF) in Arizona was formed to make worker's compensation insurance more available to small companies (since many private insurance carriers do not write policies for small businesses/organizations).

- **Arizona Civil Rights Act (ACRA)**

Arizona employers with one (1) or more employees are subject to the sexual harassment provisions of the Arizona Civil Rights Act; so, if a business/organization has one or more employees, its employees have protections from sexual harassment under ACRA.

- **Arizona Wage Laws**

Arizona employers must designate two or more days in each month, not more than sixteen days apart, as fixed paydays for payment of wages to the employees.

When an employee is discharged from the service of an employer, he/she must be paid wages due him within three working days or on the next regular payday, whichever is sooner.

Employers may not withhold or divert any portion of an employee's wages unless one of the following applies:

1. The employer is required or empowered to do so by state or federal law.
2. The employer has prior written authorization from the employee.
3. There is a reasonable good faith dispute as to the amount of wages due, including the amount of any counterclaim or any claim of debt, reimbursement, recoupment or set-off asserted by the employer against the employee.

- **Arizona Minimum Wage Act**

The minimum wage in Arizona became \$8.05/hour as of January 1, 2015. This rate is adjusted annually, based on economic indicators, by the Arizona Industrial Commission and becomes effective January 1 of the following year.

NOTE: This law requires that new hires be given the employer's name, address, and phone number on the first day of employment; see Part 4, Human Resource (HR) Forms and Recordkeeping Documents.

There is a "small business" exemption:

- the business must have gross annual revenue of less than \$500,000; and,
- the business must be exempt from paying the minimum wage under the federal Fair Labor Standards Act (FLSA), 29 U.S.C. 206(a).

- **Smoke-Free Arizona Act**

As of May 1, 2007, employers must prohibit smoking in all public places and place of employment. The only exception is outdoor patios as long as tobacco smoke does not enter, via entrances or windows or ventilation systems or other means, any areas where smoking is prohibited.

Certain signage is required at ALL entrances to buildings. For information about signage, go to:
<http://www.smokefreearizona.org/order-signage.asp>

- **Arizona Child Labor Laws**

A.R.S. 23-230 to 23-242 AND the federal Fair Labor Standards Act (FLSA) provide guidance regarding “Youth Employment”, including the permissible hours of work for youths under the age of 16, prohibited types of work for youth under age 16, and prohibited types of work for youth under 18.

- **Wage Payments, Tax Withholdings (Social Security, Medicare, federal income, state income), and Garnishments**

With regard to wage payments, see **Arizona Wage Laws**, on the previous page.

With regard to tax withholdings, employers should obtain and refer to **Publication 15, “Circular E, Employer’s Tax Guide”**, which is available from the IRS; go to:

<http://www.irs.gov/app/picklist/list/publicationsNoticesPdf.html>

With regard to garnishments, you should obtain **Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)**; go to:

<http://www.dol.gov/whd/regs/compliance/whdfs30.pdf>

- **Employee Polygraph Protection Act**

The Act restricts the use of polygraphs (which includes lie detector tests, "honesty" tests, and similar tests or activities), except under some very specific conditions and only with the consent of the employee and only if certain procedures are followed and documented. A poster, "**Notice: Employee Polygraph Protection Act**", must be displayed; see **PART 4**.

- **Fair Credit Reporting Act (FCRA)**

Background checks/investigations of applicants or employees are considered “consumer reports” under the Act. Applicants or employees must be given a Notice of the employer’s intention to obtain a “consumer report” and authorize the background check/investigation.

A copy of the applicant/employee’s rights under the FCRA (*“A Summary of Your Rights Under the Fair Credit Reporting Act”*) also must be provided to him/her.

No adverse employment decision based on the results of the “consumer report” can be made until the applicant/employee is told of the information used to reach the decision and is given the opportunity to correct such information.

- **Employee Retirement Income Security Act (ERISA)**

ERISA sets standards for employee benefits plans to ensure the equitable character of and financial soundness of such plans and sets standards and rules governing the conduct of plan fiduciaries. Group health insurance plans, profit-sharing plans, 401(k) plans, 403(b) plans, and other such group benefits plans must meet ERISA standards.

- **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

Identifies the obligations employers have with regard to the hiring of members of the uniformed services, providing benefits to such members during periods of active duty, and the re-employment of such members returning from active duty.

- **Fair and Accurate Credit Transactions Act (FACT)**

As of June 1, 2005, all employers are required to destroy any document that has personal information on it prior to discarding the document. Personal information could be a telephone number, address, Social Security number, etc.

The law requires the destruction — ‘shredding or burning’ or ‘smashing or wiping’ — of all paper or computer disks containing personal information that is ‘derived from a consumer report’ before it is discarded. This law applies to all employers with one or more employees.

The aim is to protect the public from identity theft, one of the fastest-growing crimes in the United States. Many times personal information is stolen from an employer. The information comes from the employer's paperwork, as well as computer database systems.

Employers have a duty to restrict access to this data as well as properly dispose of (destroy) the information. Every employer should establish written guidelines for maintaining confidentiality and placing restrictions on access to and use of this information. The guidelines also should contain provisions regarding data of temporary employees and contract employees.

For additional information, go to: <http://www.ftc.gov/bcp/edu/pubs/business/alerts/alt152.shtm>

EMPLOYERS OF 11 OR MORE

- **Occupational Safety and Health Act (OSHA)**

Employers of 11 or more employees in certain, but not all, Standard Industrial Classification (SIC) codes and employers required by the Bureau of Labor Statistics must keep records of on-the-job injuries and illnesses on a calendar year basis and must provide that information annually to the Bureau of Labor Statistics.

All employers of 11 or more must meet OSHA safety standards, must display the OSHA required poster, and must report any accident that results in one or more fatalities or the hospitalization of five or more employees.

EMPLOYERS OF 15 OR MORE

- **Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; and, the Arizona Civil Rights Act.**

These laws prohibit discrimination in any aspect of employment (recruiting, interviewing, selection, compensation, benefits, selection for training, discipline, termination, layoff, etc.) on the basis of race, gender, religion, national origin, creed, or color. The Arizona law prohibits discrimination on the basis of handicap status, as well.

The federal laws require employers to display a notice, "*Equal Opportunity Is The Law*", which is available from the Equal Employment Opportunity Commission; see **PART 4**.

The Arizona law requires employers to display a separate, additional notice, "*Arizona Law Prohibits Discrimination In Employment*", which is available from the Civil Rights Division, Attorney General's Office; see **PART 4**.

NOTE: Arizona employers with one [1] or more employees are subject to the sexual harassment prohibitions in the Arizona Civil Rights Act; previously, only employers with 15+ employees were subject to those prohibitions.

- **The Genetic Information Non-Discrimination Act**

The Act prohibits employers from using a person's genetic information in making employment decisions such as hiring, firing, job assignments, or any other terms of employment; and, it prohibits employers from requesting, requiring, or purchasing genetic information about persons or their family members.

The Act also prohibits group and individual health insurers from using a person's genetic information in determining eligibility or premiums; and, it prohibits an insurer from requesting or requiring that a person undergo a genetic test.

The law requires employers to display a notice that is a supplement to the "*Equal Employment Opportunity Is The Law*" poster required by the Civil Rights Acts; see **PART 4**.

- **The Americans With Disabilities Act (ADA) AND the Americans With Disabilities Amendments Act of 2009 (ADAAA)**

These laws prohibit discrimination in any aspect of employment on the basis of a person being:

- a) a "qualified individual with a disability";
- b) someone with a history of a disability; or,
- c) someone perceived to have a disability.

A "qualified individual with a disability" is one who meets the prerequisite qualifications for a job and who can perform the essential functions of the job, with or without reasonable accommodation.

The "*Equal Opportunity Is The Law*" poster covers discrimination on the basis of disability; no additional notice or poster is required. This is a complicated law. It is recommended that employers who are required to comply with the ADA meeting compliance requirements as quickly as possible and that they get assistance from an experienced human resource professional.

EMPLOYERS OF 20 OR MORE

- **Age Discrimination in Employment Act (ADEA)**

This law prohibits discrimination in any aspect of employment on the basis of age – defined as age 40 or older. The "*Equal Opportunity Is The Law*" poster covers discrimination on the basis of age; no additional notice or poster is required.

- **COBRA**

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) allows employees, and their enrolled dependents, who otherwise would lose group health insurance benefits to continue such benefits. Employers are required to provide an "*Initial COBRA Notice*" to employees who enroll for group health insurance benefits at the time of enrollment or at the time benefits become effective. If a spouse and/or dependent children are enrolled, an "*Initial COBRA Notice*" also has to be mailed to them.

At the time of a COBRA "qualifying event", the "qualified beneficiary(ies)" must be provided with a "*COBRA Election Notice*" that includes all information necessary for a "qualified beneficiary" to make an election decision.

For answers to frequently asked questions (FAQ's) about COBRA by employers, go to:

http://www.dol.gov/ebsa/faqs/faq_compliance_cobra.html

NOTE: COBRA is a complicated law. It is recommended that employers who are required to comply with COBRA get assistance from an experienced human resource professional or employment law attorney.

- **Older Workers Benefit Protection Act (OWBPA)**

It is basically an amendment to the ADEA that establishes the circumstances under which a "release/waiver of claims" agreement, in which the employee waives his/her rights under the ADEA, is valid when offered, in conjunction with a severance package, to an employee who is being discharged or laid-off or otherwise separated from employment.

EMPLOYERS OF 50 OR MORE

- **Family and Medical Leave Act (FMLA)**

The Act requires employers to grant up to 12 weeks of unpaid FMLA leave to employees who are eligible.

The Act requires employers to display a notice, "*Your Rights Under the Family and Medical Leave Act of 1993*", which is available from the Wage and Hour Division, U.S. Dept. of Labor; see **PART 4**.

NOTE: the original FMLA has been amended by the Congress. The changes became effective on January 16, 2009. The changes in the compliance requirements are substantial; the forms for an employee and the employer to use for FMLA requests also have changed.

The new regulations include provisions for:

Military Caregiver Leave: Implements the requirement to expand FMLA protections for family members caring for a covered service member with a serious injury or illness incurred in the line of duty on active duty. These family members are able to take up to 26 workweeks of leave in a 12-month period.

Leave for Qualifying Exigencies for Families of National Guard and Reserves: The law allows families of National Guard and Reserve personnel on active duty to take FMLA job-protected leave to manage their affairs — "qualifying exigencies." The rule defines "qualifying exigencies" as: (1) short-notice deployment (2) military events and related activities (3) childcare and school activities (4) financial and legal arrangements (5) counseling (6) rest and recuperation (7) post-deployment activities and (8) additional activities where the employer and employee agree to the leave.

For further information about FMLA, including Military Caregiver Leave, go to:

<http://www.dol.gov/whd/fmla/index.htm> **and** <http://www.dol.gov/whd/regs/compliance/whdfs28a.pdf>

NOTE: The FMLA is a complicated law. It is recommended that employers who are required to comply with the FMLA get assistance from an experienced human resource professional or employment law attorney.

- **Trip Reduction Legislation (Maricopa County Employers)**

Employers in Maricopa County, Arizona, who employ 50 or more employees working at, or reporting to, a single work site must comply with the 1988 Air Quality Bill (ARS 49-581 et seq.).

For more information about the requirements of employers for establishing a trip reduction program, go to:

http://www.maricopa.gov/aq/divisions/trip_reduction/default.aspx

- **Arizona Crime Victim Leave Act**

Requires employers to provide unpaid "crime victim leave" to employees who is a "victim" of a crime, as defined in A.R.S. 13-4439 or A.R.S. 8-420, in order to attend all court proceedings involving the perpetrators of the crime, including preliminary hearings, trials, and post-trial hearings.

For more information, see the Arizona Crime Victims' Rights Laws brochure that is found at:

http://www.azag.gov/victims_rights/CrimeVictimsRightsLaws.pdf

The leave guarantees for victims can be found in ARS 13-4439.

EMPLOYERS WITH 100 OR MORE

- **EEO-1 Reporting**

Private employers must file an EEO-1 report annually if they are:

- subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees EXCLUDING State and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations;

OR

- subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

For more information or to obtain an EEO-1 Report Form, go to: <http://www.eeoc.gov/eo1survey/>

- **Trip Reduction Legislation (Maricopa County Employers)**

Employers in Maricopa County, Arizona, who employ 100 or more employees working at, or reporting to, a single work site must meet MORE requirements of the 1988 Air Quality Bill (ARS 49-581 et seq.) than do employers of 50-99 employees working at, or reporting to, a single work site.

For more information about the requirements of employers for establishing a trip reduction program, go to:

http://www.maricopa.gov/aq/divisions/trip_reduction/default.aspx

- **Worker Adjustment and Retraining Notification Act (WARN)/ Plant Closing Law**

Requires employers to provide early (60 days prior) and written notification to employees when plant closings, layoffs, or reduction of work hours will affect them. Certain terms and conditions apply (number of employees that will be affected, employer size, etc.) and certain exceptions exist based on reason for the actions. If layoffs, plant closings, or reductions in hours worked are anticipated for more than a few employees, the organization should obtain additional information regarding the requirements of the WARN/Plant Closing Law.

PART 4: Required Notices and Posters, by Threshold Numbers of Employees

ALL EMPLOYERS (1+ Employees)

- **Worker's Compensation Laws, State of Arizona**

"*Notice to Employees RE: Arizona Worker's Compensation Law*"; the bi-lingual (English and Spanish) poster is available from your Worker's Compensation insurance carrier or at:

http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkersCompLawBilingual.pdf

NOTE: the poster **MUST** include the name, address, and phone number of the worker's compensation insurance carrier **AND** the policy number. If you obtain the poster from your carrier, that information should be pre-printed on the poster. If the information is not pre-printed on the poster (regardless of the source), you must write-in that information.

AND

"*Work Exposure To Bodily Fluids, HIV, AIDS, HepC*"; the bi-lingual (English and Spanish) poster is available from your Worker's Compensation insurance carrier or at:

http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToBodilyFluids_HIV_AIDS_HepC.pdf

NOTE: certain employers also may be required to post/display the following:

"Work Exposure to Methicillin-resistant *STAPHYLOCOCCUS AUREUS* (MRSA), Spinal Meningitis, or Tuberculosis (TB); the bi-lingual (English and Spanish) poster is available from:

http://www.ica.state.az.us/Claims/Forms/Claims_Poster_WorkExpToMRSA_SpMen_TB.pdf

- **Occupational Safety and Health Act (OSHA)**

All Employers must post either the Arizona **OR** the federal poster.

The Arizona poster, "*Employee Safety and Health Protection*", is available from the Industrial Commission, State of Arizona. The bi-lingual poster (English and Spanish) is available at:

http://www.ica.state.az.us/ADOSH/Forms/ADOSH_Poster_WorkplaceSafetyBilingual.pdf

The federal posters, "*Job Safety and Health, It's the Law*", are available at:

<http://www.osha.gov/Publications/osha3165.pdf> (English)

<http://www.osha.gov/Publications/osha3167.pdf> (Spanish)

To obtain the booklet regarding recordkeeping requirements and which includes the OSHA forms for recordkeeping, go to: <http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf>

- **Unemployment Insurance for Employees**

"*Notice To Employees, You Are Covered By Unemployment Insurance*". Available from the Arizona Department of Economic Security at:

<https://www.azdes.gov/InternetFiles/Pamphlets/pdf/POU-003.pdf> (English)

<https://www.azdes.gov/InternetFiles/Pamphlets/pdf/POU-003-S.pdf> (Spanish)

- **Fair Labor Standards Act (FLSA)**

"*Employee Rights Under The Fair Labor Standards Act*". Available from the U.S. Department of Labor, Wage and Hour Division in English, Spanish, and other languages.

For the English version, go to: <http://www.dol.gov/whd/regs/compliance/posters/minwagep.pdf>

For the Spanish version, go to: <http://www.dol.gov/whd/regs/compliance/posters/minwagespP.pdf>

- **Employee Polygraph Protection Act**

"*NOTICE: Employee Polygraph Protection Act*". Available from the U.S. Department of Labor, Wage and Hour Division.

For the English version, go to: <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eppac.pdf>

For the Spanish version, go to: <http://www.dol.gov/whd/regs/compliance/posters/eppaspan.pdf>

NOTE: The two printed pages must be taped or pasted together to form an 11 x 17 inch poster.

- **Uniformed Services Employment and Reemployment Rights Act (USERRA)**

"*Your Rights Under USERRA*." Available at: http://www.dol.gov/vets/programs/userra/USERRA_Private.pdf

- **Arizona Minimum Wage Act**

"*Arizona Minimum Wage Act*" poster. Available at:

http://www.ica.state.az.us/Labor/Forms/Labor_MinWag_MinimumWagePoster_2015_English.pdf (English); and,

http://www.ica.state.az.us/Labor/Forms/Labor_MinWag_MinimumWagePoster_2015_Spanish.pdf (Spanish).

The AZ minimum wage became \$8.05/hour as of January 1, 2015. For Frequently Asked Questions (FAQs) regarding the Arizona Minimum Wage Act, go to:

http://www.ica.state.az.us/Labor/Labor_MinWag_FAQs_English.aspx

NOTE: Every year, the Industrial Commission of the State of Arizona will set the minimum wage to be effective on January 1 of the following year; please make sure you check with the Industrial Commission to learn what the change, if any, in the minimum wage will be. Also note that each year the minimum wage changes, the required poster changes. You can obtain the current poster (in English and Spanish) at the same web address.

- **E-Verify**

The Department of Homeland Security has a notice/poster available that identifies the employer as one that complies with E-Verify.

This notice/poster of employer participation is recommended and is available at:

http://www.uscis.gov/USCIS/Controlled%20Vocabulary/Native%20Documents/E-Verify/E-Verify_Poster_V08-08_Standard_English.pdf (English); and,

<http://www.uscis.gov/USCIS/E-Verify/EVerifyPosterSpanish1.pdf> (Spanish).

The "right to work" posters are available at:

http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Right_to_Work_Poster_English.pdf (English); and,

http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Right_to_Work_Poster_Spanish.pdf (Spanish).

To obtain a copy of the *E-Verify User Manual for Employers* (M-775, September 2012), go to:

http://www.uscis.gov/USCIS/Verification/E-Verify/E-Verify_Native_Documents/manual-employer_comp.pdf

- **Smoke-Free Arizona Act**

Employers are required to post “No Smoking” signs OR the international “No Smoking” symbol wherever smoking is prohibited. And, the same signage must be posted at every entrance. The signs must include information about to whom a complaint can be made. To order signage, go to:

<http://www.smokefreearizona.org/order-signage.asp>

15 OR MORE EMPLOYEES

- **Title VII, the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Americans with Disabilities Act (ADA); and, the Arizona Civil Rights Act.**

"Equal Employment Opportunity Is The Law"; this poster identifies protections provided by the Civil Rights Act, the Equal Pay Act, the Americans With Disabilities Act, and the Age Discrimination in Employment Act. Available from the Equal Employment Opportunity Commission.

For the English poster, go to: <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>

For the Spanish poster, go to: <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeosp.pdf>

NOTE: The two printed pages must be taped or pasted together to form an 11 x 17 inch poster.

AND

"Arizona Law Prohibits Discrimination In Employment"; this poster identifies protections provided by the Arizona Civil Rights Act. Available from the Arizona Attorney General's Office, Civil Rights Division. (English and Spanish language versions on the same poster.). Go to:

<https://www.azag.gov/sites/default/files/sites/all/docs/civil-rights/discrimination/EmploymentPoster.pdf>

- **Genetic Information Non-Discrimination Act (GINA)**

“EEO is the Law” Poster Supplement; this poster supplements the *“Equal Employment Opportunity Is The Law”* poster

For the English poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/Supplement_English.pdf

For the Spanish poster, go to: http://www.dol.gov/ofccp/regs/compliance/posters/pdf/Supplement_Spanish.pdf

20 OR MORE EMPLOYEES

- **Age Discrimination In Employment Act (ADEA)**

Same poster as for the Civil Rights Acts; see **15 OR MORE EMPLOYEES**, above.

50 OR MORE EMPLOYEES

- **Family and Medical Leave Act (FMLA)**

"Employee Rights and Responsibilities Under the Family and Medical Leave Act ." Available from the U.S. Department of Labor, Wage and Hour Division.

For the English poster, go to: <http://www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf>

For the Spanish poster, go to: <http://www.dol.gov/whd/regs/compliance/posters/fmlasp.pdf>

OTHER REQUIRED NOTICES/POSTERS

- *"Notice to Employees Working On Government Contracts"*.

Applies to employers with federal government contracts that exceed a certain dollar amount. Contact the U.S. Department of Labor; Wage and Hour Division. Phone: (602) 514-7100.

- Posters/Notices are also required of employers who:
 - (a) anticipate a plant closing or mass layoff that falls under the Worker Adjustment and Retraining Notification Act (WARN)/Plant Closing Act; (contact the U.S. Department of Labor; phone: 602-514-7100);
- OR,**
- (b) are working on federally-financed construction projects; (contact the U.S. Department of Labor; phone: 602-514-7100).

COUNTING EMPLOYEES FOR COMPLIANCE PURPOSES

The U.S. Supreme Court says that as long as an employee is on the payroll every day of a calendar week (whether at work or not), he/she is counted as an employee for compliance purposes. *See Walters v. Metropolitan Educational Enterprises, 1997 WL9783 (Supreme Court).*

WHERE TO POST

Employment posters/notices must be displayed in areas that employees frequent on a daily basis, such as exits and entrances, by time clocks, and/or lunchroom or break areas. Companies with large physical facilities should display posters/notices in multiple locations. If employees work in separate facilities, buildings, or locations, posters/ notices must be displayed in each location, facility, or building. If employees work on more than one floor/level of a multiple-story building/facility, posters/notices must be displayed on every floor on which employees work.

Also, to ensure that posters/notices are visible to applicants, a set of posters/notices should be displayed in the employment (or reception) area where applicants complete their Employment Application forms.

OTHER COMPLIANCE RESOURCES

- **OSHA FORM 300: LOG OF OCCUPATIONAL INJURIES AND ILLNESSES**

Businesses/Organizations in certain Standard Industrial Classification (SIC) codes and employers required by the Bureau of Labor Statistics must keep records of on-the-job injuries or illness.

To obtain the booklet regarding recordkeeping requirements and which includes the OSHA forms for recordkeeping, go to: <http://www.osha.gov/recordkeeping/new-osha300form1-1-04.pdf>

- **IMMIGRATION REFORM AND CONTROL ACT (IRCA)**

The IRCA requires that an I-9 form be completed for each new hire within the first 3 days of employment (not including the first day of employment) in order for the employer to verify the identity and the employment eligibility of the new employee.

NOTE: The new hire, by law, MUST complete Section 1 of the I-9 form on his/her first (1st) day of employment.

Failure of the employer to properly document the employee's identity and employment eligibility, using the I-9 form, can result in a penalty of from \$110 to \$1100 PER VIOLATION.

To obtain the current version of the form I-9 (rev. 03/08/13), go to: <http://www.uscis.gov/files/form/i-9.pdf>

A **Handbook for Employers** (M-274, Rev. 03/08/13) is available from the Bureau of Citizenship and Immigration; go to: <http://www.uscis.gov/files/form/m-274.pdf> to download the file

The **Handbook** provides instructions for completing the I-9 forms and contains color photos of documents that are acceptable as proof of identity, proof of employment eligibility, or both.

- **EQUAL EMPLOYMENT OPPORTUNITY, EMPLOYER INFORMATION REPORT EEO-1**

Employers with 100+ employees are required to submit an annual EEO-1 Report. Obtain an instruction booklet and the EEO-1 Report form from the Joint Reporting Committee; phone: 1.866.286.6440. Or, you can go to: <http://www.eeoc.gov/employers/eeo1survey/index.cfm>

- **HAZARD COMMUNICATION STANDARD (HCS)**

All employers with hazardous chemicals in their workplaces must have labels and MSDS's for their exposed workers, and train them to handle the chemicals appropriately.

For general information about hazardous chemicals in the workplace and the requirements of employers, go to: <http://www.osha.gov/dsg/hazcom/index.html>

For information about employer responsibilities and compliance assistance available from federal OSHA, go to: http://www.osha.gov/dcsp/compliance_assistance/index.html

- **THE FEDERAL WAGE GARNISHMENT LAW**

With regard to garnishments, you should obtain *Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)*; go to: <http://www.dol.gov/whd/regs/compliance/whdfs30.pdf>

- **NEW HIRE REPORTING (PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996)**

Employers are required to report new hires within 20 days of employment. In Arizona, new hires must be reported to the Arizona New Hire Reporting Center. New hires can be reported by sending a copy of the employee's completed W-4 form or by sending a completed Arizona New Hire Reporting Form.

For additional information, contact them at: <https://az-newhire.com/>

- **FAIR CREDIT REPORTING ACT (FCRA)**

Employers who obtain or wish to obtain background investigation reports ("consumer reports") about applicants or employees (e.g., reference checks, credit checks, felony conviction checks, etc.) through an outside agency/firm or using consumer reporting services must comply with the FCRA. Applicants or employees must be provided with a written disclosure Notice and must sign the Notice **before** the "consumer report" is conducted.

A copy of the "consumer report" must be given to the applicant or employee if it is the basis of an adverse employment action (e.g., not hiring an applicant, taking disciplinary action against an employee, discharging an employee, etc.) along with a copy of "A *Summary of Your Rights Under the Fair Credit Reporting Act.*"

For additional information about the FCRA, go to: <http://www.ftc.gov/os/statutes/fcrajump.shtm>

- **FAIR AND ACCURATE CREDIT TRANSACTIONS (FACT) ACT**

As of June 1, 2005, all employers are required to destroy any document that has personal information on it prior to discarding the document. Personal information could be a telephone number, address, Social Security number, etc.

The law requires the destruction — 'shredding or burning' or 'smashing or wiping' — of all paper or computer disks containing personal information that is 'derived from a consumer report' before it is discarded. This law applies to all employers with one or more employees.

The aim is to protect the public from identity theft, one of the fastest-growing crimes in the United States. Many times personal information is stolen from an employer. The information comes from the employer's paperwork, as well as computer database systems.

Employers have a duty to restrict access to this data as well as properly dispose of (destroy) the information. Every employer should establish written guidelines for maintaining confidentiality and placing restrictions on access to and use of this information. The guidelines also should contain provisions regarding data of temporary employees and contract employees.

PART 5: HR Forms and Recordkeeping Documents

This part identifies the forms and documents typically needed to conduct appropriate human resource (HR) activities and to keep adequate employment records in each employee's personnel file. It is recommended that employers create and maintain a personnel file for each employee. The file should, at least, include the documents listed below.

▪ **Employment Application.**

A completed and signed Application, which should be obtained prior to interviewing, should be kept in the personnel file of the person hired. If the applicant attached a resume to the Application form, keep it attached to the Application. If the applicant provided a resume prior to or after the Application form was completed, attach it to the Application form.

Applications of those not hired should be filed, in case you need them at a later date. Applications of those not hired should be shredded after approximately 18 months.

NOTE: the recordkeeping requirement is 12 months; but, employees can file EEOC charges up to 300 days following an alleged discriminatory event. So, it is wiser to keep the applications for the longer period.

▪ **Fair Credit Reporting Act (FCRA) Notice and Authorization + *Summary of Applicant Rights Under the FCRA***

Each applicant for whom a background check, criminal background check, or other “consumer report” will be obtained must complete a Notice and Authorization form AND must receive a copy of the Federal Trade Commission’s (FTC) publication, “*Summary of Applicants Rights Under the FCRA*” BEFORE the background check, criminal background check, or “consumer report” is ordered.

▪ **Telephone Reference Check**

For each reference called, a Telephone Reference Check form should be completed. The goal is to obtain as much information as possible or (to protect against negligent hiring) show that an attempt was made to obtain information but was unsuccessful. Completed forms should be attached to the Application form of the person about whom the call is made.

▪ **Offer Letter**

While offers can be made verbally, it is better to make them via an offer letter. The offer letter should state the agreed upon job title and starting wage/salary. The letter should include a statement that it is contingent upon ALL of the contingencies listed in the letter. Thus, if the applicant signs the offer letter, he/she has agreed to accept the contingencies.

Contingencies upon which an offer is based and that should/could be listed include, but are not limited to, that:

- the employee provide proof of identity and proof of employment eligibility and properly complete a form I-9 on his/her first day of employment; and, meet E-Verify requirements;
- the employee sign on his/her first day of employment a Confidential Information Agreement; if this is a contingency, a copy of the Agreement should be included with the offer letter so the applicant can read/review the Agreement before being required to sign;
- the employee provide a copy of his/her current driver’s license and MVD report, if he/she will be driving on company business;
- and/or other such contingencies.

The offer letter should include language that the applicant, if he/she signs the letter, attests that he/she is not under a “covenant not to compete agreement” with a former employer and that he/she will not bring materials, files, documents, or other information from a previous employer that would be in violation of a “Confidential Information Agreement” with a former employer.

Also, the offer letter should identify the process by which a signed copy is presented to the employer and the date and deadline at which the offer, if not accepted, is void.

- **New Hire Orientation & Assimilation Checklist**

This form provides a checklist of the forms each employee is to complete during the first few days of employment, the information that the employee is to receive regarding the company and its products or services, the materials or tools or documents the employee is to be given, and other related actions.

At the conclusion of the orientation and assimilation process, the employee signs that all of the information was presented, all of the forms were completed, and all of the materials/tools/documents received. The signed original of this form should be kept in the personnel file.

- **Form I-9, Employment Eligibility**

The completed and signed I-9 form for each employee should be filed **separate from the personnel file**. It is recommended that all I-9 forms be kept together in a **separate file**, so Immigration and Citizenship Enforcement (ICE) will not have access to personnel files if they conduct a field audit to inspect and verify I-9 forms.

For current employees, the forms should be filed by hire date. As employees leave the organization, their forms should be filed by termination date. Periodically, the forms of terminated employees should be purged based on the date the employer no longer has to produce the form.

Forms that are no longer required to be produced (one year from the termination date or three years from the hire date, **whichever is longer**) should be shredded, per the FACT Act; see page 19.

- **E-Verify**

When E-Verify is conducted and the new hire is shown to have employment authorization, a copy of the employment authorization (printed from the computer screen) must be attached to the form I-9.

- **Tax withholding forms.**

Keep the original federal (W-4) and state (A-4 in Arizona) forms in the personnel file. From time to time, the employee may wish to change information (address, number of exemptions).

- **Employee Data and Whom To Notify In Case of An Emergency Form**

This form collects data needed to meet payroll and recordkeeping requirements and should be kept in the personnel file. As necessary, the employee should update this form so that address, phone number, and who to notify in case of an emergency is always current. As new, updated forms are filed, the old ones can be destroyed.

- **Arizona Minimum Wage Notice**

The statute requires employers to provide each new hire with a “disclosure” form at the time of hire. That form must include the name, address, and telephone number of the business.

- **Confidential/Proprietary Information Agreement**

Each employee should be required to sign such an Agreement to agree not to divulge or disclose confidential/proprietary information obtained while an employee either while employed or following termination of employment. The signed original of the Agreement should be kept in the personnel file.

- **Covenant Not-To-Compete Agreement (Key Employees Only)**

Only key employees should be required to sign such an Agreement to agree not to compete against the company either while employed or for a time period following termination of employment. Courts have ruled that having all employees sign such agreements invalidates the company’s ability to enforce such agreements. Only those employees who genuinely are in a position to compete should be required to sign such an agreement.

The signed original of the Agreement should be kept in the personnel file.

- **HR Policy Manual & Employee Handbook Receipt**

When the printed Manual/Handbook is issued to an employee, he/she should sign a Receipt form that is kept in his/her personnel file as documentation of having received a copy of the Manual/Handbook.

If a printed copy of the Manual/Handbook not distributed to the employee but, instead, is available online via a company intranet, then the Receipt language is modified to reflect the employee's acknowledgement of where to find the document. That Receipt is kept in the employee's personnel file as documentation of his/her being notified how to access the Manual/Handbook.

- **Timekeeping Records**

Two types of records are typically used to record the hours worked by non-exempt employees: one for payroll periods that are every two weeks (bi-weekly payroll) and one for payroll periods that are twice per month (semi-monthly).

The Fair Labor Standards Act (FLSA) requires employers to establish a 168 hour workweek (24 hours x 7 days) and requires that employers keep records of the hours worked by non-exempt employees (whether paid hourly or by salary) in each workweek.

NOTE: if a semi-monthly payroll period is elected, the calculation of over-time must still be for the workweek. Thus a single workweek, depending upon when the first and last days of the payroll period fall, may include some days in two payroll periods. To ease the calculation of overtime pay, many employers use a bi-weekly payroll period (two workweeks in one payroll period) so that recordkeeping and overtime calculations are easier.

The signed originals of time-keeping records should be kept in a separate file, by payroll period. These records are required to be available to the U.S. Department of Labor, Wage and Hour Division, for inspection for at least the past 3 years. It is suggested that records over 2 years old be stored, rather than filed.

- **Performance Management (Performance Evaluation) Form**

Periodically, the performance of each employee should be evaluated on a performance management form. The employee's manager or supervisor who conducts the evaluation then meets with the employee to discuss which performances need to be improved (because of deficiencies) and which need to be continued (because they meet or exceed expectations). The signed originals of each form should be kept in the personnel file. Previous form(s) should not be discarded when adding the most current one.

- **Other Forms**

There may be other forms or documentation that an organization should use or might be required to use, depending upon the kind of organization, the number of employees, and the employment laws with which an organization has to comply, in order to meet recordkeeping/documentation requirements.

Such forms/documents might include, but not be limited to, the following:

Request for FMLA Leave of Absence; Request for Non-FMLA Leave of Absence; Return to Work Certification, FMLA; Return to Work Certification, Non-FMLA; Absence/Attendance form; Disciplinary (Corrective) Action form; Performance Improvement Plan (PIP); Exit Processing Checklist; and, Exit Interview form.

NOTE: EXHIBIT K provides information about the retention requirements for certain forms/records/ documents.

RECOMMENDATIONS REGARDING PERSONNEL FILES & RECORDKEEPING

What to Keep in Personnel Files

The following records related to employment should be kept in the personnel file of each employee:

- Employment application, with resume, interviewing notes, pre-employment assessments/tests, and telephone reference check form attached
- The Offer Letter
- The Covenant Not-To-Compete Agreement
- The Confidential Information Agreement
- The Manual/Handbook Receipt form
- A current Job Description
- The Employee Data and Whom To Notify In Case of An Emergency form
- The New Employee Orientation Checklist
- Records relating to hiring, promotion, demotion, transfer, layoff, rates of pay, other forms of compensation
- Records relating to other employment practices, including disciplinary/corrective actions/warning, recognition awards, attendance records, etc.
- Records of participation in professional development, education classes, and the like
- OSHA-required documentation regarding Hazardous Materials/Chemicals training in which the employee has participated
- Performance management/evaluation forms
- Termination records, including exit processing checklist and exit interview

What to keep in CONFIDENTIAL files

The following items should be kept in **CONFIDENTIAL** files, separate from the employee's personnel file:

- Medical Records. The American with Disabilities Act (ADA) requires employers to keep all medical records separate. Many states have privacy laws to protect employees. Medical records include those related to: physical examinations; medical leaves (including FMLA leave and/or Non-FMLA medical leave); and, drug and alcohol testing results.
- Workers comp claims. All paperwork related to an employee's on-the-job injury/illness.
- Equal/Employment Opportunity. If a internal/external charges of discrimination and/or harassment are investigated, it is recommended that these files also be maintained separately.
- Immigration (I-9) Forms. It is recommended that these forms be maintained chronologically by the employees' dates of hire. Keeping this information in a separate file reduces the opportunity for an auditor to pursue and investigate unrelated information.
- Invitation to Self-Identify Gender/Sex or Race. In order to minimize claims of discrimination, it is important to keep source documents that identify an individual's race and sex (the Invitation To Self-Identify form required of federal contractors by Executive Order 11246) in a separate file.
- Invitation to Self-Identify Disability or Veterans Status. This information is required to be maintained by federal contractors. Laws prohibit employment decisions on the basis of certain protected classes; however, managers have the right to access an employee's file for a number of operational issues. Unless there is a need to know for accommodation purposes these files should be maintained separately to reduce a potential source of bias.

- Safety Training records – Hazardous Materials/Chemicals. OSHA requires training records of employee participation in Hazardous Materials/Chemicals training to be kept in the employee's personnel file. A copy of that record can be kept in a training log/file by class title/subject/topic and date.

Access to Files

Every employer should have written policy statements regarding access to personnel files, including CONFIDENTIAL files, by HR persons, employees, manager/supervisors, and former employees.

- Personnel File. It is recommended that only the employee, HR employees with a need to know, or managers/supervisors with a need to know have access to an employee's personnel file.
- CONFIDENTIAL Medical File. It is recommended that only HR employees with a need to know, managers/supervisors, as needed to provide reasonable accommodation, or government/legal agencies conducting investigations relevant to the information in Confidential Medical files have access to an employee's CONFIDENTIAL medical file.
- I-9 form and E-Verify confirmation. It is recommended that only HR employees with a need to know or government/legal agencies conducting audits or investigations relevant to the information on I-9 forms or to E-Verify confirmations have access to I-9 forms or E-Verify confirmations..

PART 6: A Non-Exhaustive Self-Assessment of Your Organization's Compliance with Employment Laws

Mark "T" or "F" for each of following items to conduct a non-exhaustive self-assessment of your organization's compliance with federal and state employment laws.

1. Notices & Posters

The following posters are prominently displayed where employees and applicants can easily find and read them:

ALL EMPLOYERS (1+ Employees)

___ "Notice to Employees RE: Arizona Worker's Compensation Law" (Arizona Workers Compensation law)

AND

___ "Work Exposure To Bodily Fluids" (Arizona Workers Compensation law)

___ "Employee Safety and Health Protection" (Arizona OSHA)

OR

___ "Job Safety and Health: It's the Law" (federal OSHA)

___ "Notice To Employees, You Are Covered By Unemployment Insurance" (Arizona Unemployment law)

___ "Employee Rights Under The Fair Labor Standards Act" (federal Fair Labor Standards Act)

___ "NOTICE: Employee Polygraph Protection Act" (federal Employee Polygraph Protection Act)

___ "Your Rights Under USERRA" (federal Uniformed Services Employment and Reemployment Rights Act)

___ "Arizona Minimum Wage Act" (Arizona law)

___ "Smoke-Free Arizona, No Smoking" signage (Smoke-Free Arizona Act)

___ "We Participate in E-Verify" (Arizona law requiring E-Verify)

___ "You Have The Right To Work, Don't Let Anyone Take It Away" (Arizona law requiring E-Verify)

15 OR MORE EMPLOYEES

___ "Equal Employment Opportunity Is The Law" (federal Civil Rights Act of 1964)

AND

___ "EEO is the Law" Poster Supplement (federal Civil Rights Act of 1964)

AND

___ "Arizona Law Prohibits Discrimination In Employment" (Arizona law – AZ Civil Rights Act)

50 OR MORE EMPLOYEES

___ "Employee Rights and Responsibilities Under the Family and Medical Leave Act " (federal Family and Medical Leave Act)

___ Notices/Posters are located in each building/facility (for employees who work at multiple, separate buildings/facilities).

___ Notices/Posters are located on each floor (for employees who work in multiple-story buildings/facilities).

2. HR Policies and Practices + Your Organization's Employee Handbook/Manual

___ Each employee has a copy of the handbook/manual and has signed a receipt stating that he/she understands that he/she is to read the handbook and abide by the current policies.

____ The handbook/manual includes statements such as: "this handbook/manual is not a contract of employment", "this handbook/manual is subject to change at the discretion of the employer, with or without notice", "employment is at-will (for no specific duration)", and, "this list of actions for which you can be disciplined or terminated is not all inclusive".

3. Personnel Files and Recordkeeping

____ All records for an employee are kept in his/her personnel file, **except** I-9 forms, E-Verify authorizations, requests for FMLA leave, requests for reasonable accommodation (ADA) and/or FMLA leave.

____ There is a policy regarding employee access to their personnel files, making copies of file documents for employees, and how your organization will respond to court orders or subpoenas for documents.

____ There is a policy regarding FORMER employee access to their personnel files, making copies of file documents for FORMER employees, and how your organization will respond to court orders or subpoenas for documents.

4. Employment Practices, including EEO/AA

____ All applicants must complete and sign an Employment Application prior to being interviewed.

____ The Application for Employment form is reviewed periodically to ensure that it does not ask for or collect any potentially discriminatory information.

____ An EEO-1 Report (*organizations with 100+ employees*) is completed and submitted annually.

____ All managers and supervisors receive periodic training regarding legal/non-discriminatory interviewing techniques and questions and use structured interviews and use a list of prepared, job-related questions to interview applicants.

____ Offers of employment are made contingent upon the applicant: completing a form I-9 and providing acceptable documents to establish identify and employment eligibility; signing a Confidential/Proprietary Information Agreement form; providing copies of degrees/diplomas/ certificates, as appropriate; being accepted for bonding; taking a physical examination and being recommended for employment; and other such contingencies.

5. Reference Checking + Fair Credit Reporting Act (FCRA)

____ Managers and supervisors have been trained and receive periodic re-training regarding "negligent hiring".

____ References are sought from prior employers/supervisors before an offer of employment is made; a reference checklist form is used to document references.

____ Applicants are provided with a written "*Notice and Consent*", separate from the Employment Application form, and must sign the "*Notice and Consent*" before a "consumer report" is conducted.

____ If, as a result of a "consumer report", an applicant is not hired, the applicant is provided with an adverse-action notice and a copy of the "consumer report" and a copy of "*A Summary of Your Rights Under the Fair Credit Reporting Act*" (rev. 01/2005).

6. New Hires, including: New Hire Reporting Requirements, New Hire Orientation, the Immigration Reform and Control Act (forms I-9); and, the Arizona Legal Arizona Workers Act

____ All new hires receive a "disclosure" form that includes the name, address, and telephone number of the employer, as required by the Arizona Minimum Wage Act.

____ All new hires are reported to the AZ New Hire Reporting Center within 20 days of the hire date.

____ A New Employee Orientation Checklist is completed during orientation and signed by the employee and the supervisor when orientation is completed.

____ Each new hire completes Section 1 (Employee's Certification) of a form I-9 **on his/her first (1st) day of employment.**

____ Each new hire provides proof of identity and/or employment eligibility on or before the 3rd day of employment and Section 2 (Employer's Certification) of a form I-9 is completed on or before the 3rd day of employment.

____ A **Handbook for Employers** (M-274; Rev. 03/08/13) is available at all sites where forms I-9 are completed.

____ The documents used to prove identity and employment eligibility are NOT copied or attached to the I-9 form.

____ The employee's employment eligibility is confirmed using E-Verify.

____ A copy of the E-Verify certification is printed and attached to the form I-9.

7. The Americans With Disabilities Act (ADA)

____ All managers and supervisors have been trained and receive periodic re-training regarding how the ADA affects employment practices, particularly interviewing.

____ The Employment Application has been reviewed to ensure it does not inquire regarding a person's health or disability status or about whether the person has received worker's compensation or other disability benefits.

____ The results of any post-offer, pre-employment medical/physical exam are kept in a separate, confidential medical file.

8. Family and Medical Leave Act (FMLA) [*applies ONLY to employers with 50+ employees*]

____ Employees request FMLA leave on a form which must be completed, signed, and submitted before a decision to grant or deny FMLA leave is made.

____ A "Notice of Eligibility and Rights & Responsibilities" form (WH-381, rev. January 2009) is given to each employee who requests FMLA leave.

____ A "Designation Notice" (WH-382, rev. January 2009) is given to each employee who requests FMLA leave once a decision is made whether the employee is or is not eligible.

____ A completed and signed "Certification of Health Care Provider" form (form WH-380-E, rev. January 2009 OR WH-380-F, rev. January 2009) must be received before a decision to grant or deny the request for FMLA leave is made.

____ Employees who return to work from FMLA leave that was for their own serious illness are required to provide a "Release To Return To Work Certification" form (or similar document) signed by their Health Care Provider or treating physician.

____ Employees are required to integrate vacation time, or sick leave time, or other paid-time-off with unpaid FMLA leave, except when receiving disability or worker's compensation lost wages benefits.

9. Harassment: Sex/Gender, Race, Age, Religion, and/or other protected factors

____ A policy stating that harassment (on the basis of sex/gender, race, color, age, religion, and/or other protected factors), including the creation of a hostile work environment, is unwelcome and prohibited in the workplace has been created; it is included in the employee handbook/manual.

____ All managers and supervisors have been trained and receive periodic re-training regarding how to prevent unlawful harassment in the workplace.

____ Employees are trained regarding how to make a complaint of harassment; the employee handbook/ manual also contains this information.

____ There are several persons to whom a complaint can be made other than the employee's supervisor/ manager; at least one of them is a female supervisor/manager.

____ Periodically, management-by-walking-around is conducted to ensure there are no improper posters, signs, or cartoons in work areas and to allow employees to discuss any improper behaviors.

10. Performance Management

___ A current job description, including the Essential Functions of the job, has been provided to each employee for his/her job.

___ Managers and supervisors have been trained and receive periodic re-training regarding how to provide performance evaluation feedback on an on-going basis and how to conduct a periodic performance evaluation interview.

___ When performance is not meeting expectations, the manager/supervisor meets with the employee to discuss performance and obtains a written performance/behavior improvement plan from the employee regarding how he/she will improve his/her performance and/or behavior.

11. Discipline and Terminations

___ Standards of conduct (work rules) are listed in the employee handbook/manual.

___ All disciplinary actions are documented; the employee signs the discipline form; and, the employee receives a copy of the form.

___ All involuntary terminations (dismissals or firings) are reviewed by HR and/or upper management before being acted upon.

___ For terminated employees who do not receive their final paychecks at the time of termination, the final paycheck is mailed within 3 work days of the date of termination.

___ If an employee has not returned tools, equipment, or other company property, we deduct the value of the property from his/her final paycheck or hold the paycheck until the property is returned.

12. Fair Labor Standards Act (FLSA)

___ All job positions have been reviewed to determine whether the position is Exempt, or Non-Exempt, from the overtime provisions of the FLSA (as revised August 2004).

___ A 168 consecutive hour workweek (7 consecutive periods of 24 hours each) has been established for Non-Exempt employees.

___ All Non-Exempt jobs are paid either the federal or the AZ minimum wage, whichever is greater.

___ All Exempt jobs are paid a minimum of \$455/week, regardless of the number of hours scheduled to work or actually worked in a work week.

___ All employees in Non-Exempt job positions submit a signed record of hours worked (a time card/time sheet) in each workweek.

___ Employees in Exempt jobs are "docked" for partial day absences when they do not have accrued vacation or sick leave time.

13. COBRA & HIPAA

___ Each new employee (and spouse and/or dependents, if enrolled) receives an Initial COBRA Notice at the time of enrolling for medical benefits or when the benefits become effective.

___ A HIPAA Certificate of Coverage is automatically provided when a COBRA "qualifying event" has occurred.

___ As new hires enroll for group health insurance, a HIPAA Certificate of Coverage from the last employer is requested.

14. Drugs/Substances/Alcohol Testing

___ A written drugs/substances/alcohol testing policy (that contains all of the required elements identified in A.R.S. Title 23) has been created and has been distributed to employees.

Protocols have been established for:

- ___ collecting a urine specimen
 - ___ “shy-bladder syndrome”
 - ___ maintaining chain-of-custody to the testing lab
 - ___ the screening panel and methodology to be used for initial testing
 - ___ the confirmatory methodology if the initial test is non-negative (positive)
 - ___ reporting the results of the drugs/substances test
 - ___ maintaining chain-of-custody for specimens that test positive twice
 - ___ obtaining expert testimony from the testing lab, as needed
- ___ All non-negative (positive) test results are forwarded to a Medical Review Officer (MRO) who then contacts the applicant/employee to discuss whether the use of prescription drug/medicine can explain the positive test result.
- ___ Employees who use prescription medicines/drugs that are issued with a warning notice/label that the medicine/drug may cause drowsiness or that the employee should not operate equipment/ machinery are referred to the MRO for consultation.
- ___ Procedures for maintaining the confidentiality of an employee's drugs/substances/alcohol test, request for treatment, or related confidential information have been implemented.

15. OSHA, including Claims of On-The-Job Injury/Illness

- ___ An OSHA Form 301 is completed whenever an employee experiences an on-the-job illness, injury, or accident.
- ___ All on-the-job accidents, injuries, and illnesses are investigated to obtain complete data and to identify ways to prevent future such incidents.
- ___ All recordable injuries and illnesses are recorded on an OSHA Form 300 Log; the summary data from the previous year's Form 300 is transferred to an OSHA form 300A and is displayed in conspicuous locations from February 1 to April 1 of each year.
- ___ There are employees in all areas/departments and on all shifts who have been trained in first aid and CPR.

16. Hazard Communication Standard (HCS)

- ___ All hazardous chemicals used or stored in the workplace have been identified and are properly labeled.
- ___ A Written Hazard Communication Program has been created, has been communicated to employees, and is reviewed, at least annually, and updated, as necessary.
- ___ Material Safety Data Sheets (MSDS's) are available for each hazardous chemical and are located in each area in which the hazardous chemical is used or stored.
- ___ All new employees are trained regarding the hazardous chemicals they work with and all employees who transfer are trained regarding the hazardous chemicals used in their new department/area.
- ___ As employees are trained, they sign a document verifying the training; the originals of the training certification documents are kept in each employee's personnel file and copies are kept in a master HCS training file.

17. Smoke-Free Arizona Act

- ___ All entrances to each building have the required signage.
- ___ All employees have been trained about the Act, as required by the Act.
- ___ No ashtrays are available in any building.
- ___ Any designated smoking area outside a building is at least 20 feet away from an entrance.

NOTE: for every statement for which your answer was “F”, your organization is at-risk. See PART 7, which begins below, for further information about Risk Assessment and Risk Management.

PART 7: A Non-Exhaustive Self-Assessment for Risk

As previously stated, for every statement in **PART 6** for which your answer was “F”, your organization is at-risk. But, **PART 5** is a non-exhaustive list. Your organization can be at-risk even if all of your answers in **PART 6** were marked “T.”

The following is a list of statement that would be included in a RISK MANAGEMENT AUDIT of HR policies, procedures, and practices. Mark “T” or “F” for each of the statements below in order to conduct a non-exhaustive assessment of your organizations exposure to risk.

A. EMPLOYMENT, including EEO and AA and Prohibited Harassment

___ We use multiple recruiting sources to minimize the risk of “disparate impact.”

___ We conduct periodic training with supervisors/managers regarding how to interview to minimize the risk of discrimination.

___ We require supervisors/manager to use prepared questions in interviews to minimize the risk of discrimination.

___ We have provided supervisors/managers with a list of unlawful/discriminatory questions that are not to be used during interviews to minimize the risk of discrimination.

___ We use written job offers in which all the contingencies upon which the offer is based are listed in order to minimize the risk of detrimental reliance and/or wrongful discharge.

___ We conduct regular (at least annual) training of ALL employees with regard to our Prohibited Harassment, including Sexual Harassment policy, including how to report an allegation.

___ We conduct regular (at least annual) training for all supervisors/managers with regard to our Prohibited Harassment, including Sexual Harassment policy, including how to prevent such harassment.

B. ADA + ADAAMA COMPLIANCE

___ An ADA coordinator has been identified

___ Our Employment Application includes a statement about the availability of accommodation in the application and interviewing processes.

___ There is appropriate signage in the area in which applications are distributed and received regarding the availability of accommodation in the application and interviewing processes.

___ The area in which applications are distributed and received is accessible to the disabled.

___ Supervisors/Managers have been training regarding how interviewing is effected by the ADA, in order to minimize the risk of discrimination.

___ The essential functions of jobs been identified and incorporated into job descriptions or attached to each job description as a separate attachment.

C. "EMPLOYMENT ELIGIBILITY VERIFICATION"; (I-9) FORMS COMPLIANCE

___ We have a procedure producing forms that need to be presented for inspection and for purging and destroying forms that no longer have to be presented.

___ The employee(s) who complete Section 2 of the I-9 form on behalf of the employer has/have been trained regarding how to complete the section, what documents are acceptable for proof of identity, proof of employment eligibility, or both, and what to do if documents acceptable for Section 2 are not presented within the time limit.

D. E-VERIFY COMPLIANCE

___ We have a “designated agent” who conducts e-verify.

___ The employee who conducts e-verify has a copy of the E-Verify User Manual (June 2011).

E. HAZARD COMMUNICATION STANDARD (HCS) COMPLIANCE

We have hazardous chemicals/materials in the workplace; therefore:

___ We have a designated Safety Officer who is responsible for HCS compliance.

___ We have a Written Hazard Communication Program.

___ We train new hires, and transferred employees, who will work with or be exposed to hazardous chemicals/materials.

___ We document employee training under HCS by placing the original training certificate in the employee’s personnel file.

F. FAIR LABOR STANDARD ACT (WAGE & HOUR) COMPLIANCE

___ We have a job description for each job position and the FLSA status (Exempt or Non-Exempt) is listed on each job description.

___ We have identified the "work week" for every job or job class.

___ If Non-Exempt employees receive non-discretionary bonuses, we factor those bonuses into overtime payments for Non-Exempt employees.

NOTE: for every statement for which your answer was “F”, your organization is at-risk.

What can we do? What should we do?

1. Have a RISK MANAGEMENT AUDIT of your HR policies, procedures, and practices conducted to determine what, if any, compliance discrepancies exist. When compliance discrepancies exist, risk exists.

For information about such Audits, contact **HRHelp**.

2. Consider Employment Practices Liability (EPL) insurance to insure against financial loss from a discriminatory act, act of harassment, and/or act of non-compliance.

Employment practices liability (EPL) insurance, as a risk management tool.

The recent recession has resulted in a rise in employee lawsuits against their employers for such claims as age discrimination, sexual harassment, disability discrimination, racial discrimination, and retaliation – the latter being an up-and-coming growth industry for EPL lawyers.

While American firms were downsizing in 2010, the Equal Employment Opportunity Commission (EEOC) saw record 99,922 discrimination claims filed in the fiscal year ending September 30. It was the highest number of cases brought in the agency’s 45-year history.

Before a claimant can press a discrimination claim in federal court, he/she must file a charge of discrimination with the EEOC. But even if the charges wind up being ruled unfounded, EPL cases can be a drain on time and monetary resources for a small or mid-sized organization. The average tally for a discrimination case exceeded \$235,000, according to the EEOC.

What can EPL do for an organization?

Employers can purchase EPL insurance as a risk management tool for employee claims.

What Is EPL Insurance?

EPL insurance policies protect organizations from the financial costs incurred from employment-related lawsuits filed for a range of reasons, from wrongful termination to harassment to discrimination and so on. More than half of claims are filed against small organizations, according to insurer Munich RE. However, less than two percent (2%) of organizations with fewer than 50 employees purchase EPL insurance.

A recent Chubb Insurance survey found that 36 percent of private company executives understand the gravity of their exposure to EPL suits and 21 percent said they had an experience with an EPL suit in the last five years.

While every EPL policy is different, a company with \$1 million in sales and 50 employees can likely get a policy for about \$7,000 per year – \$10,000 if they also take out coverage protecting directors and officers in the event of liability lawsuits against them personally.

Leading Causes of EPL Claims

The leading charge filed in discrimination cases is an allegation of racial discrimination, at 36 percent of cases, according to EEOC figures from 2009. Gender-based discrimination was alleged in 30 percent of cases. Age-based claims made up 24 percent and allegations from the disabled tallied 23 percent. In many cases, multiple allegations are made.

One of the growing charges, according to the EEOC, is retaliation against employees for making discrimination claims, which can involve a job switch that the employee views as a demotion related to the initial claim.

If an employee goes to his/her supervisor and says he/she has been harassed by another employee, he/she can file a charge with the EEOC. Then if the organization decides to discharge the employee or cut back his/her hours, that is retaliation. Retaliation charges are more likely to succeed than the original charge of discrimination. The employer may prevail on the charge of discriminated, but lose on the retaliation claim for moving the complainant to a different job or office setting.

EPL policies often have a broad definition of actions that trigger the insurance, but usually the definitions include any written demands for monetary or non-monetary compensation, an administrative action or EEOC charge, a lawsuit or any type of formal statement that an employee – or ex-employee – has been harmed, experts say.

Protections Against EPL Lawsuits

In general, the more protections a small organization puts in place against EPL claims and the better internal policies and procedures that are implemented, the lower the organization's premiums will be for EPL coverage and the more likely the organization will be considered a candidate for coverage. It's essential that organizations have a written employee handbook with strong anti-harassment and anti-discrimination policies, but other efforts can also pay off.

Training managers/supervisors in HR procedures and policies is a necessity. Such training should include, but not be limited to, procedures for conducting disciplinary actions, procedures for discharging/firing, how to prevent unlawful harassment or discrimination, how to respond to unlawful harassment or discrimination, the expectations of managers/supervisors with regard to ADA and FMLA situations, and other such topics/issues.

An employer considering an EPL insurance policy should be asking certain questions to make sure the policy will protect them, such as what kind of claims will be covered and what kind won't and the policy limits and deductibles. Another issue is whether the policy allows your organization to choose the lawyer who will represent you in the case of a claim. Most policies specify that the insurance company gets to choose legal representation; if the employer has a preferred attorney for such matters, it may want to look for a policy that allows some choice in selecting the attorney that will represent it.

Employment Practices Liability Insurance – Buyer Beware

From the law firm of Quarles & Brady, with comments (hi-lited in **YELLOW**) by **HRHelp**

An employer who purchases employment practices liability insurance (“EPLI”) likely expects coverage for claims of unlawful employment practices. As one large employer recently found out the hard way, such coverage may be unavailable when it is most needed.

A federal trial court recently held that Cracker Barrel is not entitled to coverage under its EPLI policy in a large lawsuit brought by the U.S. Equal Employment Opportunity Commission (“EEOC”), because the plaintiff technically was not an employee as provided in the policy. The Cracker Barrel decision highlights that EPLI is not a panacea, and there are important factors that should be considered by employers in considering whether to purchase this insurance.

The Cracker Barrel Decision

In *Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, M.D. Tenn., No. 3: 07-cv-00303, a federal trial court in Tennessee held that the company could not collect \$2.7 million under its EPLI policies for the settlement of an EEOC discrimination lawsuit. **The court ruled that because the restaurant chain’s EPLI policies limited claims to proceedings brought by employees — and the EEOC, which sued the company, was not its employee — the claim was not covered.**

The case arose after 10 Cracker Barrel employees filed charges of race and/or sex discrimination with the EEOC and the EEOC filed a complaint against the company under Title VII of the 1964 Civil Rights Act. The company notified its insurer of the charges and later sent in a written notice of the complaint. After spending what it estimated to be at least \$700,000 defending itself, the company entered into a consent decree with the EEOC and settled the case. The consent decree required Cracker Barrel to place \$2 million in a settlement fund. **Cracker Barrel sought to recover the defense and settlement costs under its EPLI insurance policies.**

The district court granted the insurer’s motion for summary judgment. Quoting the policy language, the court observed that, “[a] claim under the policies is defined as “a civil, administrative or arbitration proceeding commenced by the service of a complaint or charge, which is brought by any past, present, or prospective “employee(s) of the ‘insured entity’ against any ‘insured’” for certain listed causes.

Cracker Barrel argued that this definition required only that the proceeding “evolved from” or be started “as a result of” a complaint or charge brought by the employee. However, the court ruled that the words “evolved from” or “as the result of” were not found in the definition. As a result, the court held that the insurers did not have a duty to indemnify Cracker Barrel for the settlement of the EEOC complaint.

The court recognized that the insurer still might have had a duty to defend this case. As the court observed, the duty to defend is broader than the duty to indemnify under the law. Nevertheless, the court reasoned that in this case, the issue is not one of the substance of the underlying allegations, but rather whether the form of the EEOC complaint fell within the policies’ definition of a claim. Since the court found that the complaint did not fall within the policies’ definition of a claim, the court ruled that the insurer had no duty to defend.

Should You Buy EPLI?

Most companies have insurance for comprehensive general liability (“CGL”) and insure against fire, theft, floods and other catastrophes. **These policies typically do not cover employment claims such as sexual harassment, age discrimination, wrongful termination, and defamation. Indeed, these policies often expressly exclude employment-related claims.**

As a result, some employers have seriously considered and ultimately purchased EPLI policies. Should your company do so? The answer is, of course, “it depends.” There are about 50 insurers offering EPLI policies, and there are significant differences among the coverage offered. This means that any employer — or its insurance broker — must shop carefully for the coverage desired at the right price.

Factors to Consider in Evaluating EPLI

Most EPLI insurers offer “claims-made” coverage. Under these policies, coverage occurs when the complaint or lawsuit is filed, not when the alleged wrongful action occurred. Thus, if you were to purchase a policy covering the 2011 policy period, coverage would be limited to complaints or lawsuits filed in 2011.

Most EPLI policies include defense costs (also known as legal fees) within the limit of liability for a covered loss. This is an important factor. For example, let’s assume the limit is \$100,000 per claim. If a former employee files an employment discrimination claim and the employer incurs \$50,000 in defense costs, the insurer will only pay another \$50,000 to settle the case or pay a judgment. After that, the employer in this example is on its own.

EPLI policies typically cover claims such as sexual harassment, discrimination, wrongful discharge, and retaliation and sometimes personal injury claims, such as defamation and invasion of privacy. However, **EPLI policies often expressly exclude intentional wrongdoing. This is significant because many employment claims, especially discrimination claims, involve allegations of intentional misconduct.** If a jury were to conclude that an employer intentionally discriminated against a former employee, the EPLI policy may not cover the employer for the loss. The good news is that many EPLI policies often pay defense costs until a jury makes that finding and sometimes during any appeal. In employment cases, defense costs can often exceed a plaintiff's actual damages. As a result, the duty to defend is highly valuable to the employer.

"Prior acts" (acts that occurred before the policy period or whether the claim was made during the policy period) are typically covered as long as the employer did not have prior knowledge of the alleged wrongful acts. In other words, just as you cannot buy fire insurance for a building while it is burning, you also cannot insure against a "known" employment loss.

In purchasing EPLI coverage, an employer also needs to consider how much control it will retain over the defense of a claim where the insurer has accepted coverage. Can the employer select its own defense counsel? If the employer has counsel it trusts and who knows its employment practices, it may not want the insurer to appoint its own chosen counsel.

[NOTE: HRHelp has clients who were defended by law firms selected by their EPLI insurance carriers. The insurance carrier will inform its policy holder that the carrier will select a law firm from among those law firms on its "list" – my experience is that the law firms on the "list" are similar to health care providers on a "preferred provider list" – that is, the law firms on the "list" are willing to accept cases at the hourly rate that the carrier will pay. Policy holders will be told that, if it wants to use a law firm that it prefers, the insurance carrier will pay that firm the established amount and the policy holder will have to pay the difference between the billing rate of the firm it prefers and the rate paid by the insurance carrier. (Similar to "in-network" and "out-of-network" reimbursements by group health insurance carriers.)

So, it is in every employer's better interest to know what, if any, control it will have in selecting the law firm, to know the rate that will be paid, to know whether that rate will allow the employer to select its own law firm or be defended by a law firm on the "list".]

In addition, the employer needs to consider how much control it will have over any settlement. The insurer's and employer's interests do not always coincide in this respect. While settlement may make economic sense to the carrier in the context of a particular insurance claim, **an employer may have business reasons that make settlement undesirable.**

[NOTE: I have clients who were TOLD that their case would be settled, rather than defended, because the carrier said that it would be less expensive to do so. The carrier was not interested in any "principle" behind my client's desire to defend against the claim.

HRHelp was involved in a case where the attorney assigned by the carrier, in response to a demand letter received from an attorney for a former employee, advised the employer to settle. The attorney did not inform the employer that the lawsuit threatened in the demand letter could not be filed unless and until the former employee exhausted her administrative remedies – unless and until the employee filed a Charge of Discrimination with the EEOC or ACRD and had received a "Right to Sue" notice.

From my perspective, the carrier was eager to have this case settled without incurring much cost. Any settlement with the former employee would be paid by the employer, not the carrier. So, it appeared that the carrier, through the attorney who works for the carrier, not the employer, was trying to "steer" the employer into settling versus defending.]

In short, employers have to assess whether EPLI coverage makes sense.

[NOTE: in other words, "caveat emptor" – buyer beware. Before purchasing such coverage, the wise employer will ask a lot of questions about what is or is not covered and how the employer would be defended should a demand letter or Notice of Charge of Discrimination be received.]

As the Cracker Barrel decision demonstrates, EPLI policies are not a cure-all, but they can provide employers with some level of protection for some employment claims.

Of course, **the best protection of all is to have good policies and practices in place, stay familiar about employment matters, and consult with employment counsel (or HRHelp) early and often when potential issues arise. Here again, a proactive, preventive approach will go far in limiting costs, exposure and liability.**

[NOTE: The “best” proactive, preventative approach is to periodically conduct an HR Audit – a complete audit of HR policies and practices and documentation/recordkeeping – to determine the risk, if any, to which the employer is exposed.]

For further information about EPLI, contact your insurance broker/agent.

PART 8: FAQ’s regarding HR and Employment Law Compliance Issues

1. When are I-9 (Employment Eligibility Verification) forms supposed to be completed?

EVERY new hire, by law, must complete Section 1 of a form I-9 on his/her FIRST day of employment.

To obtain the current version of the form I-9, go to: <http://www.uscis.gov/files/form/i-9.pdf>

The Employer certification section (Section 2) can be completed on or before the 3rd business day of employment (not including the first day on the job).

The penalty for discrepant I-9 forms (i.e., forms that contain recordkeeping errors) ranges from \$110 to \$1100 PER FORM. Most employers have forms that are incorrectly completed, incomplete, and/or lacking required data.

The penalty for knowingly hiring an illegal alien starts at \$10,000 with a minimum 6 month jail sentence.

Additional information for employers is available in the **Handbook for Employers** (rev. 03/08/13), go to: <http://www.uscis.gov/files/form/m-274.pdf>

2. What is E-Verify?

The Legal Arizona Workers Act requires all employers in Arizona to use E-Verify, in addition to the federal I-9 process, to verify that new hires have employment eligibility (i.e., have the legal right to work in the U.S.).

The consequences for non-compliance begin with a 10 day suspension of the businesses right to operate in Arizona.

To obtain information about E-Verify or to enroll in the program, go to: http://www.dhs.gov/files/programs/gc_1185221678150.shtm

3. Do all my employees have to be age 18 or older?

No. However, the state of Arizona has youth employment (child labor) laws (A.R.S. 23-230 through 23-242) that restrict the hours an underage (under 18) child can work. Also, the federal and Arizona Occupational Safety and Health Acts (OSHA) restrict the kinds of jobs and work activities that an underage child can perform.

No one under 14 can be employed, with a few exceptions. No one under 16 may be employed before 6 a.m. or after 9:30 p.m., except newspaper carriers; employees under 16 cannot work more than 3 hours per day or 18 hours per week while school is in session if they are enrolled in school OR more than 8 hours per day or 40 hours per week if they are not enrolled in school. No one under 16 may be employed in solicitation sales or door-to-door deliveries after 7 p.m.

4. Can job offers be made verbally? Or, should they be in writing?

While offers can be made verbally, it is better to make them via an offer letter. The offer letter should state the agreed upon job title and starting wage/salary. The letter should include a statement that it is contingent upon ALL

of the contingencies listed in the letter. Thus, if the applicant signs the offer letter, he/she has agreed to accept the contingencies.

Contingencies upon which an offer is based and that should/could be listed include, but are not limited to, that:

- the employee provide proof of identity and proof of employment eligibility and properly complete a form I-9 on his/her first day of employment; and, meet E-Verify requirements;
- the employee sign on his/her first day of employment a Confidential Information Agreement; if this is a contingency, a copy of the Agreement should be included with the offer letter so the applicant can read/review the Agreement before being required to sign;
- the employee provide a copy of his/her current driver's license and MVD report, if he/she will be driving on company business; and/or
- other such contingencies.

The offer letter should include language that the applicant, if he/she signs the letter, attests that he/she is not under a "covenant not to compete agreement" with a former employer and that he/she will not bring materials, files, documents, or other information from a previous employer that would be in violation of a "Confidential Information Agreement" with a former employer.

Also, the offer letter should identify the process by which a signed copy is presented to the employer and the date and deadline at which the offer, if not accepted, is void.

5. What questions can or cannot be asked during an employment interview?

Questions that are considered to be discriminatory (the answers to the questions could result in discrimination against the applicant) are unlawful and should not be asked.

Questions that are job-related and that will allow you to assess how well the person could perform the job are lawful and may be asked.

See **EXHIBIT H** for further information.

6. What is "negligent hiring"?

When an employer hires someone into a position where it is foreseeable that the employee could do harm to the public and the employer does not complete an adequate background check and the employee does do harm to the public, the employer can be liable under the legal theory of "negligent hiring."

For instance, if a company has employees who install appliances, who deliver furniture, or who otherwise are in a customer's home and the employee commits an act of violence toward the homeowner, or steals, or rapes, and the company did not conduct a thorough background check, and the employee has a history of such acts, the employee probably will face a claim of "negligent hiring."

The most common risk for employers is allowing employees to drive on company business without knowing the employee's driving record. If an employee drives on company business and his/her driving record shows a history of speeding, moving violations, running stop signs or red lights, and the employee is involved in an accident while driving on company business, the business will probably face a claim of "negligent hiring." See **EXHIBIT I** for further information.

7. Does a payroll service (ADP, Paychex, other) automatically report new hires to the Arizona New Hire Reporting Center?

Typically, such payroll services only provide the information on your behalf if you have enrolled for that service and are paying a fee for that service. Since the liability is on the employer, not the payroll service, you should verify with your payroll service that it is reporting new hires. If it is not, you can pay for that service or report new hires yourself.

8. Can we test employees for prohibited/illegal drugs or substances? Applicants?

Yes. Arizona has a drugs/substances/alcohol statute that is favorable toward an employer, provided the employer has a written drugs/substances/alcohol testing program that meets the statutes. Having a written policy that meets the Arizona statutes allows an employer to: terminate an employee who refuses to provide a specimen for testing or who tests positive to receive a discount on worker's compensation insurance costs.

When a drugs/substances/alcohol testing policy that meets the Arizona statutes is in place, employees who refuse to consent to provide a specimen or who test positive will be disqualified from receiving unemployment insurance benefits.

NOTE: In the fall of 2010, Proposition 203, the Arizona Medical Marijuana Act (AMMA), was approved by voters. There are provisions in the AMMA that prohibit employment discrimination against a person (applicant or employee) who possesses a Medical Marijuana Card issued by the AZ Dept. of Health Services. For more information about the AMMA, please contact [HRHelp](#).

For additional information about drugs/substances testing, see **EXHIBIT F**.

9. Who is an employee and who is an independent contractor and why does it make a difference?

The Internal Revenue Service (IRS) has begun a very serious effort to determine whether workers declared as independent contractors are instead employees. Employers who have paid workers as independent contractors (gross wages without withholding for taxes) in order to avoid the employer's FICA contribution and federal Unemployment Tax are being assessed the amount of the FICA and unemployment taxes that should have been paid, **plus** interest and penalties, by the IRS.

Read **EXHIBIT B** for further information. Your answers to the questions in that document will help you determine whether a worker is an employee or an independent contractor.

If, after answering the questions, you are still uncertain whether a worker is an employee or an independent contractor, you may want to obtain a form SS-8 from the IRS or contact an employment law attorney for further assistance.

For additional information about who the IRS considers to be an employee or an independent contractor, go to: <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>.

Also, see Publication 15, (Circular E), *Employer's Tax Guide*, for more information; go to: <http://www.irs.gov/pub/irs-pdf/p15.pdf>. Section 2 is entitled: "Who Are Employees?"

10. How often and when do I have to pay employees?

The Arizona Wage Claims Statute (A.R.S. 23-351) states that employees must be paid at least twice monthly; so, you can pay weekly, bi-weekly, or semi-monthly. You can withhold up to 5 days of salary/ wages; meaning that the pay day can be up to a week (5 working days) following the end of the payroll period.

Employees who quit or resign can be paid on the normal pay day following their last day of employment; you have the option of paying sooner.

Employees who are discharged (involuntary termination) must be paid within seven (7) business days or on the normal pay day following discharge, whichever is sooner.

You must withhold (payroll deduct) for certain taxes (Social Security, Medicare, federal withholding, and AZ withholding). You may make other payroll deductions, such as for health insurance, uniforms, purchases of company products, etc., only when the employee has provided written authorization to do so.

You must withhold for garnishments, tax liens, or other court ordered deductions. You cannot withhold from payroll any amounts for tools, keys, equipment, or other lost or non- returned items, unless you have a signed document from the employee authorizing such a deduction.

With regard to garnishments, you should obtain *Fact Sheet #30: The Federal Wage Garnishment Law, Consumer Credit Protection Act's Title 3 (CCPA)*; go to: <http://www.dol.gov/esa/whd/regs/compliance/whdfs30.pdf>

11. What is the difference between hourly-paid versus salary-paid employees? Between Exempt and Non-Exempt employees?

The Fair Labor Standards Act (FLSA) defines employees as either exempt from the overtime payment provisions of the Act or non-exempt from the provisions of the Act. Non-exempt employees can be paid either hourly or by salary.

NOT ALL EMPLOYEES PAID ON A SALARY BASIS ARE EXEMPT; JUST BECAUSE AN EMPLOYEE RECEIVES A SALARY DOES NOT MAKE HIS/HER JOB POSITION EXEMPT FROM OVERTIME.

To be exempt, jobs also must meet the three (3) tests established by the Dept. of Labor:

- a fixed salary test; **AND**,
- a salary level test; **AND**,
- a job duties test.

Exempt employees are those who meet the FLSA fixed salary test, the salary test, **AND** the job duties test for one of the following categories:

- Professionals,
- Outside Sales Persons,
- Executives, or
- Administrative.

NOTE; Many job positions that are treated as Exempt (because they meet the fixed salary test and the salary level test) are NOT exempt because they fail the Job Duties Test.

Exempt employees do not have to be paid overtime for hours worked that exceed 40 hours in a workweek.

ALL EMPLOYEES IN NON-EXEMPT JOBS MUST BE PAID OVERTIME FOR THEIR HOURS WORKED THAT EXCEED 40 HOURS IN A WORKWEEK, WHETHER THEY ARE REGULARLY PAID BY THE HOUR OR BY SALARY.

The Act requires employers to establish a consecutive 168 hour period (7 days x 24 hours/day) as a workweek. The workweek may begin on any day and at any time of the day. (Employers often start the workweek at 12:01 a.m. each Monday and end the workweek at 12 midnight the following Sunday.) Non-exempt employees must be paid overtime for all hours worked over 40 in the workweek. For hourly employees, payment must be at least 1½ their regular hour rate for overtime hours. Non-exempt salaried employees must, in addition to their regular salary, be paid at least ½ times their hourly equivalent rate for overtime hours.

Payment for overtime must be made with the paycheck for the payroll period in which the overtime was worked.

COMP TIME (COMPENSATORY TIME OFF) CANNOT BE PROVIDED TO NON-EXEMPT EMPLOYEES IN LIEU OF PAYMENT FOR OVERTIME. AN EMPLOYER CANNOT REDUCE THE NUMBER OF HOURS AN EMPLOYEE WORKS IN A SUBSEQUENT WORKWEEK TO "make-up" FOR OVERTIME WORKED IN A PREVIOUS WORKWEEK. E.g., if Joe works 50 hours in workweek A and 30

hours in workweek B, he has to be paid overtime for the 10 hours of overtime in workweek A even though he is only paid for the 30 hours worked in workweek B; if the payroll period covered workweeks A + B, Joe would be paid the equivalent of 85 hours: 40 + (10 x 1.5 = 15) + 30. It would be a violation of the FLSA to only pay Joe a combined 80 (50 + 30) hours in a payroll period that covered weeks A + B.

The DOL implemented regulations that became effective on August 23, 2004. The minimum salary level for an employee to be EXEMPT has increased to \$455/week, regardless of the number of hours the Exempt employee works.

EXAMPLE: an employee is hired or reassigned to a job that only works 20 hours per week and the job normally pays \$807.69/week (\$42,000 annually for a full-time, 40 hour/week employee). The now part-time employee is paid a pro-rated amount \$403.85 (50% or 20/40 times \$807.69). The job does NOT meet the

\$455/week minimum salary level. Thus, the Exempt job becomes a Non-Exempt job unless the employee is paid a salary of at least \$455/week.

For further information, go to: <http://www.dol.gov/whd/fact-sheets-index.htm> and read the Fact Sheets.

A number of free publications regarding the FLSA are available from the Wage and Hour Division, U.S. Dept. of Labor; go to: <http://www.osha.gov/pls/epub/wageindex.list>.

Questions regarding who is an exempt employee or a non-exempt employee, definitions of hours worked or not worked for calculating overtime, record keeping requirements, etc. will be answered by the Wage and Hour Division publications or by calling them.

12. Can employees agree to be treated as Exempt? Our employees consider themselves "professionals" and don't want to be treated as hourly workers. If our employees agree to it, can we still treat them as "Exempt" even if they don't meet all of the requirements under the FLSA or state law?

In a word, NO. This question comes up more often than you might think. In some cases, particular industries have developed a practice of treating certain categories of employees as "*salaried*" and assuming that they are not exempt. In others, employees would simply rather be "*salaried*" or "*exempt*" because this suggests a higher status than an "*hourly*" position, or because they prefer not to have to track their time.

Unfortunately for employers, an employee's choice generally had nothing to do with whether or not the employee can legitimately be classified as "*exempt*" from overtime requirements under state and federal law. With very few exceptions, the rights provided to employees by the Fair Labor Standards Act (FLSA) and equivalent state laws cannot be waived or modified by an agreement with the employee. [NOTE: if there were such an "agreement" and an employee filed a wage claim for unpaid overtime under the FLSA, the DOL would ignore the "agreement" since it would be illegal and therefore not binding. Thus, the employer (per the reality that "no good deed goes unpunished") that "agreed" to treat the employees as exempt would be liable for violating the FLSA and owe back wages.]

So how can employers manage employee expectations without running afoul of the law?

First, there is nothing in the Fair Labor Standards Act that precludes employers from paying a non-exempt employee a "salary." The employee must still receive extra compensation for any hours in excess of the work time covered by the salary, and must receive 1-1/2 times the "regular rate of pay" for any hours worked in excess of 40 hours in a single workweek. However, if the employee works 40 or fewer hours in a single week and the salary is at least equal to the minimum wage for all hours worked, there is nothing wrong with paying a flat salary.

Unfortunately, this still means that you need to keep a detailed record of each employee's daily work hours so that you can determine when overtime is owed. While there is no way around this, there are a number of relatively painless timekeeping systems on the market.

Alternatively, many employers practice "payroll by exception," in which employees who work on a known schedule report only deviations from their schedule, rather than "clocking in" and "clocking out" at the start and end of each shift. Such a system is permissible if it results in an accurate record of time. However, such systems require close attention by supervisors and management to ensure that employees are accurately reporting all deviations from their schedules. For that reason, a system in which employees affirmatively record their actual hours on a daily basis is generally preferable.

13. How important is it that a non-exempt employee signs his/her time sheet?

VERY. When a non-exempt employee signs that the time sheet is accurate (he/she has not worked fewer hours than recorded and not worked more hours than recorded), the company is protected.

If the employee were to file a claim with the Wage & Hour Division of the Dept. of Labor that he/she had not been paid overtime, the signature would allow the company to refute the employee's claim that he/she worked more hours than recorded.

If the company learned and had proof that the employee had worked fewer hours than recorded, the signature would be proof of the employee's falsification of the time sheet. Then, the employee could be disciplined or discharged

and the employer would have the signed time sheet, along with other document of the false record, to defend any claim.

14. Do I have to provide employees Break Periods and/or Meal Periods?

Neither the federal government, nor the state of Arizona, has statutes regarding employers providing meal and/or break periods, with one exception; see the FAQ that follows regarding Lactation-Breaks. Therefore, each employer can set its own policy about meal and/or break periods.

A meal period for employees in Exempt jobs is not an employment law issue. Since Exempt employees are paid a fixed salary regardless of the number of hours worked in a workweek, the length of a meal period of an Exempt employee is not an issue under the Fair Labor Standards Act (FLSA). An overly long lunch/meal period by an Exempt employee may be a discipline issue for the employer; but, it is not a FLSA issue.

A meal period for employees in a Non-Exempt job IS an issue under the FLSA. In order for a meal period to be unpaid (which is what most employers want), the meal period has to meet guidelines of the FLSA. The following is from the FLSA and states the conditions that have to be met for a meal period to be unpaid.

29 CFR 785.19 - Meal.

Section Number: 785.19

Section Name: Meal.

(a) Bona fide meal periods. Bona fide meal periods are not work time. Bona fide meal periods do not include coffee breaks or time for snacks. These are rest periods.

The employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions.

The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating. For example, an office employee who is required to eat at his desk or a factory worker who is required to be at his machine is working while eating.

(b) It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.

So, allowing (not requiring, but merely allowing) a non-exempt employee to sit at his/her desk or work station during a “meal period” could result in the “meal period” being time worked, for purposes of the FLSA. And that work time would have to be counted when calculating overtime, if the employee performed ANY work during that “meal period.” The employee is “not relieved” when he/she could be just answering the employer’s phone or doing some job/work-related research on the internet or answering questions from customers or co-workers. Such activities would be ANY work under the FLSA definition.

15. Do I have to provide a Lactation-Break to employees who are nursing?

Yes. The FLSA was amended to require employers to provide a lactation-break to any employee who is nursing. For employers with fewer than 50 employees and for whom providing such a break would create an “undue hardship”, lactation breaks are not required.

16. Do I have to provide insurance coverage to all of my employees?

All employees must be provided worker's compensation coverage, paid in full by the employer, according to the Arizona Worker's Compensation Law. The Industrial Commission requires all employers who have employees to post two notices: "*Notice to Employees RE: Arizona's Worker's Compensation Law*"; AND, "*Work Exposure to Bodily Fluids*." See **PART 3, Notices and Posters** for information about how to obtain each poster.

Medical insurance, per the Affordable Care Act (ACA) has to be provided to employees who work at least 30 hours/week on a regular basis or the employer is subject to fines. For additional information about the ACA, see **EXHIBIT J** or contact **HRHelp** or your insurance agent/broker.

Life, dental, vision, disability, or other similar types of insurance are NOT required by law at this time.

General liability, vehicle liability, and others types of insurance coverage for one or more employees may be a wise decision, but are not necessarily required.

17. What is “Unlawful or Prohibited Harassment”?

The EEOC’s guidelines regarding prohibited harassment state that ALL forms of harassment will be subject to its guidelines: sexual harassment AND/OR harassment based on the person’s race, gender, age, color, national origin, disability, religion.

If a tangible employment action occurs against an applicant or an employee, the employer will ALWAYS LIABLE; the employer cannot present an “affirmative defense.”

A tangible employment action against an applicant or employee is an adverse employment-related decision toward the person. Such actions could include: not hiring; unwelcome transfer; disciplinary actions; discharge, etc.

The components of an affirmative defense are that:

- the business has and enforces a policy against harassment; and,
- the victim failed to use the complaint process provided in the policy.

18. What do I need to know about OSHA?

Effective January 1, 2002, OSHA requires that: each recordable on-the-job injury/illness must be reported via a form 301; the annual recordkeeping of recordable injuries/illnesses to be kept on a form 300; and, the annual summary information of recordable injuries/illnesses for the previous calendar year (from the form 300) be displayed on a form 300A from February 1 – April 1.

To obtain the booklet regarding recordkeeping requirements and which includes the OSHA forms for recordkeeping, go to: <http://www.osha.gov/recordkeeping/new-osh300form1-1-04.pdf>

19. What do I need to know about the OSHA Hazard Communication Standard?

If your organization is required to meet the requirements of the OSHA Hazard Communication Standard (HCS), you should be aware of the following. The links below will take you to useful information.

OSHA Issues Final HazCom Rule

OSHA has released a [final rule](#) that updates its Hazard Communication Standard.

According to OSHA, the new standard “covers over 43 million workers who produce or handle hazardous chemicals in more than five million workplaces across the country.” The changes are expected to prevent more than 500 injuries and 40 fatalities each year.

OSHA released some handy tools along with the new rule, including a [Fact Sheet](#) and [Quick Cards](#).

What Changed?

Here are the major changes:

- **Hazard Classification**: Chemical manufacturers and importers are required to determine the hazards of chemicals they produce or import. Classifications provide specific criteria to address health and physical hazards as well as classification of chemical mixtures.
- **Labels**: Chemical manufacturers and importers must provide a label that includes a signal word, pictogram, hazard statement and precautionary statement for each hazard class and category.
- **Safety Data Sheets**: The new format includes 16 specific sections to ensure consistency in presentation of protection info.

What Do I Need To Do And When?

Full compliance with the rule is required by June 1, 2015, with some exceptions spelled out in the Fact Sheet.

Other deadlines:

- **Employers: Train employees on the new label elements and safety data sheet format by December 1, 2013.** Update alternative workplace labeling and HazCom program as necessary and provide additional employee training for newly identified physical or health hazards by June 1, 2016.
- **Chemical Users:** Continue to update safety data sheets when new ones become available, provide training on the new label elements and update HazCom programs if new hazards are identified.

20. Must employees received accrued/earned vacation pay when they quit, resign, or are fired.

Yes. In *Schade v. Dietrich*, the Arizona Supreme Court ruled that vacation pay is “wages.” And, the Arizona Revised Statutes (ARS Title 23, Chapter 2, Article 7, Payment of Wages) requires the payment of “wages” on the next regular payday (if the person quits or resigns) or within 3 business days (if the person is discharged).

To not pay vacation pay could result in a penalty equal to three (3) times the amount owed to the employee.

21. Are all employees eligible for (non-Military) FMLA leave?

No. To be eligible for (non-Military) FMLA leave, an employee must work for a business that has 50+ employees.

In addition, the employee must have worked:

- for the employer at least 12 months, even if not consecutively; **AND**,
- at least 1250 hours during the 12 months, rolling backward from the date that FMLA leave, if granted, would begin; **AND**,
- at a site/facility where within a 75 mile distance there are 50+ employees.

22. If an employee is on FMLA leave and cannot return to work on the date he/she is scheduled to return to work, can I just fire/discharge him/her?

Maybe or maybe not; it depends. Because of the ADAAA, discharging an employee who is not able to return to work on the date he/she was scheduled to return to work may be problematic (and unlawful). While providing an indefinite unpaid leave of absence beyond FMLA leave is not a reasonable accommodation, the EEOC has taken the position that additional unpaid leave of absence may be a reasonable accommodation under the ADAAA.

23. What’s the difference between a “no-fault” attendance policy and a policy that allows for “excused”/”unexcused” absences?

A “no-fault” attendance policy states that, if you are absent, the reason doesn’t matter; i.e., you are either here or not here and the reason is not at issue.

Attendance policies that allow for “excused” or “unexcused” absences allows a supervisor/manager to count an “unexcused” absence as a violation of the attendance policy and to forgive or not count an “excused” absence as a violation of the attendance policy.

Policies that allow for “excused” versus “unexcused” absences frequently result in claims of discrimination because what one supervisor will “excuse” another will not. Thus inconsistent treatment occurs. Employees who are in protected classes (based on age, color, religion, gender, etc.) may have the perception of discrimination – my absence was “unexcused”, but a person not in a protected class was “excused” by his/ her supervisor/manager. At the minimum, such perceptions of unequal treatment create tension in the workplace; at the worse, such perceptions lead to charges of discrimination.

24. If an employee is absent, can we require a “doctor’s note/slip/statement” in order to allow the employee to return to work and/or to determine “excused” or “unexcused” under our attendance policy?

Requiring such “notes” in order to determine “excused or unexcused” is problematic. Typically there are no guidelines as to what constitutes a “doctor’s note” or what information is needed in the note. Asking for medical information, in an uncontrolled manner and without the necessary GINA notice, can result in violations of the ADA, GINA, or both.

If your organization, per the employee manual/handbook and/or per actual practice, requires an employee to present a “doctor’s note’s/slip/statement” in order to return to work and/or to determine “excused” or “unexcused”, you should consider ending that practice.

There is a process/way by which information can be obtained legally; the process/way includes limiting the information requested to only information about: (1) can the employee, with or without restrictions/ limitations, perform the essential functions of his/her job; and, (2) does the employee pose a “direct threat” (language in the ADA) to him/herself or to others.

25. We receive mailings about ALL-IN-ONE federal and state posters. Should we purchase those?

The advantages of such posters are that they are laminated and require less wall space than the space required of the individual posters.

One disadvantage are that you are paying for notices/posters that can be obtained for free from the appropriate state or federal agency. Another is that the workers compensation insurance notice will not include the name and address of your workers compensation insurance carrier or the policy number; all of that information is required, by law, to be on the notice/poster.

The major disadvantage of purchasing such posters is the risk of having to comply with a law with which your business would otherwise not be required to comply. For instance, the ALL-IN-ONE, 5-in-1, and 6-in-1 posters include the FMLA poster.

If your business is under 50 employees, but posts the notice, it will have accepted responsibility to comply with FMLA since it notified employees of their rights to FMLA . . . Ooops!

It is recommended that you review the required notices and posters, by threshold numbers of employees (see **PART 4**), and post only those you are required to display.

26. If employees pay for the cost of disability insurance, instead of the company paying the premium, the benefit is not taxed to the employee. Can we require every employee to sign up for disability insurance and deduct the premium from payroll?

No. If the employee pays all or part of a premium, he/she may not be required to sign up for the benefit. Only when the employer pays the entire cost is it possible to require every employee to sign up for disability insurance.

HRHelp periodically creates and sends HR Alerts via email regarding employment law issues. Often the HR Alerts are in response to questions, like the ones above, about compliance with the laws. If you wish to be on the distribution list, send an email to: hrhelp@cox.net. In the Subject line, enter: **Subscribe**.

A: Why Small and Medium-Sized Organizations *Really Do* Need An HR Function

AN EXCERPT, with comments added by HRHelp

SHRM Information Center

SHRM WHITE PAPER

WHY SMALL AND MEDIUM-SIZED ORGANIZATIONS *REALLY DO* NEED AN HR FUNCTION

By Patricia A. Mathews and Phyllis G. Hartman, SPHR

Introduction

Small (20-100 employees) to medium-sized (101-500 employees) organizations do need an HR function. Statistics related to the effective management and continued growth of an organization support this need. Without professional HR advice from an internal HR professional or an external HR consultant, companies often make costly mistakes that could have been prevented.

Even when legal issues don't arise, fairly common employment-related mistakes result in costs to the organization in terms of lost productivity, efficiency, effectiveness, sales and revenues, and decreased profitability.

COMMON HR MISTAKES SMALLER ORGANIZATIONS MAKE

♦ *Lack of Knowledge of Employment Laws*

Companies with as few as 14 employees are subject to 15 federal labor laws, not to mention state and local laws. An organization that grows to 50 employees can be covered by 20 federal labor laws! Small employers may believe that most laws only pertain to larger organizations, or they may simply be unaware of current employment law requirements since no one in the organization is actually responsible for assuring legal compliance. For example, many owners of small organizations are not aware of the requirement that I-9 forms be completed by all new hires.

Employment laws are often difficult to understand or interpret; they are subject to frequent change. They can vary from state to state, and new laws appear on a regular basis. Even the best-trained HR professionals are challenged to keep up with changes in employment law.

♦ *Failure to Understand Employment-at-Will*

Many believe that they can fire "at will." After all, it's their business and they have control over who does and who doesn't work there. Unfortunately, case law doesn't necessarily work in their favor, and the Equal Employment Opportunity Commission (EEOC) may call to advise them that an ex-employee has filed a complaint alleging wrongful termination based on case laws that override employment-at-will. [The federal Civil Rights Act, the AZ Civil Rights Act, the Americans With Disabilities Act (ADA), the Age

Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and most other employment laws override employment at-will.]

To make matters worse, smaller organizations typically do not have the documentation needed to support a termination decision, fail to have a documented termination process in place or fail to document performance or behavior feedback showing that an employee was given an opportunity to improve.

♦ ***Designating the Initial Days of Employment as a Probationary Period***

Some still use the term “probationary period” for the initial 30, 90 or more days of employment. This can cause problems when that “really good” new hire turns out to be not so great and the company terminates him or her. By identifying the first 90 days as a probationary period, the company has indicated that the new hire is officially “off probation” as of day 91. The business now must show cause in order to terminate.

["Introductory Period", "Get Acquainted Period", or other such titles still mean "Probationary Period."]

Since small companies may not be adept at evaluating new hires, they delay taking termination action until day 88, even though they knew the new hire was not working out by day 45. This can create legal liability for them if a complaint of wrongful termination is filed. New hires need to know what is expected and must be kept under observation so that they receive timely feedback on how well they are fulfilling these expectations.

Example: A small manufacturing company had a large production order to complete for a major client, and it delayed terminating five unacceptable new hires. Though the company believed it needed the “warm bodies” from a staffing perspective, the poor performers were actually *costing it money* in terms of poor customer service and losses in product quality. They were also having a negative impact on the morale of the employees who were “carrying” the new hires.

♦ ***Using Another Organization’s Employee Handbook***

Writing an employee handbook is a difficult task, and paying to have one written creates additional cost. Therefore, when small business owners identify the need to have written rules and expectations or when supervisors need a tool to “back them up” when enforcing policies and procedures, they may “borrow” an employee handbook used by another organization. The “borrowed” handbook is then revised and distributed.

The small business owner may borrow from an organization that is in a very different business, or is significantly larger, or is subject to unique regulatory controls. Perhaps the “borrowed” handbook was originally “borrowed” from another organization and may be out of date or not in compliance with current employment law. **[This is something I see quite frequently ... “borrowed” handbooks that, at best, do not meet the needs of the organization and, at worst, are not in compliance with the laws with which the organization must comply.]**

Sometimes policies and procedures may be difficult to administer, so supervisors either ignore or administer them on a haphazard basis. And employees, perceiving inequitable treatment, may take legal action or even undertake union organizing efforts.

Often there are frequent policy revisions or changes, causing confusion among employees. Employees may not be required to sign an acknowledgment and receipt for the handbook. One former employee sued his small financial services organization for wrongful termination citing that he never received a copy of the current employee handbook or the revised policy upon which his termination was based.

♦ ***Poor Documentation Practices***

Effective documentation is critical to the employment process. Many employment activities can be the basis for a discrimination charge – from when an employee is interviewed and hired to when the employee is terminated. To be effective, documentation must be accurate, consistent, complete and evaluated.

Lack of documentation, followed by incomplete or inconsistent documentation and poorly worded documentation, can create liability for the organization. **[One client, in order to obtain/collect the documentation required to refute a claim of age discrimination (since there were only 5 pieces of paper in the personnel file of a 23 year employee) paid \$14,000 in consulting fees. They “won” the claim; but, doing so was not cost-effective.]** If there is no formal process for documentation, personnel files may contain information on employee behavior or performance issues that have never been shared with the affected employees. Files may contain only commendation memos or recognition for achievements. Supervisors may write notes about poor performance or behavior and, instead of sharing the information with the struggling employee, keep the notes in a private file to use as grounds for termination.

Example: A small printing services company wanted to terminate an employee with two years of service for some abrasive behavior issues. The supervisor had occasionally mentioned some of the issues to the employee, but incidents had not been documented. The employee’s personnel file had two memos commending her for her hard work on some specific projects. Although the supervisor wanted to terminate her quickly, the company was advised to place the employee on a “performance improvement plan” and delay termination until the proper documentation was prepared and the employee was given an opportunity to correct her behavior.

B: Employee or Independent Contractor Relationship?

IRS Changes Independent Contractor Rules

Whether someone who works for you is an employee or an independent contractor is an important question. The answer determines your liability to pay and withhold federal income tax, social security and Medicare taxes, and federal unemployment tax.

In general, someone who performs services for you is your employee if you can control what will be done and how it will be done.

The courts have considered many facts in deciding whether a worker is an independent contractor or an employee. These facts fall into three main categories:

Behavioral control

Facts that show whether the business has a right to direct and control how the worker does the task for which the worker is hired include the type and degree of—

• ***Instructions the business gives the worker.*** An employee is generally subject to the business' instructions about when, where, and how to work. All of the following are examples of types of instructions about how to do work:

- When and where to do the work
- What tools or equipment to use
- What workers to hire or to assist with the work
- Where to purchase supplies and services
- What work must be performed by a specified individual
- What order or sequence to follow

The amount of instruction needed varies among different jobs. Even if no instructions are given, sufficient behavioral control may exist if the employer has the right to control how the work results are achieved. A business may lack the knowledge to instruct some highly specialized professionals; in other cases, the task may require little or no instruction. The key consideration is whether the business has retained the right to control the details of a worker's performance or instead has given up that right.

- **Training the business gives the worker.** An employee may be trained to perform services in a particular manner. Independent contractors ordinarily use their own methods.

Financial control

Facts that show whether the business has a right to control the business aspects of the worker's job include:

- **The extent to which the worker has unreimbursed business expenses.** Independent contractors are more likely to have unreimbursed expenses than are employees. Fixed ongoing costs that are incurred regardless of whether work is currently being performed are especially important. However, employees may also incur unreimbursed expenses in connection with the services they perform for their business.
- **The extent of the worker's investment.** An employee usually has no investment in the work other than his or her own time. An independent contractor often has a significant investment in the facilities he or she uses in performing services for someone else. However, a significant investment is not necessary for independent contractor status.
- **The extent to which the worker makes services available to the relevant market.** An independent contractor is generally free to seek out business opportunities. Independent contractors often advertise, maintain a visible business location, and are available to work in the relevant market.
- **How the business pays the worker.** An employee is generally guaranteed a regular wage amount for an hourly, weekly, or other period of time. This usually indicates that a worker is an employee, even when the wage or salary is supplemented by a commission. An independent contractor is usually paid by a flat fee for the job. However, it is common in some professions, such as law, to pay independent contractors hourly.
- **The extent to which the worker can realize a profit or loss.** Since an employer usually provides employees a workplace, tools, materials, equipment, and supplies needed for the work, and generally pays the costs of doing business, employees do not have an opportunity to make a profit or loss. An independent contractor can make a profit or loss.

Type of relationship

Facts that show the parties' type of relationship include:

- **Written contracts describing the relationship the parties intended to create.** This is probably the least important of the criteria, since what really matters is the nature of the underlying work relationship, not what the parties choose to call it. However, in close cases, the written contract can make a difference.
- **Whether the business provides the worker with employee-type benefits, such as insurance, a pension plan, vacation pay, or sick pay.** The power to grant benefits carries with it the power to take them away, which is a power generally exercised by employers over employees. A true independent contractor will finance his or her own benefits out of the overall profits of the enterprise.
- **The permanency of the relationship.** If the company engages a worker with the expectation that the relationship will continue indefinitely, rather than for a specific project or period, this is generally considered evidence that the intent was to create an employer-employee relationship.
- **The extent to which services performed by the worker are a key aspect of the regular business of the company.** If a worker provides services that are a key aspect of the company's regular business activity, it is more likely that the company will have the right to direct and control his or her activities. For example, if a law firm hires an attorney, it is likely that it will present the attorney's work as its own and would have the right to control or direct that work. This would indicate an employer-employee relationship.

For a worker who is considered your employee, you are responsible for:

- Withholding Federal income tax,
- Withholding and paying the employer social security and Medicare tax,
- Paying Federal unemployment tax (FUTA)
- Issuing Form W-2, Wage and Tax Statement, annually,
- Reporting wages on Form 941, Employer's Quarterly Federal Tax Return.

For a worker who is considered an independent contractor, you may be responsible for issuing [Form 1099-MISC](#), *Miscellaneous Income*, to report compensation paid.

The status of certain workers is specifically determined by law; these workers are known as **statutory employees** and **statutory non-employees**. See [Publication 15, \(Circular E\) Employers Tax Guide](#), for more information. That document is available at: <http://www.irs.gov/pub/irs-pdf/p15.pdf>

If you would like for the IRS to determine whether or not a worker is considered an employee, please submit Form SS-8, *Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding*. The form is available at: <http://www.irs.gov/pub/irs-pdf/fss8.pdf>

C: Eight Reasons Small Businesses Should Use Non-Compete Agreements

Source: the law firm of Fisher & Philips LLP

Small business owners understandably may be reluctant to use non-compete agreements for many reasons. The desire to divert precious resources to paying an attorney to prepare a contract is hardly appealing. Similarly, businesses may feel that such agreements are unnecessary because they have few employees. But as Ben Franklin once wisely advised, an ounce of prevention is worth a pound of cure.

The term "non-compete agreement" technically refers to a contract that preclude a person from engaging in certain acts of competition for a prescribed period of time within a prescribed geographic area. In common usage, however, the term often is used more broadly to refer to any contract by which someone has any type of competitive restrictions, including non-solicit, non-recruit, non-disclosure and confidentiality agreements. Simply put, non-competes come in all shapes and sizes, but the reasons small business owners should use one or more of these covenants are equally diverse.

1. Enhance the value of your company if you think you may sell someday – If you think someday you may wish to sell your business, it is important to protect the value of your company by requiring employees to sign restrictive covenants. When someone purchases a business, they want to know that they will get what they pay for. If they believe key employees with access to customers and relationships may not stay on board after a merger or acquisition, they may balk at the price or even walk away. You may think that you can always sign employees up to a non-compete later, but such afterthought covenants present their own challenges. You can protect the value of your company and its assets by using appropriately tailored non-compete agreements.

2. Qualify for trade secret protection – Generally speaking, any valuable business information that you try to keep secret from competitors is subject to trade secret protection. But to state the obvious, to be a trade secret, the information must in fact be secret. When determining whether information should be entitled to trade secret protection, courts look at

many factors including the extent to which the owner of the secret took reasonable steps to preserve its secrecy. A widely recognized precaution includes requiring employees to agree not to use or disclose confidential information. In addition, if customer information is a trade secret, a covenant not to solicit customers (i.e., a non-solicitation agreement) may well be appropriate.

3. Protect your customer relationships – Small businesses tend to place client relationships in the hands of fewer employees. Consequently, when an employee resigns, the client relationship may walk out the door with the employee. Just as importantly, you may need time to rebuild your clients' confidence and to show that your other employees are equally capable of serving their interests. Clients are the lifeblood of any business; but this is particularly true for small businesses. A small business simply cannot afford to lose its clients.

4. Enhance client confidence – Would you do business with a company if you felt your personal financial information was at risk? Of course not. Your clients feel the same way. If your clients entrust their personal or business information to you, they want to know that your employees are not going to take it when they leave. Requiring employees to sign restrictions on their use and disclosure of confidential information is a good way to make your clients confident that their data is safe in your hands.

5. Protect your investment in training – Training employees is a worthwhile expense, and the training resources you provide may even help you to attract talented employees. But steps should be taken to prevent your competitors from swooping in to hire your employees after you invest the time and expense to train them. For this reason, courts commonly recognize that employers have a legitimate interest in protecting their investments in specialized training.

6. Clarify expectations with employees – Do your employees realize that you expect them to leave behind the information you entrusted to them if they decide to move on to a new job? Do they understand that the relationships you paid them to cultivate and maintain belong to you? The best time to clarify expectations with your employees is before a dispute arises. Doing so may influence a departing employee's conduct and provide you with the leverage you need to protect your company.

7. Shape ground rules for potential litigation – Litigation against departing employees can be expensive, but when your business is on the line, you may have little choice but to protect your interests through legal action. Although no contract can eliminate the expense associated with litigation, careful forethought can help to minimize your costs. Restrictive covenants are a perfect opportunity to reach agreement with employees about some of the ground rules that will apply if litigation becomes necessary, such as whether you are entitled to recover attorneys' fees and costs if you prevail, whether lawsuits should be filed in a local forum, and whether you are entitled to certain remedies such as an injunction or liquidated damages.

8. Deter competitors from hiring your employees – Deterring competitors from hiring your employees is not a sufficient fact in and of itself to warrant the imposition of a restrictive covenant. In fact, courts will not enforce restrictive covenants if they serve no purpose other than to restrict competition. But assuming you have a legitimate purpose for requiring employees to sign such agreements – such as a need to protect confidential information or customer relationships – sending a message to your competitors that you are prepared to protect these interests is a nice side effect.

In short, there are advantages to using non-compete agreements that may not be apparent until it is too late. Small business owners should think about protecting their business in advance.

D: The Americans With Disabilities Act Amendments Act (ADAAA)

New ADAAA regs: the untold story!!!

By Robin Shea, a partner with Constangy, Brooks & Smith, LLP.

As most people in the Human Resources and employment-law worlds are aware, the U.S. Equal Employment Opportunity Commission recently issued its final rule interpreting the Americans with Disabilities Act Amendments Act.

The ADAAA, which took effect in January 2009, was enacted toward the end of the administration of George W. Bush, with the support of disability rights advocates as well as the U.S. Chamber of Commerce and the Society for Human Resources Management (both of whom were trying to head off a version that would have been worse for employers). The ADAAA dramatically expands the population that is considered "disabled" within the meaning of the ADA but does not change the ADA's provisions on, for example, reasonable accommodation, medical examinations, or confidentiality.

There has been a lot of commentary about the new regulations, but here are some points that I have not seen anywhere else:

1. The 40-or-so pages of dense preamble and regulations, and the EEOC's "Interpretive Guidance," can be summarized in one sentence, as follows: **It is now unlawful to discriminate, not just against individuals with "disabilities," but against *anyone* because of a medical condition, whether actual, past, or perceived.** (Please note that "medical condition" also includes mental/psychiatric conditions and learning disabilities.) The only exceptions might be, for example, a person suffering from the common cold or the flu, or someone who wears eyeglasses or contact lenses. *But not necessarily.* The new definition of "disabilities" in the ADAAA is as loosey-goosey as the definition of "serious health condition" in the Family and Medical Leave Act.
2. **Individuals who are "regarded as" being only *impaired* are protected.** The only perceived "impairments" that don't count are those that are *both* transitory (duration of less than six months) *and* minor. Because it's going to be so easy to qualify, the EEOC is actively encouraging individuals to always sue under the "regarded as" prong as long as they aren't challenging an employer's failure to provide a reasonable accommodation. (For obvious reasons, reasonable accommodations do not have to be provided to individuals who are only "regarded as" being impaired, so an individual seeking a reasonable accommodation would have to establish either an actual "disability" or a record of a "disability.")
3. **Thanks (but no thanks) to this law, I expect to see some class action lawsuits** alleging ADAAA violations in connection with post-offer medical examinations and terminations at the end of extended medical leaves of absence. Under the prior version of the ADA, these cases were normally unsuccessful as class actions because an individualized analysis was required to determine who could be a member of the class (that is, who was "disabled"). But now that the determination of who is "disabled" is virtually automatic, disability discrimination cases will be more susceptible of class treatment.
4. **Most ADA case law on who is "disabled" is no good any longer.** The ADAAA explicitly overruled some excellent Supreme Court decisions, including [Sutton v. United Air Lines](#) (1999) and [Williams v. Toyota Manufacturing of Kentucky](#) (2002). However, our court system is slow, and so we are still seeing ADA decisions that take a restrictive view of who is "disabled." This is nothing to be excited about, unfortunately. Be sure to read the fine print: If the facts alleged in the case occurred before January 1, 2009, then the court is applying the old ADA, which really was a pretty good and reasonable law. (On the other hand, if you see a pro-employer decision based on facts that occurred after January 1, 2009, then you may have reason to open a bottle of champagne.)

So, what should an employer do to comply with the ADAAA?

- * **Always assume that *everyone* has an ADAAA "disability."** You will be right 99.9 percent of the time, and the rest of the time you'll be erring on the right side.
- * **Brush up, if you need to, on your legal obligations concerning reasonable accommodations.** You will have to consider reasonable accommodations in many more cases than you did in the past.

*** If you think a "medical condition" disqualifies a person from performing the job, go through the full-blown ADA/reasonable accommodation analysis.** If you think you will be unable to accommodate, consult with counsel before making any irreversible decisions.

*** If you require post-offer medical screening, review what you are doing and make sure that your medical department (or outside physician) is not automatically rejecting everyone who has certain conditions.** All medical rejection decisions should be considered "preliminary" until they have been reviewed and approved by someone in Human Resources and/or a lawyer. (This may require an employee or applicant to sign a HIPAA authorization that will allow the medical department to share relevant information with HR/Legal.)

***Review your medical leave/termination policies and practices, and be especially on the lookout for any provisions that seem to call for "automatic" termination without an individualized assessment or consideration of reasonable accommodation options.**

*** Make sure your managers and supervisors know the laws.** Be sure that your front-line supervisors and other managers know at least that the ADA has been amended and that it will cover significantly more people than before.

E: Extended Unpaid Leave of Absence as “reasonable accommodation” under the ADAAA

The question, “*When can an employer discharge an employee who’s FMLA leave has expired?*” is not as simple or straight-forward as you may think or wish.

Below you will find an article from the law firm of VedderPrice; **HRHelp** has hi-lited some portions. Following the article is a **QUESTION & ANSWER** section based on some of the content from the article. Craig O’Loughlin, of the law firm Quarles & Brady LLP, has graciously answered the questions submitted to him.

As you will read, if an employee is not released to return to work at the end of FMLA leave, the employer should not summarily discharge that employee. Providing the employee with an extended unpaid leave may be needed to fulfill the requirements of the Americans With Disabilities Act (ADA) and to protect the employer from a claim of discrimination based on the employee’s disability.

The only things known for certain are:

- that a “flexible, interactive discussion” (terminology in the ADA) should be conducted before any decision is made to discharge an employee in such circumstances; and,
- that every set of circumstances is unique and “fact specific”; there cannot be a “one-size-fits-all” approach without creating risk.

Recent EEOC Lawsuits Reinforce Need for Flexible Extended Leave Policies

From the law firm of VedderPrice

When the ADA Amendments Act went into effect in January of 2009, prudent employers shifted their focus from questioning whether an employee was truly disabled, and thus covered by the ADA, to responding to accommodation requests and engaging in the interactive process.

A recent spate of EEOC-initiated lawsuits involving “extended leave of absence policies” serves as a stark reminder that those employers that fail to routinely explore reasonable accommodations before terminating disabled employees, even employees who have been off work for more than a year, do so at their own peril.

The outer limits are easy to define. **Even the EEOC acknowledges that indefinite unpaid leave is not a reasonable accommodation.** Beyond that absolute, however, there are no clear-cut answers as to how far employers are expected to go in accommodating employees who are unable to work.

Providing additional unpaid leave beyond the 12 weeks required by the FMLA will, in most cases, be viewed as a reasonable accommodation that employers must grant. Indeed, the EEOC has taken the position that an employer must provide additional leave at the expiration of the FMLA-covered period as a reasonable accommodation unless:

- i. there is another effective accommodation that would allow the disabled employee to return to work and perform the essential functions of the employee's position, or
- ii. granting additional unpaid leave would create an undue hardship for the employer.

Unfortunately, many employers have, in an effort to manage their way through the complex web of state and federal leave laws, workers' compensation statutes and short-term disability benefit programs, promulgated absence control policies with automatic termination thresholds, often at the one-year anniversary.

Seeking to put an end to, or at least significantly curtail, this approach, the EEOC is issuing probable cause findings and filing lawsuits against employers around the country. Spencer H. Lewis, Jr., director of the EEOC's New York District Office, announcing a lawsuit against the Princeton Healthcare System, explained that "too many companies discriminate against persons with disabilities by strictly applying blanket leave policies."

Chicago District Office Regional Attorney John Hendrickson, announcing a \$6.2 million settlement with Sears, warned: "[T]he era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA is over. . . . Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law."

The common thread running throughout these class actions is an allegation that the employer's extended leave of absence policies were unlawfully inflexible and prevented engagement in the interactive process required by the ADA.

Also noteworthy is the fact that the EEOC has recently sought nationwide discovery regarding the employer's extended leave of absence policies in a number of cases initially brought on behalf of individuals, as opposed to a class of employees.

Employers are well-advised to treat seriously any claim involving such a policy, lest they be caught unprepared, devoting minimal resources to what is perceived as an insignificant single party claim, only to end up facing a pattern or practice class action lawsuit by the EEOC.

Reducing Risk

Proactive employers should consider the following options:

- Amend your leave of absence policies that call for automatic termination following a specified leave term; instead it should provide that termination will only occur if no reasonable accommodation is available to assist the employee in returning to work.
- Eliminate any policy or practice requiring that the employee be 100% released for full duty before allowing the employee to return to work.
- Assign a dedicated HR representative, or team of HR representatives, trained on ADA issues and reasonable accommodations, to handle leave of absence returns and the associated return to work and accommodation process.
- Consider extending an unpaid leave of absence for a reasonable period if the employee represents he or she will soon be able to return to work. Other accommodation options that should be considered include allowing the employee to return to modified duty, part-time work, reassignment to a different position (with or without a reasonable accommodation) and assistive devices.
- Notify an employee that he or she is approaching the end of the leave period and invite the employee to engage in the interactive process to discuss whether reasonable accommodations are available to assist the employee in returning. Importantly, employers should document every communication with the employee during the interactive process, including every offer of a reasonable accommodation and every response from the employee.

- No termination decision should be made unless the employer has a documented record of attempting to engage the employee in an interactive process to explore reasonable accommodations, and has fairly exhausted all reasonable efforts to assist the employee in returning to work.

QUESTIONS & ANSWERS

NOTE: the answers below have been provided by Craig J. O'Loughlin, of the law firm of Quarles & Brady LLP

Even the EEOC acknowledges that indefinite unpaid leave is not a reasonable accommodation. Beyond that absolute, however, there are no clear-cut answers as to how far employers are expected to go in accommodating employees who are unable to work.

Question: Is it true that all such situations are “fact-specific” and that no specific length of time (an additional 4 or 6 or 8 or 12 weeks) will be appropriate for or should be applied in all such situations?

Answer: Yes, it is true that each request for additional time off has to be considered on its own as to whether it creates an undue hardship on the employer. There is no specific length of time that should be uniformly applied. Employers that determine that a specific request for additional time off creates an undue hardship should be prepared to prove through documentation not only evidence of the undue hardship, but also that the employer interactively engaged the employee in reaching that determination.

The common thread running throughout these class actions is an allegation that the employer’s extended leave of absence policies were unlawfully inflexible and prevented engagement in the interactive process required by the ADA.

Question: So if there is a “flexible, interactive discussion”, as defined in the ADA, with an employee at or near the time his/her FMLA leave is expiring, is that the “first prong” of an affirmative defense? Is finding that an accommodation either cannot be made or is unreasonable the “second prong” of an affirmative defense?

Answer: The first line of defense is having an ADA policy that specifies that a reasonable accommodation will be considered at any time the employee requests, including during or at the conclusion of FMLA leave. Prior to an employee's expected return, a proactive employer will send a letter inviting the employee to let the employer know of any accommodations the employee may need upon returning to work, and to request that the employee inform the employer as soon as possible if the employee will not be able to return to work on the anticipated date. This begins the interactive process.

A finding by the employer that a requested accommodation creates an undue hardship should only occur after:

- ♦ the interactive process (potentially including several back and forth letters with the employee) is well-documented,
- ♦ the employer has had the need for the accommodation medically certified,
- ♦ the employer has suggested alternative accommodations, and
- ♦ the employer can prove objectively (through actual numbers or hard facts - not speculation) that in the given case, no reasonable accommodation is available.

Question: So any employee who is out on a medical leave of absence (under FMLA or the company’s own leave policy) is considered to be a person with a disability under the ADA if he/she cannot obtain a release to work statement from his/her health care provider? AND,

The employer, in order to avoid an ADA claim, should conduct a “flexible, interactive” discussion with said employee?

Answer: No, a person is disabled under the ADA only if he/she meets the specific definition of disability under that statute. While an employee's inability to get cleared to return to work may show that the severity of the impairment is great enough to be considered a disability, the impairment itself must be analyzed under the ADA's definitions.

In any case where the employee is unable to get return-to-work certification, the employer must engage the employee (and potentially the employee's medical care provider) in a discussion as to whether there is any accommodation the employer could reasonably provide to bring the employee back to work and how long it may be before the employee would be able to return to work.

Situation: At or near to the end of the employee's FMLA leave, a "**Return to Work Certification**" (RWC) form is completed by the employee's health care provider **and** the form is marked "**NO; the employee is not released to return to work**", so the employee is granted additional unpaid leave of absence.

Question: In the situation above, how long does the employer have to 'make due' or use a temp before replacing the person who has used all of his/her FMLA time and who has been given an extended unpaid (non-FMLA leave) leave of absence as an ADA accommodation because he/she has not been released to return to work by his/her health care provider?

Answer: If an RWC is marked "**No**" as to the employee being able to return to work, the employer must work diligently to get an anticipated date from the employee or health care provider as to when the employee will be released to work.

Without a return date, an employer will be unable to determine whether extended leave is reasonable.

If the employee and health care provider refuse to provide a return date, the employer should send a letter to both informing them that without a return date, the employer is unable to make a determination as to whether the leave is reasonable **and** by failing to provide a return date, or even an estimation of one, the employee is failing to participate in the interactive process which could result in the employee losing the protection of the ADA and risking discharge from employment.

Employers should also watch out for the chronic-extender employee who simply provides a date of return, and then repeatedly extends that return date. Just as indefinite leave does not have to be accommodated under the ADA, an employee who continually extends may also be outside the coverage of the ADA.

F: Drugs/Substances/Alcohol Testing – the Arizona Statutes

Private sector employers in Arizona are able to establish a drugs/substances/alcohol testing policy as part of their company human resource (HR) policies and practices OR as part of a collective bargaining agreement.

Random testing, of certain groups/classes of employees (safety-sensitive, security, or other interests) is mandated by certain state and/or federal regulations and, is legally defensible when required by regulation. Random testing that was not mandated was more difficult to defend, until the Arizona Revised Statutes (A.R.S.) were revised in 1994.

Drugs/substances/alcohol testing based on reasonable suspicion or cause (on-the-job injury, driving accident, performance/behavior consistent with users or abusers) and drugs/substances/alcohol testing of applicants is allowed in the A.R.S.

NOTE: until further information about the Arizona Medical Marijuana law is available, employers that have a drugs/substances/alcohol testing program that meets A.R.S. Title 23, Article 14 should continue following the actions, protocols, and procedures in their testing program.

The provisions of the A.R.S. with regard to drugs/substances/alcohol testing of applicants and/or employees are described below.

SUMMARY: A.R.S. Title 23, Chapter 2, Article 14 Regarding Drug Testing of Employee and Applicants

- Only private sector employers are covered by the Act.
- Testing may be conducted in order to investigate individual employee impairment; to investigate workplace accidents; to maintain the safety of those in or outside the workplace; to maintain productivity, quality, and/or

security; or, when there is reasonable suspicion that an employee's performance or the work environment are affected by drugs/substances/alcohol.

- Random testing of an employee or of groups of employees is allowed.
- Urine, blood, breath, saliva, hair, or other bodily substances are considered as samples (specimens).
- Employers may request samples from employees or applicants for the purpose of testing the sample for drugs and may request the person to provide reliable identification at the time the sample is collected.
- Employers may request samples from employees for the purpose of testing the sample for alcohol and may request the person to provide reliable identification at the time the sample is collected.
- Testing must normally be done immediately before, during, or immediately following the scheduled/ regular work period. For non-exempt employees, the time needed to test is considered time worked.
- The cost of testing employees must be paid by the employer. The cost of testing applicants can be paid in whole by the employer, in whole by the applicant, or shared by both parties.
- Employers must pay the transportation costs to a testing site if employees are required to travel away from their normal work site for testing.
- When samples are collected, they must be properly labeled. The employee or applicant must have the opportunity to identify any prescription drugs/substances/alcohol currently being used.

[NOTE: because of the Americans With Disabilities Act, such disclosure should only be made to a Medical Review Officer (MRO) and only when an employee or applicant has tested non-negative (positive) for prohibited drugs/substances and/or alcohol.]

- The collection, transportation, and storage of the sample must be done to not result in contamination, adulteration, or misidentification. And, the analysis must follow scientifically accepted analytical methods.
- Testing must be done at a lab/facility approved or certified by the U.S. Dept. of Health and Human Services, the College of American Pathologists, or the AZ Dept. of Health Services.
- An initial positive test of a sample from an employee must be retested and confirmed using a chromatographic methodology.
- To have protection under the AZ Statute, the employer must have a **WRITTEN** drug testing policy and must distribute a copy of same to each employee (or may make the policy available in the same manner as other human resource policies, such as via the employee handbook or as a posting). In addition, all applicants must be made aware that they must undergo drug testing.
- The **WRITTEN** policy must include the following:
 - * policy statement (prohibition of use of illegal or controlled substances or prescription drugs for which the employee does not have a current prescription);
 - * identification of persons subject to be tested;
 - * circumstances under which testing will be required;
 - * the drugs/substances, including alcohol, prohibited and to be tested for;
 - * a description of the collection protocols and testing protocols;
 - * the consequences of refusing to provide a specimen (or providing a specimen that is adulterated or substituted);
 - * discipline or other employment actions that may be taken based on the testing procedure or test results;
 - * the employee's right to request a copy of the test results;
 - * the right of an employee who tests positive to explain why (to a Medical Review Officer (MRO));

and,

- * a promise of confidentiality.
- The policy must cover ALL compensated employees, including officers, directors, and supervisors (managers).
- An employer may take adverse employment action (discipline or discharge) against any employee who refuses to provide a specimen (or provides a specimen that is adulterated or substituted) or who tests positive for drugs/substances/alcohol. An employer may take adverse employment action (refuse to hire) an applicant who refuses to supply a specimen (or provides a specimen that is adulterated or substituted) for a drugs/substances/alcohol test or who tests positive for drugs/substances/alcohol (but not alcohol).
- No liability will occur for an employer who establishes a drugs/substances/alcohol testing program, as described above, for:
 - * good faith actions based on a positive test result;
 - * failure to test or failure to test for a specific substance;
 - * failure to detect a specific substance or a medical or mental or emotional or psychological disorder; or,
 - * termination or suspension of the testing program.
- All communications received by the employer through the testing program (or in conjunction with the testing program) cannot be disclosed, even in a legal action, unless the proceeding is related to an action by an employer or employee under the statute.
- Confidentiality must be maintained. Exceptions include disclosure to:
 - * the person tested or his/her designee;
 - * individuals (Medical Review Officer's (MRO's)) authorized by the employer to receive test results or hear the person's explanation of positive results; or,
 - * an arbitrator, mediator, court, or governmental agency.
- The tested person has right of access to written test results.
- Compliance with the statute is voluntary. No cause of action if an employer has a testing program not in compliance with the statute; but, a testing program not in compliance does not have the immunity protections offered by the statute.
- "Misconduct" for the purpose of disqualifying an unemployed person from receiving unemployment benefits now includes, "failure to pass, or refusal to take, a drug or alcohol impairment test administered pursuant to the statute".

ACTIONS REQUIRED TO CREATE AND IMPLEMENT A DRUGS/SUBSTANCES/ALCOHOL TESTING PROGRAM

Employers who create drugs/substances/alcohol policies and protocols for the drug testing of employees and applicants which meet legal guidelines and who consistently follow the policies and practices established have the best protection from legal challenges.

A written drugs/substances/alcohol testing program should include:

1. a policy statement that identifies the purposes of the program, the drugs/substances, including alcohol, that are prohibited, and definitions of when and where the prohibition against drugs/substances/alcohol use applies;
2. plans for communicating the policy and protocols to all employees prior to the implementation of the policy and for periodically reviewing the policy and protocols with all employees;
3. statements identifying how employees will be selected for testing and how selection, if based on reasonable suspicion, will be confirmed before asking an employee to submit to testing;

4. methods for getting employees selected for testing to a pre-determined location at which the specimen can be collected and plans for having a pre-established document/agreement with the collection agency/ organization regarding the protocols for collecting specimens and transporting the specimens to the selected laboratory;
5. steps for obtaining proper releases from employees to allow specimens to be collected and to allow the results of the lab analysis to be released;
6. protocols with the collection agency/organization regarding “shy bladder” syndrome;
7. protocols with the collection agency/organization **and** with the specimen testing organization for maintaining chain-of-custody of the specimen from collection thru analysis and for storage, if the sample tests positive;
8. protocols for a Medical Review Officer (MRO) to review ALL positive test results with employees to determine whether the positive test result was from a prohibited drugs/substances/alcohol or from a current, valid prescription;
9. steps for reviewing the lab analysis results with the employee who provided the specimen, whether positive or negative for drugs/substances/alcohol;
10. plans for establishing a relationship with an Employee Assistance Program (EAP) concurrent with the implementation of the policy and for offering drugs/substances/alcohol treatment for those who test positive for the first time or for those who voluntarily identify their drugs/substances/alcohol use and ask for treatment;
11. statements identifying the discipline that will be applied to employees who refuse to submit to testing or who fail to complete an EAP or who test positive a second time; and,
12. plans for providing periodic training regarding drugs/substances/alcohol use or abuse for managers and supervisors and for all other employees.

NOTE: A non-negative (positive) test for drugs/substances/alcohol ONLY shows that the person has, or had, the drugs/substances/alcohol in his/her system. **A non-negative (positive) test DOES NOT DEMONSTRATE IMPAIRMENT.**

Therefore, policies based on the employee or applicant not testing positive for drugs/substances/alcohol (whether use is on or off the job) have been upheld in the legal system; policies that state or imply that a positive test is proof of impairment have not been upheld.

NOTE: The drugs/substances that should be prohibited under a drugs/substances/alcohol policy include: illegal drugs/substances, including alcohol; **and**, controlled substances (i.e., alcohol, prescription drugs); **and**, prescription drugs for which a person (employee or applicant) does not have a current, valid prescription.

CAVEAT: Creating drugs/substances/alcohol testing policies and procedures that meet the needs of the business and that meet the compliance requirements of employment laws, such as the ADA, Worker's Compensation laws, and the AZ Drug Testing Statutes, is not recommended as a "do-it-yourself" project for anyone unfamiliar with the laws or with drugs/substances/alcohol testing protocols. If you attempt to create and implement a drugs/substances/alcohol testing program yourself, it is strongly recommended that the policies and protocols reviewed by an attorney or a HR professional who has expertise regarding the Arizona drug testing statutes.

**“model/recommended”
Table of Contents
HR Policy Manual and Employee Handbook**

NOTE:

Some of the topics/issues listed below will not be applicable to every organization and will not require a policy statement.

Conversely, some organizations may require policy statements for topics/issues not listed below.

page

WELCOME!

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HR POLICY MANUAL & EMPLOYEE HANDBOOK

Should your organization have one?



INTRODUCTION

Think of a handbook serving the same purpose as a “fire drill.”

When you participated in a “fire drill” at school, the purpose was to ensure that everyone knew exactly what to do in case of an emergency – boys in one line; girls in another line; turn right or left; go out the door; meet at the swing set, or monkey bars, or big tree. The school wanted to ensure that, should a particular circumstance occur, every child would know what to do so that pandemonium, chaos, or mayhem did not happen.

With a handbook, the organization identifies, IN ADVANCE, what its policies/practices will be with regard to certain issues; therefore, the organization pre-determines how it will manage certain issue, situations, and circumstances when they are presented. Instead of having to ponder/consider what to do when those issues/situations/circumstances occur, managers and supervisors can go to the handbook, read the policy statement, and apply it. This also reduces the risk that actions will be taken based upon the employees involved which could result in discriminatory animus.

Obviously, managing some situations will not be quite so simple. But, without policies and practices in place prior to the situation, the managers of the organization could react the same way as would children who had not been prepped by fire drills.

ADVANTAGES OF AN EMPLOYEE HANDBOOK (partial listing)

- **Certainty.** Without published policies and procedures, supervisors and managers may not know which steps, if any, to take in a given situation. Employees may not understand what's expected of them or why you handle matters in a certain way without written guidance.

And, employees know what is expected of them, so that they can meet or exceed those expectations and not be surprised if consequences are applied for failure to meet expectations.

- **Consistency.** Putting policies and procedures on paper and distributing them to employees encourages managers and supervisors to consistently apply them.

NOTE: inconsistent treatment often results in claims of unfair (discriminatory) treatment and/or can result in employees seeking to be represented by a labor union.

- **Proof.** The number of employment-related lawsuits seems to increase every year. A handbook with clearly stated policies can persuade judges and juries that your company acted appropriately because your employees had notice of what to expect if they engaged in certain conduct.

NOTE: with or without a handbook, an agency (EEOC or equivalent state agency) will investigate how “similarly situated” employees were treated. So, to better ensure **Certainty** and **Consistency** AND to provide **Proof** that employees were informed of expectations, a handbook is necessary.

- **Efficiency.** A handbook is simply an efficient way to communicate necessary information like work rules, terms of employment, and wage and benefits information to employees.
- **Protection.** A well-drafted handbook can protect you from certain types of legal claims, particularly charges that your company formed an implied contract of continued employment with your employees. And if your policies and procedures are sound and your practices conform to your policies, a handbook can be an effective tool for combating a union- organizing campaign.

DISADVANTAGES (a partial listing)

If your handbook isn't carefully drafted, it can support a claim that your employees are protected by an implied contract of continued employment. To be effective, language disclaiming an implied contractual relationship must be very clear. And, if you don't follow your own policies, your handbook will be persuasive evidence in any lawsuit filed against you.

H: Lawful and Unlawful Interview Questions

Various federal and state laws prohibit discrimination in all aspects of employment, including the hiring (interviewing and selection) process. Interview questions must be job-related. Questions which are not related to the applicant's ability to perform the job duties and which ask for or collect information which could be used to discriminate on the basis of age, gender, national origin, color, religion, disability, or any other protected factor are discriminatory and unlawful/illegal.

Guidance is provided on the following 4 pages.

INTERVIEWING GUIDANCE:

- WHAT QUESTIONS CAN LEGALLY BE ASKED OF AN APPLICANT?
- WHAT QUESTIONS, IF ASKED, WOULD BE CONSIDERED TO BE POTENTIALLY DISCRIMINATORY (UNLAWFUL)?

From the EEOC document: Guide to Pre-Employment Questions

CATEGORY	QUESTIONS ALLOWED (LAWFUL)	EXAMPLES OF POTENTIALLY DISCRIMINATORY (UNLAWFUL) QUESTIONS
Arrest records	None (<i>also, see Conviction records, below</i>)	Number and kinds of arrest
Availability for work on weekends, evenings	If asked of all applicants and it is a business necessity for the person to be available to work weekends and/or evenings	Any inquiry about religious observance
Child care	None, unless asked of all applicants	Inquiry into child care arrangements of only female applicants
Citizenship, birthplace & national origin	The only legitimate concern here is whether the applicant is eligible to work in the United States, under the terms of the Immigrant Reform and Control Act of 1986. There is a fair and advisable way to obtain information. The best approach is to ask: "Are you either a U.S. citizen or an alien authorized to work in the United States?" The Yes or No answer that follows provides all needed information while not disclosing which (citizen or alien) the applicant is.	Birthplace, national origin, ancestry, or lineage of applicant, applicant's parents or applicant's spouse
Conviction records	Inquiry into convictions if job-related	Any inquiry about conviction, unrelated to job requirements
Creed or religion	None, except where religion is a bona fide occupational qualification	Applicant's religious affiliation, church, parish, or religious holidays observed
Credit records	None, unless job-related	Inquiries about charge accounts, bank accounts, etc.
Family status	Whether applicant has responsibilities or commitments that will prevent meeting work schedules, if asked of all applicants regardless of sex	Marital status, number and age of children, spouse's job
Height and weight	None, unless job-related	Any inquiry unrelated to job requirements
Language	Language applicant speaks or writes fluently, if job-related	Applicant's other tongue, language used by applicant at home, or how applicant acquired the ability to read, write or speak a foreign language
Marital status	None	Whether applicant is married, single, divorced, separated, engaged or widowed
Military status	Military experience or training	Type or condition of discharge
Name	Whether applicant has worked under a different name	The original name of an applicant whose name has been legally changed or the national origin of an applicant's name
Organizations	Applicant's membership in professional organizations if job-related	All clubs, social fraternities, societies, lodges or organizations to which applicant belongs
Photographs	None except after hiring	Photographs with application or after interview but before hiring

Pregnancy	None	Any inquiry into pregnancy, medical history of pregnancy or family plans
Race or color	None	Applicant's race or color of applicant's skin
References	Names of character references	Name of applicant's pastor or religious leader
Relatives/friends	Names of applicant's relatives already employed by your organization or a competitor, but you may <u>not</u> give preference if women and minorities are underrepresented in workforce	Names of friends working for the company or relatives other than those working for the company
Sex/Gender	None, except where sex/gender is a bona fide occupational qualification	Any inquiry except where a bona fide occupational qualification
Workers' Compensation	None	Past workers' compensation claims

GUIDE TO PRE-EMPLOYMENT INQUIRES UNDER THE ARIZONA CIVIL RIGHTS ACT

A private employer is covered by the **Arizona Civil Rights Act (ACRA)** if it is an employer with 15 or more employees on each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Acceptable Pre-Employment Inquiries

Name of applicant. Any other names applicant may be known by so a proper check of work and educational records can be made.

Place and length of residence, telephone number, only.

Statement concerning employment subject to verification that applicant meets legal age requirements.

Status of Residency:
1) U.S. Citizen?
2) Legal right to work in the U.S.?

Statement to applicant that, if hired, applicant may be required to submit proof of citizenship/legal right to work in the U.S.

Foreign languages applicant reads, speaks, or writes, if job related.

Subject

Name

Residence

Age

Birthplace, Citizenship

National Origin

Unacceptable Pre-Employment Inquiries

Inquiries regarding origin of applicant's name that may tend to indicate the applicant's national origin, religion or ancestry.

ACRA prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age.

It is unlawful for an employer to print or publish any notice or advertisement relating to employment indicating any preference, limitation, specification or discrimination based on age, except when age is bona fide occupational qualification for

It is unlawful to limit, segregate or classify applicants for employment in any way which would deprive or tend to deprive employment opportunities based on an individual's age.

It is unlawful to require proof of citizenship or residency prior to of employment.

To inquire, limit, segregate or classify applicants for employment in any way that will deprive or tend to deprive employment based on an applicant's national origin.

	<p><u>Gender</u> To limit, segregate or classify applicants for employment in any way that would deprive or tend to deprive employment opportunities based on an applicant's gender.</p>
	<p><u>Religion</u> To inquire, limit, segregate or classify applicants for employment in any way that would deprive or tend to deprive employment opportunities based on an applicant's religion.</p>
<p>Statement of regular days, hours or shifts to be worked.</p>	<p><u>Work Days/ Shifts</u></p>
<p>Statement that photo may be required <u>after hiring</u></p>	<p><u>Race/Color or Physical Description</u> To inquire, limit, segregate or classify applicants for employment in any way which would deprive or tend to deprive employment opportunities based on an applicant's race, color or physical description</p>
<p>Make pre-employment inquiries into the ability of an applicant to perform job related functions.</p>	<p><u>Medical</u> The prohibition against discrimination based on a disability, includes medical exams and inquiries.</p>
<p>Require a medical examination <u>after an offer of employment</u> has been made to a job applicant and before commencement of employment duties of the applicant and may condition an offer of employment on the results of such examination if <u>both</u> of the following apply:</p>	<p>Except as stated, a covered entity <u>shall not</u> conduct a medical or exam or make inquiries of a job applicant as to whether the applicant is an individual with a disability or as to the nature or or severity of the disability.</p>
<p>(a) All entering employees in the same job classification are subjected to the examination <u>regardless of disability</u>.</p>	<p>To fail or refuse to hire, or to otherwise discriminate against, any Individual based on the results of a genetic test received by the employer.</p>
<p>b) Information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a <u>confidential medical record</u>.</p>	<p>Use qualification standards, exams, tests or other selection criteria that screen out or tend to screen out an individual with a disability, or a class of individuals with disabilities, unless the standard test or other selection criteria is shown to be job related for the job position in question and is consistent with business necessity.</p>
<p>Inquiry into academic, vocational, professional education and schools attended, degrees/diplomas received</p>	<p><u>Education</u> Specific inquiry into the nationality, racial, or religious affiliation of a school.</p>
<p>Inquiry regarding prior convictions. When, where, final disposition of case. <i>Must include statement that conviction will not be an absolute bar to employment.</i></p>	<p><u>Criminal Record</u></p>
<p>May ask for references: (a) Person who referred applicant. (b) Names of applicant's relatives currently employed by company. (c) Former employers</p>	<p><u>Professional/Character References</u></p>
<p>Emergency contact information.</p>	<p><u>Notice in case of emergency</u></p>

List of organizations, clubs, professional societies or other associations of which applicant is a member, **excluding** those which by their name or character indicate race, color, religion, gender, age, disability or national origin.

Organizations

Notice to applicant that any misstatements or omissions of material facts in the application may be cause for dismissal.

Miscellaneous

It is recommended that questions to be used in an interview be prepared in advance and be reviewed by the HR Dept. of your organization or by the employment/labor law attorney your organization uses to ensure that the questions are not potentially discriminatory (unlawful).

I: Negligent Hiring – Employees Who Drive On Company Business

An employer can be liable for the negligent acts of its employees. Most employers are at risk for the following: negligent hiring claims arising from accidents caused by employees who drive on company business.

Negligent hiring liability occurs when the employer can foresee that the employee can do harm to the public, but the employer does not conduct a sufficient or appropriate background check of the employee (which can include a driver's license and MVD report for those who drive on company business).

Few employers check the driver's license or MVD reports of employees who drive on company business. Such employers just assume the employee has a driver's license and an acceptable driving record.

However, if an employee is involved in an accident while driving on company business, the employer may be named in a negligent hiring claim if the plaintiff's attorney discovers that the employee does not have a valid driver's license or has a history of moving violations, DWI/DUI, felony hit & run, or the like.

So, ALL employees who drive on company business (including the secretary/receptionist who drives to the Post Office at 4:45 p.m. each day to drop off the mail, or the person who is sent to pick-up lunch for a meeting, or the person who drives to the office supply store during his/her lunch hour to pick up the post-it notes that are needed) should be required, at the time of hire and periodically thereafter, to provide a valid driver's license and a copy of their MVD report (the 60 month report is preferred to the 39 month report).

The employer, if the employee does not have a valid driver's license or if the employee's MVD report includes more violations than is acceptable to the employer, can remove the employee from driving. The definition of an "acceptable record" should be in writing, to avoid inconsistent application. The standard (i.e., what is an "acceptable record") should be restrictive. The more violations that are "acceptable" to the employer, the greater the likelihood that a court or jury will second-guess the employer's standard, especially if there is an employee-involved accident that results in bodily injuries.

Also, in Arizona, as in most states, the vehicle insurance of the personal vehicle that the employee drives on company business is primary if an accident occurs. However, not all employees carry insurance; and, some carry only low amounts of liability insurance.

Once the employee's vehicle insurance is exhausted, the injured party(s) will pursue the employer for further payments. Yet, if the employer does not have a "Non-Owned Auto" endorsement to its general liability insurance policy, the general liability insurance carrier will deny the claim.

So, every employee who drives on company business should be required to have the highest liability limits possible (so it is less likely that their liability coverage will be exhausted) AND every business should ensure that its general liability insurance policy includes a "Non-Owner Auto" endorsement to cover any liability that might arise from an employee driving on company business.

HR Risk Management Tip

David Mitchell, SPHR, MBA, MA in HR, CIC

Employees using their own vehicles on company business

Many employers do not understand the risk to which they expose their company by allowing employees to run errands or do other company business while using their own vehicles.

Often the company can and is held liable IN ADDITION TO the employee if an at-fault accident occurs while the employee driving his/her personal vehicle on company business.

The way a company usually finds out they are liable is after the employee has been deposed, by counsel for the plaintiff's, and was asked if he/she was on company time when the accident occurred. Once the plaintiff's attorney discovers that the employee was on company time at the time of the accident, the employer is served. The company then starts the mad scramble to figure out if there is any insurance to cover this loss.

The question then becomes: is the employer covered under the employee's policy and, if so, for how much? The answer to the first part of the question is maybe. If the employee has liability coverage, the employer has coverage along with the employee and will have the opportunity to share those limits. The exception to this coverage is delivery, livery, or if the employer is engaged in the business of selling, repairing, servicing, storing, or parking vehicles. An example where there would not be coverage under the employee's policy is pizza delivery; but, coverage also depends on the employee's policy, as some personal policies exclude any business use.

The next question is: is the employee's vehicle insurance policy in effect? There is a strong possibility that the employer does not know whether the employee had insurance on his/her personal vehicle at the time of the accident.

The next question is: how much coverage does the policy have? It is possible, especially if the employee is young and/or without a lot of personal assets, that he/she, if liability insurance is on the policy, is carrying only the minimum state requirements of \$15,000 per person, \$30,000 per accident and \$10,000 property damage. Since the insurance on the personal vehicle is primary, once the limits are exhausted, the employer becomes liable for the excess (the amount of the award less the liability limits on the personal vehicle policy).

Four Approaches

As a risk management technique what should an employer do? There are four approaches we will talk about.

Approach number one is avoidance. Never allow an employee under any circumstances to use their own vehicles on company business, even when employees may be traveling between meetings. This approach probably is not practical for most businesses, since such businesses do not want to have to own and provide vehicles to employees.

Approach number two is to have a list of designated drivers who only on rare occasions will use their vehicles. The company should establish criteria regarding which employees can be designated drivers. Such criteria could require that an employee's motor driving record be kept on file with the company showing the employee that is "acceptable" to the company. This approach should reduce the risk of liability to the company.

Approach number three is for the company to add an endorsement called non-owned auto to either its business auto policy or general liability policy. This endorsement does not come automatically with a business auto policy or with a general liability policy. It must be requested by the employer and added on as an endorsement.

The non-owned auto endorsement is an excess policy. The endorsement would be triggered after the employee's policy limits are exhausted and would provide "excess" coverage up to the limits chosen on the endorsement.

The fourth approach is a combination of approach number two and approach number three. This approach provides the best protection for the employer.

If you have questions regarding this article please contact David Mitchell at IDEAL INSURANCE (602-938-7579).

J: Resources regarding the Affordable Care Act (ACA)

UNITED STATES DEPARTMENT OF LABOR

The following two pages are from: <http://www.dol.gov/ebsa/healthreform/>

United States Department of Labor Employee Benefits Security Administration **Affordable Care Act**

For information on the protections related to your employment-based health plan or if you are looking for coverage, please visit our [consumer page](#). The Affordable Care Act prohibits employers from retaliating against employees who report violations of the Act's health insurance reforms, found in Title I of the Affordable Care Act. For more information, visit www.whistleblowers.gov.

Regulations and Guidance

- [Affordable Care Act Implementation FAQs](#)
- [Affordable Care Act Nondiscrimination Provisions Applicable to Insured Group Health Plans](#)
- [Applicability to HRAs, Health FSAs, and Certain other Employer Healthcare Arrangements](#)
- [Automatic Enrollment](#)
- [Coverage of Preventive Services](#)
- [Early Retiree Reinsurance Program](#)
- [Employer Shared Responsibility](#)
- [Essential Health Benefits](#)
- [Excepted Benefits](#)
- [Extension of Coverage For Adult Children](#)
- [Grandfathered Health Plans](#)
- [Internal Claims and Appeals and External Review](#)
- [Mental Health Parity](#)
- [Medical Loss Ratio](#)
- [Multiple Employer Welfare Arrangements](#)
- [Ninety-Day Waiting Period Limitation](#)
- [Notice to Employees of Coverage Options](#)
- [Pre-Existing Condition Insurance Plan Program](#)
- [Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, and Patient Protections](#)
- [Provider Non-Discrimination](#)
- [Public Forum on Automatic Enrollment in Large Employer Health Plans](#)
- [Small Business Health Care Tax Credit for Small Employers](#)
- [Stop Loss Insurance](#)
- [Summary of Benefits and Coverage and Uniform Glossary](#)
- [Value-Based Insurance Design in Connection with Preventive Care Benefits](#)
- [Wellness Programs](#)

Compliance Workshops, Seminars and Webcasts

- Health Benefits Laws Seminar – [Denver CO](#) | [Louisville KY](#) | [New York NY](#) | [Santa Fe NM](#)
- Health Benefits Laws – [Webcast Archive](#)
- Affordable Care Act Compliance Assistance Webcast Archive – [Part I](#) | [Part II](#)

Participant Workshops and Webcasts

- The Affordable Care Act: How Will It Affect You? – [Webcast Archive](#)

Mandated Research Studies and Surveys

- [U.S. Department of Health and Human Services' Study: Consistency of Large Employer and Group Health Plan Benefits with Requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008](#)
- [HHS Cover Document for Report to Congress, 2013 - Workplace Wellness Programs Study: Final Report](#)
- [Report to Congress, 2013 – Workplace Wellness Programs Study: Final Report](#)
- [Workplace Wellness Programs Study: Case Studies Summary Report](#)
- [A Review of the U.S. Workplace Wellness Market - 2012](#)
- [An Analysis of 2007-2009 Filings of Form M-1](#)
- [2013 Annual Report on Self-Insured Group Health Plans: 2013 Report | Appendix A \[Original\] \[Revised\] | Appendix B](#)
- [2012 Annual Report on Self-Insured Group Health Plans: 2012 Report | Appendix A \[Original\] \[Revised\] | Appendix B](#)
- [2011 Annual Report on Self-Insured Group Health Plans: 2011 Report | Appendix A | Appendix B](#)
- [Study of the Large Group Market](#)
- [Recent Data on Health Benefits from the National Compensation Survey | Letter from Secretary Hilda L. Solis](#)
- [A Review of the U.S. Workplace Wellness Market – 2012](#)

Health Insurance Marketplace

- HealthCare.gov – Official consumer site for the marketplace
- Marketplace.cms.gov – Resources for professionals preparing for the marketplace
- [HHS FAQ – State Participation in Certain Plan Management Activities](#)
- [About the Health Insurance Marketplace | En Español](#)
- [The Value of Health Insurance | En Español](#)
- [About the Small Business Health Options Program \(SHOP\) | En Español](#)

News and Official Statements

- [Testimony of Phyllis C. Borzi, Assistant Secretary of Labor, Employee Benefits Security Administration, Before the Senate Committee on Small Business and Entrepreneurship](#)
- [Statement of US Secretary of Labor Hilda L. Solis on implementation of Affordable Care Act's early retiree reinsurance program](#)
- [Statement of Assistant Secretary of Labor Phyllis C. Borzi calling on employers and benefit plans to make young adult coverage available immediately](#)
- [Statement of U.S. Secretary of Labor Hilda L. Solis on passage of health care reform by U.S. House of Representatives](#)
- [Statement of Assistant Secretary of Labor Phyllis C. Borzi on Health Care Reform](#)

Related Resources

- [Consumer Information on Health Plans](#)
- [Compliance Assistance for Health Plans](#)
- [Group Health Plan Reports and Form 5500 Data](#)
- [Health Benefits Education Campaign](#)
- [White House Web Page on Health Reform](#)
- HHS.gov/HealthCare
- [IRS Website on the Affordable Care Act](#)
- [GAO Report – Private Health Insurance: Data on Application and Coverage Denials](#)
- [House Committees Health Insurance Reform at a Glance | Implementation Timeline | Consumer Protections | For Employers](#)

Law

- [Patient Protection and Affordable Care Act](#)
- [Health Care and Education Reconciliation Act of 2010](#)

K: Retention Requirements for Forms/Records/Documents

There usually is some confusion among employers concerning the legal requirements for record keeping and retention of employee files and other employment-related records. Not only do various federal agencies have their own record retention requirements, but individual states also have requirements that have to be followed. Some of the requirements apply to most employers, while others apply primarily to government contractors and subcontractors. Many of these requirements are dependent on the number of employees or the purposes for which the record keeping is designed.

The accompanying data provides a reference regarding what records must be kept under each federal law, the retention period for those records, and the applicability of each federal law. In reviewing the data below, you will notice that the same or similar records are often required under more than one law. However, the period of retention for this information may vary. If that is the case, you are advised to retain the information for the longer period of time.

It is also advisable to establish a system for auditing your company's record keeping, including personnel files, as well as a consistent program for record destruction. However, be cautious that even with such a standard practice in place, when a discrimination charge or lawsuit is filed, all records relevant to the charge must be kept until "final disposition" of the charge or lawsuit.

LAW: Age Discrimination in Employment Act (ADEA)

Applies to employers with at least 20 employees

RECORDS/REPORTS:

Payroll or other records, including those for temporary positions showing employees' names, addresses, dates of birth, occupations, rates of pay and weekly compensation.

Applications (including those for temporary employment), personnel records relating to promotion, demotion, transfer, selection for training, layoff, recall, or discharge; job advertisements and postings; copies of employee benefit plans, seniority system and merit systems.

RETENTION REQUIREMENTS:

Three years for payroll or other records showing basic employee information. One year for applications and other personnel records. Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition" of the charge or lawsuit.

LAW: Americans with Disabilities Act (ADA)

Applies to employers with at least 15 employees

RECORDS/REPORTS:

Applications and other personnel records (e.g. promotions, transfers, demotions, layoffs, terminations) requests for reasonable accommodation.

RETENTION REQUIREMENTS:

One year from making the record or taking the personnel action.

Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition".

LAW: Civil Rights Act of 1964, Title VII

Applies to employers with at least 15 employees

RECORDS/REPORTS:

Applications and other personnel records (e.g. promotions, transfers, demotions, layoffs, terminations), including records for temporary or seasonal positions.

Requires the filing of an annual EEO-1 Report (for Federal contractors with 50 or more employees, non-contract employers with 100 or more).

RETENTION REQUIREMENTS:

One year from making the record or taking the personnel action.

Where a charge or lawsuit is filed, all relevant records must be kept until "final disposition".

A copy of the current EEO-1 Report must be retained.

LAW: Consolidated Omnibus Budget Reconciliation Act (COBRA)

RECORDS/REPORTS:

Provide written notice to employees and their dependents of their option to continue group health plan coverage following certain "qualifying events", such as the employee's termination, layoff or reduction in working hours, entitlement to Medicare, and the death or divorce of the employee (that would cause dependents to lose coverage under the employer's plan).

LAW: Employee Retirement Income Security Act (ERISA)

RECORDS/REPORTS:

Maintain, disclose to participants and beneficiaries, and report to the Department of Labor, IRS, and The Pension Benefit Guaranty Corporation (PBGC) certain reports, documents, information, and materials. Except for specific exemptions, ERISA's reporting and disclosure requirements apply to all pension and welfare plans, including:

- Summary plan description (updated with changes and modifications)
- Annual reports
- Notice or reportable events (such as plan amendments that may decrease benefits, a
- Substantial decrease in the number of plan participants, etc.)
- Plan termination

RETENTION REQUIREMENTS:

Employers must maintain ERISA-related records for a minimum of six years.

LAW: Employee Polygraph Protection Act

RECORDS/REPORTS:

Polygraph test results and the reasons for administering.

RETENTION REQUIREMENTS:

Three years.

LAW: Equal Pay Act

RECORDS/REPORTS:

Payroll records including time cards, wage rates, additions to and deductions from wages paid, and records explaining sexually based wage differentials.

RETENTION REQUIREMENTS:

Three years.

LAW: Fair Labor Standards Act (FLSA)

RECORDS/REPORTS:

Payroll or other records containing the following information for each employee:

- Employee's name, home address, date of birth (if under 19 years of age), gender, and occupation
- Time of day/day of week for beginning of workweek
- Regular hourly rate of pay or other basis of payment (hourly, daily, weekly, piece rate, commission on sales, etc.)
- Daily hours worked and total hours for each workweek
- Total daily or weekly straight-time earnings (exclusive of overtime premiums)
- Total additions to and deductions from wages for each pay period
- Total wages per paid period
- Date of each payment of wages and the period covered by the payment

For executive, administrative, and professional employees, or those employed in outside sales, employers must maintain records which reflect the basis on which wages are paid in sufficient detail to permit calculations of the employee's total remuneration, perquisites, including fringe benefits.

RETENTION REQUIREMENTS:

For at least three years.

LAW: Family & Medical Leave Act (FMLA)

RECORDS/REPORTS:

Records containing the following information:

- Basic employee data to include name, address, occupation, rate of pay, terms of compensation, daily and weekly hours worked per pay period, additions to/deductions from wages and total compensation.
- Dates of leave taken by eligible employees. Leave must be designated as FMLA leave.
- For intermittent leave taken, the hours of leave.
- Copies of employee notices and documents describing employee benefits or policies and practices regarding paid and unpaid leave.
- Records of premium payments of employee benefits
- Records of any dispute regarding the designation of leave

RETENTION REQUIREMENTS:

Three years.

LAWS: Federal Insurance Contribution Act (FICA); Federal Unemployment Tax Act (FUTA); Federal Income Tax Withholding

RECORDS/REPORTS:

Records containing the following information for each employee:

Basic employee data to include name, address, social security number, gender, date of birth, occupation, and job classification

Compensation records to include:

- Amounts & dates of actual payment
- Period of service covered
- Daily and weekly hours
- Straight time and overtime hours/pay
- Annuity and Pension payments
- Fringe benefits paid
- Tips
- Deductions and additions

Tax records to include:

- Amounts of wages subject to withholding
- Agreements with employee to withhold additional tax
- Actual taxes withheld and dates withheld
- Reason for any difference between total tax payments and actual tax payments
- Withholding forms (W-4, W4-E)

RETENTION REQUIREMENTS:

Four years from the date tax is due or tax is paid.

LAW: Immigration Reform & Control Act (IRCA)

RECORDS/REPORTS:

INS Form 1-9 (Employee Eligibility Verification Form) signed by each newly-hired employee and the employer.

RETENTION REQUIREMENTS:

Three years after date of hire or one year after date of termination, whichever is later.

LAW: Occupational Safety & Health Act (OSHA)

Applies to employers with at least 10 employees

RECORDS/REPORTS:

A log of occupational injuries and illnesses

A supplementary record of injuries and illnesses

Post a completed annual summary of injuries and illnesses

Maintain medical records and records of exposure to toxic substances for each employee.

RETENTION REQUIREMENTS:

Employee's job tenure plus thirty years

NOTE: Document destruction is governed by the Fair and Accurate Credit Transactions Act (FACT)

As of June 1, 2005, all employers are required to destroy any document that has personal information on it prior to discarding the document. Personal information could be a telephone number, address, Social Security number, etc.

The law requires the destruction — ‘shredding or burning’ or ‘smashing or wiping’ — of all paper or computer disks containing personal information that is ‘derived from a consumer report’ before it is discarded. This law applies to all employers with one or more employees.

The aim is to protect the public from identity theft, one of the fastest-growing crimes in the United States. Many times personal information is stolen from an employer. The information comes from the employer's paperwork, as well as computer database systems.

Employers have a duty to restrict access to this data as well as properly dispose of (destroy) the information. Every employer should establish written guidelines for maintaining confidentiality and placing restrictions on access to and use of this information. The guidelines also should contain provisions regarding data of temporary employees and contract employees.

L: Additional Resources

“Oops, I Did It Again”

Ten Most Common Managerial Mistakes That Lead to Litigation

Employers that fail to adopt and follow basic good management practices will substantially increase their risk of litigation and liability.

By Maxine Neuhauser

It is not illegality that fuels employee lawsuits, but rather employee anger arising from perceived unfair treatment.

Placing a legal label, such as discrimination or retaliation, on the seeming unfairness occurs afterward.

Supervisors, managers, executives and even human resources staff often engage in behaviors that, unwittingly, lead employees to feel misled, lied to or otherwise unfairly treated. In doing so, they increase the likelihood of litigation. Ten common mistakes increase the likelihood of employee lawsuits and financial exposure.

Forget About Training

Workplaces today are busier than ever. Devoting time to management training takes precious hours away from productive, moneymaking endeavors. A company, however, is its managers. What the managers say and do, the company says and does. Correct behavior prevents lawsuits. Missteps lead to liability. Managers who are not conversant in company policies, and who do not know the basics of setting goals, preparing performance appraisals and proper documentation become the catalyst for lawsuits.

Supervisors need training about how to handle difficult situations--what to say, whom to turn to for assistance and what not to do. Failing to provide management training is shortsighted, and with the rise of potential individual liability, unfair to a company's supervisors.

Disregard Company Policies

Policies establish a company's "rules for the road" for both employees and managers. They set company standards and inform employees of management's expectations. Well-drafted policies tied to an enterprise's business needs provide guidance to managers and employees. If followed, policies help ensure consistent treatment of employees.

Disregarding policies heightens the potential for inconsistent treatment. It thus increases the risk that employees subjected to harsher action than their co-workers will interpret the discipline they received as unfair or discriminatory. Ignoring policies also sends the message that the employer believes they are unimportant, and gives license to employees to disregard them as well. An employer that fails to follow its policies not only loses the benefit of having them, but it also sets itself up to be portrayed as mismanaged, uncaring and willfully noncompliant with the law.

Shoot From the Hip

Firing without notice may occasionally be appropriate, but rarely. Acting without fair warning--or rashly or arbitrarily--invites resentment. Employees who feel ambushed may be led to seek their revenge through litigation.

Companies can reduce this risk by making employees aware of the probable consequences of misconduct through well-publicized and consistently enforced policies and progressive discipline. Before disciplining an employee, a company should be able to state:

- The legitimate business reason for the action.
- Whether the action is consistent with other disciplinary actions the company has taken in similar situations, and if not, why not.

In addition, employers are usually well advised to give an employee the opportunity to give his or her side of the story before administering discipline. A meeting with the employee often provides a valuable safety valve for both employee and employer.

Often, employees admit the misconduct (or some portion of it). Though unhappy with the discipline levied, employees often will be satisfied with the opportunity to have been heard. Managers need not agree with the employee, and should not argue or apologize. Meeting and listening alone can make employees feel that they have been treated fairly--because, in fact, they have been.

Motivate Poor Performers With Raises and Bonuses

The season for annual raises and bonuses brings with it the temptation to give underperforming employees some amount of increase or bonus. Withholding raises and bonuses is a tough decision. We all like to be liked. Withholding raises and bonuses seems contrary to a supervisor's goal of maintaining morale and staff loyalty.

Giving undeserved increases, however, does not spur poor performers to improve. Rather, it reinforces poor performance by telling employees that their performance merited an increase or bonus.

Terminating someone on the grounds of poor performance, after years of raises and bonuses (even small ones), creates concrete evidence of inconsistency between what the employer says now versus what it did then. It raises suspicion of ulterior motives for the adverse employment action and provides strong motivation for the employee to consult counsel.

Criticize the Person

Few jobs lend themselves to purely objective evaluation. Subjective criteria nearly always come into play. The challenge lies in relating performance criticism (and praise) to the job and not the person. Reviews that characterize the employee, rather than evaluating his or her performance, may become evidence of bias and discriminatory stereotyping.

Praise an employee for becoming the region's leading sales person in just two months, but not for being "young and enthusiastic."

Similarly, criticize an employee for repeatedly failing to meet deadlines, not for being "lazy." Employees may need to "update their skill sets"; they do not, however, constitute "deadwood." To avoid such pitfalls, companies should encourage and assist managers in establishing measurable goals and creating business-related standards against which to evaluate employee performance.

Ignore Problems

Employers ask for trouble when they ignore problems and complaints. Failing to address performance issues has the practical effect of lowering performance standards. It leads employees to believe that they are performing at satisfactory levels because management has not told them otherwise.

Management may be dissatisfied with an employee's level of performance, and may truly believe that the employee ought to know he or she is missing the mark. Unless supervisors confront employees about performance deficiencies, however, and expressly state what employees need to do to meet expectations, change is unlikely. When after years of accepting poor performance a manager finally acts, perhaps by discharging the poor performer or perhaps by passing the employee over for promotion, the employee may react with surprise, hostility and claims of discrimination.

Put Nothing in Writing

Without a written record documenting employee performance issues and management's response, employers increase the risks of "he said, she said" situations when taking adverse employment actions. Employees who have not been given (and required to sign) counseling memos or performance evaluations frequently claim that the counseling, the warning or the evaluation was never received. Verbal warnings carry less weight than written warnings with employees, their lawyers and juries.

Employees who have been repeatedly spoken to, but never written up, are likely to discount or even disregard the import of the counseling. Employers who do not document employment issues leave themselves with little concrete evidence to prove a history of poor performance as the reason for discharge, instead of, for example, retaliation for taking medical leave.

Understand That Boys Will Be Boys

A hostile work environment, whether because of sexual harassment or harassment based on age, disability or race, may arise from either severe or pervasive conduct. Jokes, e-mails and passing comments when considered individually may be of little consequence. Accumulated and viewed as a whole, however, they can be used to show pervasive misbehavior that has converted a professional workplace into a frat house. That a harassing employee may not intend to harass his co-worker does not constitute a defense nor does it create a shield from being sued.

Employers who know of employee misconduct, such as use of the company's e-mail system to send sexually explicit jokes or photographs, and who fail to take action to stop the conduct, substantially increase their risk of litigation and liability for damages.

Lie

When management's fails to tell the truth, employee disgruntlement inevitably follows, and with it a fast-track to the courthouse – and potential liability.

Employers do not protect themselves by telling an older employee that he is being discharged because of job elimination when the true reason is poor performance. As soon as someone (younger) is hired to replace the discharged employee, the company's lie, even if intended to protect the employee from hurt feelings, will be seen as a pretext to hide discrimination.

Cover-up

Repeatedly, experience shows that a cover-up carries worse consequences than the initial misdeed. Shredding documents, deleting files or throwing away drafts upon learning of an impending lawsuit can all add up to trouble. When confronted with a bad situation, it remains true that honesty is the best policy.

From www.workforce.com.

The ten items below are not in rank order. If they were to be ranked, "Ignore Problems" would be #1.

I cannot tell you how many times calls have been received that begin with, "I know I should have called you sooner, but I have this employee who"

Ten Ways To Make Sure An Employee Will Sue You!

By Lawrence F. Feheley

I have studiously advised employers to avoid employee lawsuits, but no more. I now realize it is foolish to instruct them how to avoid legal fees. Follow this list, and you can increase the chances an employee will sue you.

- **Hire anyone who has a pulse.**

Every company wants to hire the best, but when applicants are scarce, employers are relaxed in hiring. Mistakes may stick you with an unproductive employee, or subject you to liability. While recruiting, don't inadvertently screen out potential applicants in legally protected classifications. Ensure applications are completed since they require written acknowledgment of certain legal considerations. Run background checks. Confirm conditional offers in writing.

- **Don't commit any personnel policies to writing.**

The view that putting an employer's policies in writing limits management's discretion is outdated. Well-written employee handbooks are necessary for effective human resources practices. Reliable handbooks are beneficial because they reflect the purposeful compilation of an employer's policies and policies required by law, while helping to define and resolve employee complaints or disputes. A handbook acknowledgment page signed by an employee can be valuable in any lawsuit.

- **Pay everyone a salary so you don't have to worry about overtime.**

Everyone knows that an employer doesn't have to pay overtime to an employee who is paid a salary, right? Wrong. The Fair Labor Standards Act requires that employees working more than 40 hours in a week receive overtime, at time and one-half their regular rate of pay. But there are certain exceptions to the overtime requirement for exempt employees - white-collar employees.

- **Encourage the candid and unrestrained use of e-mail among employees.**

Workplace e-mail messages are at worst, defamatory, harassing or indelible evidence of illegal conduct. Because e-mail histories are increasingly appearing in litigation, employees must be cautioned not to commit anything to e-mail that they wouldn't want published in the newspaper. Asserted rights of privacy on the part of the employees is an issue regarding written e-mail policies. Most jurisdictions permit a private employer to monitor and inspect transmissions on company-owned systems. Remember to include an explicit statement in your e-mail policy that e-mail conversations may be monitored, and employees should harbor no expectation of privacy in using the system.

- **Manage employee performance through payroll deductions.**

In many cases, federal wage-hour laws prohibit penalizing an employee financially for work-related problems. Deductions from an exempt salaried employee's compensation will most likely destroy the overtime exemption, exposing the company to overtime liability.

- **Ignore the Family and Medical Leave Act (FMLA) because it's too much trouble and paperwork.**

FMLA law requires that eligible employees be afforded up to 12 weeks of unpaid leave in a 12-month period, if they encounter a qualifying condition. Employers must adopt and publish a FMLA policy. But an employee does not have to specifically request FMLA leave. Instead, when an employee requests time off and alerts the company about a potentially qualifying condition, the company must determine if FMLA leave is applicable and notify the employee within two business days how the absence will be treated.

- **As long as you have a written Equal Employment Opportunity statement and a workplace harassment policy, don't worry about training and education.**

Employers need to have written anti-discrimination and workplace harassment policies that outline effective complaint procedures. Even the best-written policies are of little value if employees don't know about or understand them. An effective harassment prevention policy and complaint procedure can be a defense for workplace harassment or punitive damages. But, be sure managers know and understand the policies, and invest the time to provide appropriate training (documenting that it occurred).

- **Don't document anything and trust the judicial system.**

Proper documentation of employee misconduct, attendance and unsatisfactory performance is essential for proper evaluation. Good documentation requires drafting the document as though written for a third party, signing and dating it, including details about the conduct involved and disciplinary history, and having the employee sign the document (or noting their refusal). Make it a habit to put all events of significance in writing.

- **Quell dissent by quickly getting rid of complainers and trouble-makers.**

It's natural to want to get rid of problem employees, but that can be grounds for a retaliation claim. Difficult situations arise when an employee files a discrimination claim, and then performs so poorly that discipline or termination is appropriate. Test the legitimacy of disciplining a problem employee by assessing proposed discipline against other employees who haven't filed charges or complaints. A clear track record of similar discipline is a good basis to show that retaliation was not a factor.

- **Since your employees serve at-will, fire them frequently and without warning.**

At-will employment means employees can be discharged at any time and for any reason. Nonetheless, employees still cannot be fired for reasons that are prohibited by law, such as discrimination or protected conduct. At-will employees cannot be fired contrary to a specific promise, or for violating an important public policy or statute. Use caution with the number in which employees are terminated, since the process can impact pursuit of a claim.

Why train supervisors about the law?

Excerpted from Vermont Employment Law Letter, written by attorneys at the law firm Dinse, Knapp & McAndrew, P.C.
by Jeff Nolan

On your list of projects to do this year, be sure to include comprehensive training for your supervisors on legal issues.

Why? Because harassment training, while crucial, isn't enough.

If your supervisors also are trained about broader legal issues and understand the larger context in which harassment and other claims arise, they'll be better able to identify potential legal issues and seek appropriate guidance before the issues turn into real legal problems.

Management asks: Why do comprehensive legal training?

Of course, good training programs come at some price in terms of the resources devoted to planning and delivering them, lost productivity for the time supervisors spend in training, and, for some employers, the use of attorneys or consultants.

Logically, one of the first questions from decision-makers outside your HR department will be "How do we justify the costs associated with this training?" If they have a sense of humor, you could be a smart aleck and respond with the following reasons **not** to do legal training:

1. *Your* company culture is so enlightened, *you* don't need it.
2. Getting sued gives you firsthand experience with the exciting legal process.
3. Watching particularly smug supervisors getting cross-examined about every snarky e-mail they've ever sent can be fun (in a sick sort of way).
4. Jury trials get less scary after your third or fourth one.
5. Punitive damages are really no big deal.
6. You can put off training until a court or government agency concludes that discrimination occurred at your workplace and orders you to do training.
7. Ignorance is bliss.

If it seems your management team has had just about enough foolishness and would prefer some real answers, try the following points:

- Sexual harassment training is practically required by law. In light of U.S. Supreme Court decisions, an employer that conducts no sexual harassment training will be at a serious disadvantage in defending a sexual harassment claim.
- Training regarding other types of prohibited harassment also has become a legal requirement in practical terms.
- Most important from a practical perspective, comprehensive legal-issues training can prevent claims by allowing supervisors to spot legal issues and ask for help when appropriate *before* the issues turn into serious employee dissatisfaction or a lawsuit.
- Comprehensive legal training can strengthen your position when a lawsuit is filed by lessening the chance that supervisors will create what could later be portrayed as a "smoking gun" memo or e-mail.
- The fact that training was done can be a partial defense in harassment cases.

Hopefully, that list and your observations on how your practices could be improved will be enough to convince your decision-makers that comprehensive legal-issues training is worth the limited costs.

Supervisors ask: Why do we have to be trained?

Your supervisors might respond with this question or, more candidly, something like "Oh no, not more training!" Granted, many employers already do a lot of training on issues such as workplace safety, regulatory compliance, and compliance with company protocols and procedures.

Therefore, one of your initial goals in any legal-issues training program is to convince your supervisors that the issues to be covered are important *to them* as supervisors and individuals. So how do you engage your audience? Here are some thoughts:

- Open the discussion with examples (hypothetical or real if the information is public and appropriate) of how legal issues and/or litigation could affect or has affected various departments for which the group has supervisory responsibility.
- Emphasize that because of vicarious-liability principles, the actions of supervisors will be considered by the law to be actions of the employer in most circumstances.
- Explain that there's potential for supervisors to be held personally liable or at least be sued for actions taken in a supervisory role under some statutes, particularly state statutes. That, at least, should get their attention.
- Emphasize the practical burdens and disruption that legal disputes and lawsuits can cause for entire departments, for the individuals involved, and for the supervisors themselves when litigation involves a member of their department.

If you don't think that those points will generate enough interest (or fear, if that's what you're going for), you could try opening the discussion with a quiz, calling on specific supervisors in the audience and asking elementary questions about harassment, vicarious liability, and individual liability issues or even about company policies and procedures. Hopefully, your supervisors will get a perfect score, but it's more likely that the quiz would emphasize that almost everyone can learn *something* new about this rapidly changing area of employment law.

Bottom line

Having a comprehensive legal-issues training program for supervisors as a defense to a lawsuit is a great step, but obviously, avoiding a lawsuit in the first place is even better. Avoiding harm, harassment, and other legal concerns should be the ultimate objective of your supervisor training program. Remember, if your program avoids even one lawsuit, it will have paid for itself several times over.

No PROHIBITED HARASSMENT training = no affirmative defense = employer liability

Legal Alert: Court Emphasizes that Evidence of Training Is a Must

For over 10 years, employers have been able to avail themselves of an affirmative defense to sexual harassment allegations by an employee against a supervisor/manager in those situations where no tangible adverse employment action has been taken against the employee. This defense is known as the *Faragher/Ellerth* defense, and can be invoked where the employer can demonstrate that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). The vast majority of employers have anti-harassment policies including reporting procedures and protocols for employees to follow, have disseminated those policies and procedures to all employees, and have required employees to acknowledge receipt of the policies. However, the adoption, dissemination and acknowledgment of receipt of the policy by the employee may not be sufficient for employer to invoke the affirmative defense.

Recently, in *Bishop v. Woodbury Clinical Laboratory*, No. 3:08-cv-1032 (M.D. Tenn. 2010), **the court rejected the employer's *Faragher/Ellerth* affirmative defense despite the fact that the employer had an existing anti-harassment policy that was published and provided to all of its employees.** The employee admitted that she had received the policy and had been directed to read it. She claimed, however, that she did not read the policy or understand the reporting requirements. **The court noted that there was no evidence offered to demonstrate that the employee or her supervisor received any training on the sexual harassment policy and reporting obligations.** Thus, **the court concluded that the employer failed to establish that it was entitled to invoke the *Faragher/Ellerth* affirmative defense as it could not demonstrate that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.**

This case clearly highlights the employer's obligations to take reasonable care – **not only must the employer have an effective anti-harassment policy and reporting procedures disseminated to its employees, but it should also conduct anti-harassment training for its employees and supervisors to ensure they all understand the policy and procedures. Just passing out the policy is not enough.**

While this decision is not binding on courts outside of the Middle District of Tennessee, it is possible other courts will follow the court's reasoning in *Bishop*. In these increasingly litigious times, it is more important than ever for employers to institute these mechanisms to ensure that its existing policy will be deemed "reasonable," therefore permitting the employer to fully protect itself.

During the hearing described below, the employer argued against fines (\$965 per discrepant form I-9) for having improperly completed forms I-9. The employer said that the discrepancies were minor, technical errors. The federal government argued that the discrepancies were substantive errors and that the fines should be applied. The hearing officer ruled that the errors were substantive, not technical.

What were the discrepancies? Section 2 of the form I-9 was not properly completed within 3 business days of the employee's date of hire. So the employer is facing a fine of \$6,755 (\$965 x 7).

To paraphrase a commercial on TV, "*What's in your folder of I-9 forms?*"

[New OCAHO Decision Clarifying I-9 Violations](#)

The Office of the Chief Administrative Hearing Officer (OCAHO) in a recent decision confirmed that "*[f]ailure to properly complete section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one.*"

The case, *USA v. New China Buffet Restaurant* involved the question of whether the defendant was entitled to correct certain issues with its I-9s. Employers are given 10 days to correct procedural and technical violations, but substantive errors cannot be corrected.

Excerpted from the Written Decision by the Hearing Officer:

New China's prehearing statement argues that because it has now corrected its I-9 forms, the complaint is moot and should be dismissed.

The short answer to New China's contention is that it is simply wrong.

Failure to properly complete section 2 of form I-9 within three business days of hiring an employee is a substantive violation, not a technical or procedural one.

Failure of the employer to sign the certification within three business days is a substantive violation, and failure to identify proper List A, or List B and C documents on the form and to provide their titles, identification numbers and expiration dates, or alternatively attach copies of the documents to the form, is also a substantive violation.

New China's attempts to belatedly "correct" what are clearly substantive violations is accordingly ineffective.

The record thus plainly reflects that New China failed properly to complete section 2 of form I-9 for Fen Zhe Chen, Mei Hui Chen, Chang Jiang Jin, Cui Ping Jiang, Tai Peng Ouyang, Yi Mei Ouyang, and Zhi Lin.

New China Buffet Restaurant's contention that the violations charged were technical and procedural is wrong as a matter of law and ICE is entitled to summary decision as to liability.

Employer Obligations Under 8 U.S.C. § 1324a

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for any employees hired after November 6, 1986 and to make those forms available for inspection.

Forms must be completed for each new employee within three business days of the hire, and each separate failure to properly prepare, retain, or produce the forms upon request constitutes a violation.

Regulations designate form I-9 as the employment eligibility verification form to be used by employers. The form has two parts. Section 1 consists of an employee attestation, in which the employee provides information under oath about his or her status in the United States. Section 2 consists of an employer attestation, which has two separate components: a documentation part and a certification part. Both are crucial to enforcement.

The documentation part requires the employer to list the specific documents which were examined to establish an individual's identity and eligibility for employment, and to provide certain information about the documents.

The certification part requires the employer or agent to sign the form under penalty of perjury within three days of hiring an employee certifying that the employer examined the documents identified and found that they appear to be both genuine and related to the individual named.

The statute provides that an entity charged with technical and procedural failures in connection with the completion of an I-9 form must be afforded a 10 day period after being advised of the basis for the failure in which to correct such technical and procedural errors.

No such relief is available, however, when the violation is **substantive** in nature rather than technical or procedural.

Section 1324a(b)(6) states that employers are relieved from liability for certain minor, unintentional violations of the verification requirements, but does not provide a shield to avoid the basic requirements of the Act).

Section 1324a(b)(6) thus applies only to certain specific technical or procedural failures, not to failures to comply with core verification requirements

What are Substantive and Technical Violations of IRCA?

By Bruce Buchanan, Partner-in-Charge, Immigration Law Section, King & Ballou law firm

The Immigration and Customs Enforcement (ICE) issued an internal document entitled, Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties, on November 25, 2008. The American Immigration Lawyers Association (AILA), through a FOIA request, received a copy of the Guide. It is very insightful as to how ICE defines substantive and technical violations.

The following are **substantive violations**:

1. Failure to timely prepare or present the I-9;
2. Failure to ensure that the individual provides his or her printed name in Section 1 of the Form I-9;
3. Failure to ensure the individual checks a box in Section 1 of the Form I-9 attesting to whether he is a citizen or national of the United States, a lawful permanent resident (LPR), or an alien authorized to work until a specified date, or checking multiple boxes;
4. Failure to ensure an LPR or alien authorized to work provides his or her "A" Number in Section 1 of the Form I-9, but only if the "A" Number is not provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
5. Failure to ensure the individual signs the attestation in Section 1.
6. Failure to review and verify a proper List A document or proper List B or List C documents in Section 2 or Section 3;
7. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A or proper List B and List C documents in Section 2 or 3, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
8. Failure to provide the date employment begins in Section 2 of the I-9;
9. Failure to sign the attestation in Section 2 of the Form I-9;
10. Failure on the part of the employer or authorized representative to print their name in the attestation portion of Section 2.
11. Failure to date Section 2 of the Form I-9;
12. Failure to date Section 2 within three business days of the date the individual begins employment or, if the individual is employed for three business days or less, at the time employment begins.
13. Failure to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents.

14. Failure to sign Section 3 of the Form I-9;
15. Failure to date Section 3 of the Form I-9; and/or
16. Failure to date Section 3 of the Form I-9 not later than the date of the expiration of the work authorization.

A person or entity that has committed one or more substantive violations does **not** have a 10-day notification and correction period and is subject to a Notice of Intent to Fine (NIF).

The following are **technical violations**:

1. Use of the Spanish version of the I-9, except in Puerto Rico;
2. Failure to ensure an individual provides her maiden name, address or birth date in Section 1 of the I-9;
3. Failure to ensure an LPR or alien authorized to work provides his alien number ("A" Number) in Section 1 of the I-9, but only if the "A" Number is provided in Sections 2 or 3 of the Form I-9 (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection);
4. Failure to ensure the individual dates Section 1 at the time employment begins;
5. Failure to ensure a preparer and/or translator provide his or her name, address, signature, or date;
6. Failure to provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in Section 2 or 3, but only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection;
7. Failure to provide the title, business name and address in Section 2;
8. Failure to state "Individual underage 18" in Column B, for employees under the age of 18 using only a List C document; and/or,
9. Failure to provide the date of rehire in Section 3 of the Form I-9.

For technical violations, an employer is provided with at least 10 business days to correct the violations after notification of such violations. If the employer corrects the violations within the designated time period, it is normally deemed to have complied with the requirements. If the technical violations cannot be reasonably corrected, the employer should provide ICE with an explanation in writing of why the violations reasonably cannot be corrected. If ICE determines the explanation is reasonable, the technical violation will not be considered a violation subject to a NIF.

Does your organization have an explicit NO EXPECTATION OF PRIVACY policy statement that each employee has acknowledged in writing?

From the law firm of Fisher & Phillips LLP:

In Wake Of Court Ruling On Privacy Issue, All Employers Need Employee Tech Policies

In mid-June 2010, the U.S. Supreme Court, for the first time, considered whether an employer was within its rights to search employee text messages. The court decided unanimously that the search was reasonable. Although the case focused on a government employer, the decision clearly has ramifications for private businesses as well.

To protect themselves and minimize the possibilities that employees will misuse company technology, **it is extremely important that businesses and organizations put written communication policies in place. As the court observed, "Employer policies concerning communications will, of course, shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated."**

Both public and private employers should establish and implement formal, written electronic communications and systems usage policies, broad and flexible enough to cover emerging technologies, and update them regularly as new technologies develop. Internet or e-mail policies should cover use of company-issued electronic devices, texting and appropriate use of social-networking sites both at work and away from work. **The written policies should include**

explicit statements that employees have no privacy, confidentiality or ownership expectations in data stored on company systems or in any communications generated using employer-provided devices. Written policies should be acknowledged in writing by all employees.

Technology is necessary for conducting business, and its reach and effect will continue to expand. Policies that establish company expectations will help ensure that employees use that technology appropriately and in ways that provide a clear company benefit.

Two substantial risks of overtime violations under the FLSA are:

1. the automatic deduction of work time for a meal period; this issue is discussed below; and,
2. allowing NON-Exempt employees to eat at their work station; answering a phone, reviewing work-related email; answering a question from a co-worker; discussing work; etc. while at a work station is NOT an uninterrupted meal period; unless a meal period is at least 30 minutes of UNINTERRUPTED time, it has to be time worked and paid.

From the law firm of Fisher & Phillips.

Beware the Meal Period Time-Bomb

by John E. Thompson

An increasing number of federal Fair Labor Standards Act lawsuits and U.S. Labor Department investigations include claims based upon the employer's automatically deducting meal periods from non-exempt employees' recorded work times. Typically, the employees did not clock out-and-in to reflect the mealtime they took. **Instead, the employers systematically subtracted the full, scheduled meal period from each employee's total daily hours on the assumption that the person took an entire, uninterrupted meal break each workday.** An employee who worked during a meal period could avoid the deduction by using an exception feature of the timekeeping system, but the usual allegation is that employees did so inconsistently or infrequently, if ever.

Generally speaking, the FLSA does not require that employees be compensated for duty-free meal periods. However, to the extent that automatic time deductions deprive an employee of FLSA-required wages for work during a meal period, a violation often occurs. For instance, this frequently happens when the "standard" deduction is made for a day when the employee takes no meal break or takes only a shortened one, or where the meal period is shot-through with work-related interruptions.

A timekeeping-by-exception approach to meal periods is not unlawful under the FLSA *if it results in an accurate record of non-exempt employees' hours worked.* See, e.g., *Opinion Letter of Office of Enforcement Policy FLSA2007-INA* (May 14, 2007). However, experience suggests that this is *not* what occurs in the real world. An unusual set of circumstances might permit such a claim to be defended successfully, but even then the "win" is likely to be so expensive and disruptive that it will not feel much like a victory.

A safer approach is to instruct employees clearly that:

- They are to clock out-and-in for the time taken for a meal period;
- They are not to work during mealtime unless it is unavoidable; but
- They will be compensated for and must therefore accurately record any time so worked.

Of course, even if employees are told these things, in the end what matters is what actually happens. For example, there might be situations in which work-related interruptions of a meal period should lead to considering the entire period to be compensable work time.

Meal periods might also be regulated by the laws of other jurisdictions, as in the state of California. In addition to considering FLSA issues, it is also important to know whether and how those laws might affect timekeeping and pay where meals are concerned.

Here's a question that arises periodically: "**Can part-time employees be Exempt?**"

The answer is "maybe." It depends on whether the salary that is received is \$455/week or higher; the "Salary Level Test" imposed by the Fair Labor Standards Act (FLSA). Regardless of the number of hours a part-time employee works per week or his/her hourly equivalent rate (salary per payroll period divided by the number of hours worked), the job position is NON-EXEMPT if the weekly salary is less than \$455/week.

See the response to this question from the "answer site" at SHRM.org.

Part-timers earning less than FLSA's minimum aren't Exempt, regardless of duties

By Amy Maingault, Society for Human Resource Management (SHRM)

Q: We have a group of employees who all do the same work. Generally, this position is considered exempt based on the duties and the salary.

However, we have a few employees in this position who work part-time. Is it OK to classify them as exempt even if they don't meet the minimum salary specified in the new Fair Labor Standards Act (FLSA) regulations (the Salary Level Test)?

Can we prorate the minimum salary requirement stated in the FLSA since these employees work fewer hours?

A: Many employers that have part-time workers are dealing with this situation.

According to information from the Department of Labor (DOL), employers may not prorate the minimum salary for part-time workers. Although the FLSA regulations do not specifically state that, the lack of any exception for part-time workers means that the minimum applies to all workers. This interpretation is supported by DOL's elaws – FLSA Advisor, which states, "Whether an employee is considered full-time or part-time does not change the application of the FLSA."

Go to: <http://www.dol.gov/elaws/faq/esa/flsa/014.htm> or more information.

Lastly, the DOL has confirmed that employees are subject to the \$455 weekly/\$23,660 yearly minimum salary requirement regardless of how many or how few hours an employee works.

Part-time workers who do not meet that minimum may not be classified as exempt and will be entitled to overtime payments if they work more than 40 hours in a workweek.

HARVEY MACKAY

United Feature Syndicate

DON'T NEED A PRO'S HELP? THINK AGAIN

In less-educated, more class-ridden societies, the professions constituted a middle force between the working class and the capitalist class. (But today) that special role of the professional has all but disappeared.

Attorney Carl Sapers, in Progressive Architecture

These days, the crunch has finally hit the group that believed the most in its own immortality: the professions.

In just the past five years, for example, the number of people employed as architects in the United States has shrunk to 157,000 from 199,500.

While the number of lawyers continues to grow, the legal profession has accommodated this swelling of its ranks by ceasing to be a profession and becoming a business. Lawyers now compete by out-promising each other in TV ads like car dealers. Law firms weed out lawyers, no matter how skilled, who can't bring in big fees.

Doctors are facing the most serious challenge of all. Under many of the health plans under consideration by Congress, their professional judgment is subject to second-guessing by various panels of non-medical experts – government bureaucrats who will decide when and whether a medical procedure is sufficiently necessary to warrant payment. Directly or indirectly, instead of working for themselves on behalf of their patients, doctors seem destined to wind up working for the government, on behalf of the government.

Flip on relationship

The other day, I met with a lawyer I've relied on over the years for copyright work relating to my writing. The flip on the traditional lawyer/ client relationship came when he called me and offered to take me to lunch at one of my neighborhood bistros.

These days even the lawyers who don't advertise know enough to check in with their clients every now and then and to show face outside their usual haunts.

A few months earlier, I had suggested to a young author needing legal advice that he give the lawyer a call.

Over lunch, the lawyer told me this story:

"I want to thank you for having your author friend contact me. We talked about drafting an agreement with an agent who wanted to sign him up. But I could sense that the longer we talked, the further apart we were getting. He was afraid to hire me -- afraid of the money it would cost him, on top of the money he would have to pay an agent. In fact, the real purpose of his call was to see if he could get by without hiring an agent at all, much less a lawyer."

"I said to him: 'You can always avoid paying for a service, no matter what it is -- lawyer, doctor, architect, agent. But what you can't avoid is the performance of that service. If you're not going to pay to have it done, then you'll have to do it yourself.

The question is: Who can do the job better?"

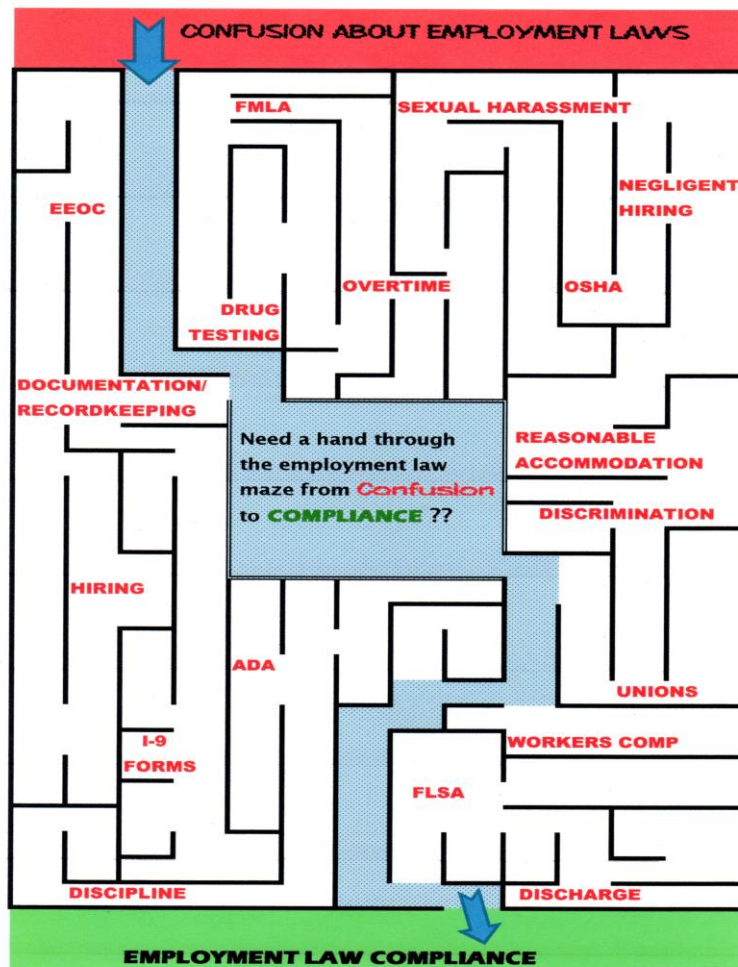
You get what you pay for

What the lawyer didn't have to say is that you get what you pay for. Because I know the author in this case, I also know that he wound up giving away a lot more of his deal than he would have had to if he had hired a professional to draft his contract with the agent.

But at least he had an agent and got published. Many first-time authors drop their manuscripts over the transom themselves to save the agent's fee, even though an agent can greatly improve the odds of publication. What I have never been able to figure out is why 100 percent of nothing is worth more than 90 percent of something.

These days, we all are into downsizing and value pricing and doing it ourselves and thumbing our noses at authority figures. It's the American Way in the '90s. But before you decide to (1) sell it on your own, (2) enter into a contract without seeing a lawyer or (3) practice do-it-yourself brain surgery, stop a minute and consider whether you're buzz wording yourself into a bad, bad decision.

Mackay's Moral: Cheap advice usually turns out to be the most expensive.



Need help navigating your way from confusion to compliance? You probably know a lot about the business you are in. But, unless that business is employment law compliance, your organization could be at risk.

On average, jury awards for discrimination claims against employers are \$500,000 - \$1,000,000, while proactive help costs a mere fraction of that.

We can help! If you lack the resources and inclination to establish a full-fledged human resources (HR) department, **HRHelp** can give you a hand.

We can provide the services and assistance your organization needs to eliminate or reduce the risk of the consequences for violations of the compliance requirements of the employment laws.

Paraphrasing Harvey MacKay from the previous page: *Which course of action will get your organization the best result?*



FOR YOUR INFORMATION

Since 1988, John Perkins, SPHR, has consulted organizations and businesses in all aspects of human resource (HR) management. One of the most vital services that Mr. Perkins provides is helping clients avoid labor law violations, specifically with regard to the following: Americans With Disabilities Act (ADA); Family and Medical Leave Act (FMLA); Fair Labor Standards Act (FLSA); Immigration Reform and Control Act (IRCA); COBRA & HIPAA; and, federal and state Civil Rights Acts.

Through his firm, **HRHelp**, Mr. Perkins works with clients to assess their risk and develop solutions to potential problems. Specific issues are then managed by creating appropriate policies and procedures to meet the needs of the businesses while avoiding labor law compliance violations.

Additionally, Mr. Perkins specializes in the following:

- Workplace incident prevention, including: sexual and other forms of harassment, discrimination, and wrongful treatment.
- Investigation of claims of harassment, discrimination, hostile work environment, and wrongful treatment.
- Training program customization for employees and managers.
- Response management for clients that have received A Notice of Charge of Discrimination from the EEOC.

Professional Activities:

- Board of Directors of the Metro Phoenix Human Resource Association, Treasurer
- Business Counselor with the Arizona Small Business Development Centers (SBDC) Network
- Civil Service Board, City of Phoenix, Board Chair
- Small Business Council of the Phoenix Chamber of Commerce, Chair

Adjunct faculty member teaching HR and management courses at:

- Arizona State University
- Keller Graduate School of Management
- Ottawa University
- University of Phoenix
- Rio Salado Community College

Education:

- Indiana University M.B.A.
- Indiana University M.S. Ed.
- Purdue University B.A.

Certification:

- He has achieved lifetime certification as a Senior Professional in Human Resources (SPHR) from the Society for Human Resource Management.

John Perkins, SPHR

33 West Missouri, #18 ♦ Phoenix, AZ 85013-1868 ♦ phone: 602.464.3553 ♦ hrhelp@cox.net ♦ www.hr-help.info