

The following is a brief summary of labor and employment law requirements employers frequently encounter. This summary is provided for information only and is not intended as legal advice. Because state laws vary, employers should consult legal counsel for the specific requirements of the states in which they do business.

AFFIRMATIVE ACTION

Three major laws require employers with federal government contracts or subcontracts to take affirmative action to employ and advance in employment individuals in certain protected categories. Executive Order 11246 requires employers with federal contracts or subcontracts of \$10,000 or more to take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, or national origin. The Vocational Rehabilitation Act of 1973 prohibits discrimination against individuals with disabilities by employers with federal government contracts or subcontracts totaling \$10,000 or more and requires these employers to take affirmative action to provide employment opportunities for disabled individuals. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") requires employers with federal government contracts or subcontracts totaling \$10,000 or more to take affirmative action to employ and advance in employment qualified disabled veterans, veterans of the Vietnam Era, and other eligible veterans, defined as those who served on active duty during a war or in a campaign or expedition for which a campaign badge was authorized. VEVRAA also prohibits covered contractors from discriminating against veterans in all employment matters. Under all three laws, employers having 50 or more employees and holding a federal government contract or subcontract of \$50,000 or more must develop written affirmative action programs.

AGE DISCRIMINATION

The Age Discrimination in Employment Act ("ADEA") prohibits employers with more than 20 employees from discharging or otherwise discriminating on the basis of age against employees who are age 40 or older. Involuntary retirement of employees with satisfactory performance violates the ADEA, although certain highly compensated executives may be required to retire at age 65. An employer may discriminate on the basis of age only when age is a bona fide occupational qualification necessary for safe and efficient operation of the business. Several states have age discrimination statutes. Some of these state statutes have no minimum age for coverage and may apply to employers with less than 20 employees.



BENEFITS

The Employee Retirement Income Security Act of 1974 ("ERISA") protects employees' rights under retirement, health, and welfare plans. ERISA's requirements include preparing written plan documents, providing summary plan descriptions to employees, submitting annual reports to the federal government, holding the plan assets in trust, and observing strict fiduciary responsibilities. Employers who violate ERISA may incur substantial penalties, including large excise taxes, personal liability of fiduciaries for plan losses, and the loss of tax deductions.

CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT

The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") applies to employers with 20 or more employees and requires employers to provide employees and their families the opportunity to continue health care coverage at group rates in situations where coverage would otherwise cease. The coverage typically extends 18 months for employees (subject to possible 11-month disability extension) and 36 months for dependents. The events triggering COBRA rights include: (1) termination or reduction in hours of the employee's employment; (2) death of the employee; (3) divorce of the employee; (4) retirement or disability of a covered employee entitling the employee to Medicare; and (5) change of a dependent child to nondependent status. Employers **must** give notice of COBRA rights in the legally prescribed form at the time employees become eligible for coverage and upon the occurrence of a triggering event, such as the termination of employment. Employers must give those eligible for COBRA coverage at least a 60-day election period following termination of coverage to decide whether to continue coverage. The election period begins to run when the notice is given to the employee. Employers not subject to COBRA may be subject to state law continuation requirements.

CONCERTED ACTIVITY

Under the National Labor Relations Act, employees have the right to engage in concerted or group activities for the purpose of mutual aid or protection. This right is not limited to union organizing and collective bargaining activities; rather, it may also extend to employee protests concerning wages, hours, or conditions of employment. A single employee can engage in concerted activity when acting on the authority of other employees and not solely by and on behalf of himself. Employees have the right, upon request, to have a co-worker representative present during an investigatory interview. Not all concerted activity is protected under the law. Concerted activity is generally protected if the *methods used* and the *objectives sought* are lawful. Concerted activity is not protected in situations where the methods used unduly interfere with an employer's property rights. Strikes in violation of a collective bargaining agreement, "sit-down" strikes, and slow downs are generally unprotected.

DISABILITY DISCRIMINATION

Section 503 of the Rehabilitation Act requires federal government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. Section 504 of the Rehabilitation Act prohibits disability discrimination by recipients of federal funds. The Americans with Disabilities Act (“ADA”) prohibits private employers with 15 or more employees from discriminating against the disabled. The Rehabilitation Act and the ADA seek to ensure access to equal employment opportunities based on merit. These laws prohibit an employer from discriminating against an individual with a disability if the individual is able to perform the essential functions of the specific job held or sought. When an individual’s disability impedes his job performance, the employer must take steps to reasonably accommodate the individual, unless doing so would impose an undue hardship on the employer. Both the Rehabilitation Act and the ADA prohibit discrimination in employment against: (1) an individual with a physical or mental impairment that substantially limits one or more of the individual’s major life activities; (2) an individual with a record of such an impairment; or (3) an individual who is regarded as having such an impairment. The ADA also prohibits discrimination against a qualified individual because that person is known to have a relationship or association with another individual who has a known disability. A number of states have also adopted disability discrimination laws.



DRUG AND ALCOHOL TESTING

Private employers generally may test job applicants and employees for drugs, alcohol, and other controlled substances. Several states have enacted statutes or regulations which restrict these tests. Before testing anyone, an employer should establish and follow reasonable testing procedures and policies. Employers in specific industries (such as transportation) and employers who do business with certain government agencies may be required to establish a drug-free policy and, in some cases, test applicants and employees for the presence of certain drugs. Unionized employers must bargain for the right to test before testing employees who are represented by the union. Some states have enacted workers’ compensation premium credits for employers with a certified drug testing program.

EMPLOYMENT-AT-WILL

Traditionally, absent a collective bargaining agreement or an individual employment contract, an employer is free to discharge an employee at any time for any reason. However, courts in several states have carved out exceptions to this “employment-at-will” rule. A few states have limited the employment-at-will doctrine by determining that an employer may discharge an employee only for good cause. Other state courts have held that employees may not be discharged in violation of public policy. For example, an employer may not discharge an employee for reporting unlawful employer conduct or “whistle-blowing.” Some states have also held that an employee handbook may create an employment contract between the employer and employee. The employer violates this “contract” if the employee’s termination is contrary to the terms of the employee handbook. Several states have recognized that an employer may insert language in the handbook conspicuously disclaiming any contractual intent.

EQUAL EMPLOYMENT OPPORTUNITY

Under Title VII of the Civil Rights Act of 1964, employers with 15 or more employees are prohibited from refusing to hire, discharging, or otherwise discriminating against any individual in the terms and conditions of employment because of race, color, religion, sex (including pregnancy), or national origin. Many state and local governments have mandated additional protected classifications, such as marital status, AIDS or AIDS-related conditions, and sexual orientation. Unlawful discrimination exists either when an employer intentionally discriminates against a member of a protected group, or when a neutral policy or practice that cannot be justified by business necessity has an unintentional adverse impact on a protected class of employees. Under the Civil Rights Act of 1991, employees alleging unlawful intentional discrimination may sue for both compensatory and punitive damages and have their claim tried before a jury. In addition, an employee who prevails on a discrimination claim, regardless of intent, may be entitled to back pay, reinstatement, and attorneys’ fees.

FAIR CREDIT REPORTING ACT

An employer may incur liability under the Fair Credit Reporting Act by procuring or causing to be prepared consumer reports or investigative consumer reports on present or prospective employees if the individuals are not advised in writing and do not give their written consent that information about their character, general reputation, and personal characteristics may be disclosed in the report. If an employer rejects an applicant, either wholly or in part because of the information contained in a consumer report or investigative consumer report, the employer must advise the applicant of this fact and his/her rights under the Act, and supply the name, address and 1-800 number of the consumer reporting agency that made the report. A willful violation can result in actual damages, punitive damages, and attorneys’ fees. An employer who negligently fails to comply with the Act will be liable for actual damages and attorneys’ fees.

FAMILY AND MEDICAL LEAVE

The Family and Medical Leave Act (“FMLA”) requires that employers with 50 or more workers provide eligible employees up to 12 weeks unpaid leave during any 12 month period to care for a newborn child or newly placed adopted or foster child, to care for an employee’s seriously ill family member, because of a serious health condition that makes the employee unable to perform his or her job functions, or because of a qualifying exigency arising out of an immediate family member’s active duty in the Armed Forces. Up to 26 weeks of leave must be provided during a single 12 month period to provide care for or otherwise assist a qualified service member (meaning spouse, son/daughter, parent, or next of kin of the employee) who was injured in the line of duty while on active duty. Covered leave may be taken on a reduced leave schedule or on an intermittent basis if medically necessary or if agreed to by the employer and employee. During an FMLA leave the employer must maintain the employee’s coverage under any group health plan on the same basis as if the employee had been continuously employed. The employee who takes leave is entitled to be returned to the same or equivalent position with equivalent pay, benefits, and other terms and conditions of employment.

GARNISHMENT

Garnishments are court orders requiring an employer to withhold specified amounts from an employee's wages for payment of a debt owed by the employee to a third party. Generally, employers may not terminate an employee because the employee is subject to a garnishment order for a single indebtedness. States allow garnishments for different types of debts, such as child support or bankruptcy. The IRS may garnish wages for payment of past due taxes. Failure to comply with the garnishment order or improperly protesting the order may subject an employer to complete and immediate liability for the underlying claim.

IMMIGRATION REFORM AND CONTROL ACT

The Immigration Reform and Control Act of 1986 ("IRCA") requires employers to verify the identity and entitlement to employment of every new employee hired by completing a Form I-9. All employers, regardless of size, are subject to IRCA's provisions. Employers must document all verifications and may face significant monetary penalties if proper documentation is not maintained. Employers may not knowingly hire "unauthorized" aliens. Penalties for hiring unauthorized aliens include significant monetary sanctions and imprisonment. IRCA also imposes sanctions against employers for discriminating against employees or applicants because of national origin or citizenship status.

MILITARY SERVICE AND VETERANS' RIGHTS

Employers are prohibited from discriminating against employees who volunteer for or who are called for military service. Military service includes both active and reserve duty. The basic rule is that employers must return the veteran to the job he or she would have had but for military service, with accrued seniority-based benefits. Employers must also grant employees leave time for reserve or training duty and cannot require that employees use vacation time for these activities. The leave may be unpaid.

OCCUPATIONAL SAFETY AND HEALTH

The federal Occupational Safety and Health Act of 1970 and equivalent state statutes impose obligations on virtually all employers to maintain a place of employment that is free of job safety and health hazards. Compliance officers of the federal Occupational Safety and Health Administration ("OSHA") and OSHA state plans conduct inspections of employers' facilities to determine the state of compliance, and their agencies issue citations for violations that are discovered. Citations may be classified as *de minimis*, other than serious, serious, failure to abate, repeat, and willful, and accompanying proposed penalties can be as high as \$70,000 per allegation or violation. Criminal penalties are available when a willful violation causes death of an employee. Employers may contest these alleged violations in proceedings before the federal Occupational Safety and Health Review Commission or before a corresponding adjudicatory agency in OSHA state plan jurisdictions. Recordkeeping and accident reporting requirements apply.

PERSONNEL FILES

Several states have statutes allowing employees, upon request, to inspect and copy their personnel or medical records and to include in those records an explanation of any matter they contest. Some states also have constitutional or statutory restrictions on third-party access to personnel records. There are no federal laws requiring private employers to grant employees access to their personnel files. OSHA, however, requires employers to permit employees access to their medical and exposure records. Under federal law, employers are required to maintain employment applications and personnel records for at least 12 months. Longer retention requirements apply to medical and exposure records. State laws vary regarding retention. Medical records should be kept confidential and should be maintained separately from other employee records.

POLYGRAPH ACT

Federal law prohibits the use of polygraph tests to screen job applicants or to test employees, except in narrow circumstances. Some polygraph testing is permitted in specific industries (such as pharmaceuticals, security services, and federal contractors) and in investigations involving economic loss or injury in the workplace. When testing is permitted, employers must meet several prerequisites and observe numerous procedural safeguards. Many states prohibit all polygraph testing.

SEXUAL HARASSMENT

Sexual harassment exists when an employee is subjected to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature if: (1) submission is made a term or condition of employment; (2) submission to or rejection of a sexual invitation is used as a basis for employment decisions; or (3) the sexual advance, request, or conduct substantially interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. In some cases, liability can be avoided by having an adequate policy prohibiting sexual harassment and taking prompt and appropriate remedial action.

SMOKING

State and local legislation may restrict smoking in public places but generally grants private employers authority to designate smoking and nonsmoking areas within the place of business, absent a written agreement to the contrary between the employer and employees. Suits based on the employer's common law duty to provide a "reasonably safe" workplace have been successful when employees have been able to demonstrate that secondhand smoke poses health hazards. On the other hand, a number of states have moved to protect the job rights of employees who smoke or use tobacco products away from company premises during nonworking hours. Included in this "smokers' rights" legislation are laws labeling employment decisions based on tobacco use outside the workplace as "discriminatory" and laws prohibiting mandatory employee nicotine or tobacco testing. Federal regulation of workplace smoking is under consideration.



UNEMPLOYMENT INSURANCE

Unemployment insurance provides temporary income for workers who lose their jobs through no fault of their own. Unemployment taxes are collected from employers by the states and deposited in the federal treasury until they are requisitioned by the states to pay claims for benefits to the unemployed. To be eligible for benefits, an employee must be unemployed, physically able to work, actively seeking work, and have earned a required amount of wages during a specified period. An employee may be disqualified from receiving benefits if the employee quit his or her last job voluntarily and without good cause, was discharged for work misconduct, refused to apply for or accept suitable work, or knowingly made a false statement or withheld information in order to obtain benefits. In some states, a person is ineligible if unemployed because of a labor dispute.

WAGES AND HOURS

The Fair Labor Standards Act of 1938 (“FLSA”) requires the payment of a statutorily prescribed minimum wage to all covered employees except certain younger workers who may be paid a sub-minimum training wage for up to 180 days. The current minimum wage is \$5.85 per hour, which will increase to \$6.55 on July 24, 2008 and then increase again to \$7.25 on July 24, 2009. States may enact legislation requiring the payment of wages in excess of the federal minimum. The FLSA also requires employers to pay overtime to all nonexempt employees at a rate of one and one-half times the employee’s “regular rate” for all hours worked in excess of 40 per week. Other federal and state laws may require a higher overtime rate. The payment provisions of the FLSA contain numerous exemptions from coverage, including exemptions for independent contractors, apprentices, volunteers, and certain “white collar” employees (such as executive, administrative, or professional employees, computer professionals, and outside salesmen). Some states proscribe certain deductions by an employer.

The Equal Pay Act of 1963 requires that male and female workers receive equal pay for work performed under similar working conditions and requiring equal skill, effort, and responsibility. Unlike the minimum wage provisions of the FLSA, there are no exempt employees under the Equal Pay Act. The FLSA and many state laws also prohibit the use of “oppressive” child labor or the employment of youths in certain “hazardous” occupations.

Most federal and state statutes governing wages and hours require employers to maintain records that accurately reflect hours worked. Wages are generally due upon completion of work and must be paid within a reasonable time thereafter, although many states provide for a specific time period. Payment must be made by cash, check or, in some states, by direct deposit to an employee’s bank account and must be accompanied by a statement showing gross wages, deductions, and net wages.

WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT

The Worker Adjustment and Retraining Notification Act (“WARN”) applies to employers of 100 or more employees and provides certain protections to employees involved in plant closings and mass layoffs. WARN requires employers to provide at least 60 days’ advance written notice of covered layoffs and plant closings to affected employees, their representatives, and appropriate local government officials. If the employer does not give the required notice it may be held liable to affected employees for back pay and benefits for the 60-day notice period. Covered employers are required to notify employees when a plant closing will affect 50 or more employees. An employer must notify employees of a mass layoff if the layoff affects at least one-third of the employees and at least 50 employees. (If 500 or more employees are affected by the layoff, the one-third requirement does not apply.) Managers and supervisors are included as employees under WARN; therefore, they should be counted when computing whether WARN applies, and they should receive the required notice if they are laid off in a plant closing or mass layoff covered by WARN. There are some exceptions for WARN’s required 60-day notice but many of the exemptions have been narrowly construed.



WORKERS’ COMPENSATION

Workers’ compensation laws provide compensation to employees for lost wages caused by occupational diseases or injuries arising out of and in the course of employment. Recovery under workers’ compensation laws is an employee’s exclusive remedy for work-related injuries or diseases. Therefore, an employer is generally immune from a lawsuit by an employee for damages resulting from an occupational injury, even for injuries caused by the employer’s negligence, including gross, wanton, willful, or reckless conduct. In addition to replacement for lost wages, workers’ compensation laws provide for payment of medical treatment, hospitalization, and rehabilitative services to the injured employee. The amount of benefits varies by state.

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