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Human Resource Law From Start to Finish

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Other Employment Laws You Need to Know

Submitted by Monica Vicky Bowers

HUMAN RESOURCE LAW FROM START TO FINISH

Safeguarding the Employment Lifecycle: What You Need to Know

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OTHER EMPLOYMENT LAWS YOU NEED TO KNOW

HUMAN RESOURCE LAW FROM START TO FINISH

Safeguarding the Employment Lifecycle: What You Need to Know

I. OTHER EMPLOYMENT LAWS YOU NEED TO KNOW

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A. Family and Medical Leave Act (FMLA)

Summary

The Family and Medical Leave Act of 1993 (FMLA) is a federal law enacted to assist families with balancing work life and family commitments. The regulations governing application of the law became effective August 5, 1993 and were revised effective January 16, 2009. The FMLA was further amended by the National Defense Authorization Act for Fiscal Year 2010. The FMLA is administered and enforced by the Wage and Hour Division of the United States Department of Labor.

A. Basic Leave Entitlement

The FMLA entitles an eligible employee up to 12 weeks of paid and/or unpaid, job-protected leave for the following:

- The birth of a son or daughter or placement of a son or daughter with the employee for adoption or foster care;
- To care for the employee's *spouse*, *child* (typically under age 18), or parent, who has a *serious health condition*;
- For a *serious health condition* that makes the employee unable to perform the employee's job; or
- Ay qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

Note, twenty-six (26) workweeks of leave are available during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member's spouse, son, daughter, parent, or next of kin (military caregiver leave).

MAINTENANCE OF HEALTH BENEFITS

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work, regardless of whether the employee is on paid or unpaid leave. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

EMPLOYEE ELIGIBILITY

To be eligible for FMLA benefits, an employee **must**:

- work for a covered employer;
- have worked for the employer for at least 12 months;
- have worked at least 1,250 hours over the previous 12 months; and
- work at a location where the employer has at least 50 employees within 75 miles.

While the 12 months of employment need not be consecutive, employment periods prior to a break in service of **seven** years or more need not be counted unless the break

is occasioned by the employee's fulfillment of his or her National Guard or Reserve military obligation (as protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA)), or a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service.

Spouses employed by the same employer are limited in the **amount of** family leave they may take for the birth and care of a newborn child, placement of a child for adoption or foster care, or to care for a parent who has a serious health condition to a combined total of 12 workweeks (or 26 workweeks if leave to care for a covered service member with a serious injury or illness is also used). Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement. However, the combined leave limitation is not applicable to care for a spouse, son or daughter with a serious health condition or the serious health condition of the employee. Also, no limitation for employee's spouse, son, daughter or parent with a qualifying exigency who is a military member on "covered active duty."

Under some circumstances, employees may take FMLA leave intermittently – taking leave in separate blocks of time for a single qualifying reason – or on a reduced leave schedule – reducing the employee's usual weekly or daily work schedule. When leave is needed for planned medical treatment, the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operation. If FMLA leave is for birth and care, or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval.

Under certain conditions, employees **or** employers may choose to "substitute" (run concurrently) accrued **paid** leave (such as sick or vacation leave) to cover some or all of the FMLA leave. An employee's ability to substitute accrued paid leave is determined by the terms and conditions of the employer's normal leave policy.

What is a Serious Health Condition?

"**Serious health condition**" means an illness, injury, impairment, or physical or mental condition that involves either:

• Inpatient care (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical-care facility, including any period of incapacity (*i.e.*, inability to work, attend school, or perform other regular daily activities) or subsequent treatment in connection with such inpatient care; **or**

• Continuing treatment by a health care provider, which includes:

(1) A period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that **also** includes:

• treatment two or more times by or under the supervision of a health care provider (*i.e.*, in- person visits, the first within 7 days and both within 30 days of the first day of incapacity); **or**

• one treatment by a health care provider (*i.e.,* an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (*e.g.,* prescription medication, physical therapy); **or**

(2) Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; **or**

(3) Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity. A visit to a health care provider is not necessary for each absence; **or**

(4) A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. Only supervision by a health care provider is required, rather than active treatment; **or**

(5) Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

What type of notice is required?

To provide notice means that an employee provides at least verbal notice sufficient to make an agency aware of the need for leave for an FMLA-qualifying reason and the anticipated timing and duration of the leave. An employee need not actually request his rights under the FMLA or even mention the FMLA. Supervisors should watch for employees missing work due to multiple doctors' appointments, out for a prolonged period due to medical condition, caring for a *spouse*, child or parent due to a medical condition, pregnancy, adoption or placement of foster child or time off to help a family member in the military. An employee must provide sufficient information to reasonably determine whether the FMLA may apply to the leave request. If the employee is unable to do so personally, notice may be given by the employee's *spokesperson*. The agency should inquire further of the employee or *spokesperson* if it is necessary to obtain more information about whether FMLA leave is being sought and to obtain the necessary details of the planned leave. Notice is only required to be given once, regardless of whether leave is taken on a continuous, intermittent or reduced schedule basis. However, any changes in an employee's scheduled leave (e.g., from continuous to intermittent leave) should be communicated to the agency.

When an employee seeks leave due to a qualifying reason, for which the agency has previously provided the employee FMLA-protected leave, the employee must specifically reference either the qualifying reason for leave or the need for FMLA leave. Calling in "sick" without providing more information will not be considered sufficient notice to trigger an agency's obligations under the FMLA. An employee must advise the agency *as soon as practicable* if the dates of scheduled leave change or if the dates were initially unknown.

An agency may require an employee to comply with the agency's usual procedures and requirements for requesting leave (unless they are more strict than FMLA regulations), as well as the completion of any applicable forms. Failure to follow internal procedures does not permit the agency to deny or delay an employee's taking FMLA leave if the employee gave timely verbal or other notice. In the case of a medical emergency, written advance notice may not be required of the employee.

Upon request, an employee who provides notice of the need to take FMLA leave on an intermittent or reduced leave schedule for planned medical treatment must advise the agency of the reasons requiring such a schedule and of any treatment schedule. The employee and agency are expected to work out a schedule that meets the employee's needs without unduly disrupting the agency's operations. The schedule is subject to the approval of the employee's/family member's *health care provider*.

FMLA Forms

1. WH-381 Notice of Eligibility and Rights & Responsibilities
2. WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition
3. WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition
4. WH-384 Certification of Qualifying Exigency For Military Family Leave
5. WH-385 Certification for Serious Injury or Illness of Covered Service member -- for Military Family Leave
6. WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave
7. WH-382 Designation Notice

Notice of Eligibility and Rights & Responsibilities

When an employee requests FMLA leave or an agency acquires knowledge that an employee's leave may be for an FMLA qualifying reason, the agency must notify the employee within 5 business days of his eligibility.

Employee eligibility is determined and notice must be provided at the commencement of the first instance of leave for each FMLA qualifying reason in the applicable 12-month period. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility for that reason does not change during the 12-month period. If, at the time an employee provides notice of a subsequent need for FMLA leave during the 12-month period due to a different qualifying reason and the employee's eligibility status has not changed, no additional eligibility notice is required.

If the specific information provided by the notice changes, the agency shall within 5 business days of receipt of the employee's first notice of need for leave following any change, provide written notice referencing the prior notice and stating any of the information that has changed.

If an agency fails to provide an employee with this form, the agency may not take action against an employee for failure to comply with any provision required to be disclosed on the form.

Certification Forms

If certification will be required, the agency must provide the appropriate certification form to the employee with the Notice of Eligibility and Rights & Responsibilities.

- Health Care Provider for Employee's Serious Health Condition

- Health Care Provider for Family Member's Serious Health Condition
- Qualifying Exigency for Military Family Leave
- Serious Injury or Illness of Covered Service member

Designation Form

When an agency has enough information to determine whether the leave is being taken for FMLA qualifying reasons, the agency must notify the employee regarding whether the leave will be designated as FMLA leave within 5 business days. Only one notice of designation is required for each FMLA qualifying reason per applicable 12-month period. If the agency determines that the leave will not be designated as FMLA qualifying, the agency must notify the employee of that determination. If the agency has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave (e.g., certification will not be required), the agency must provide the employee with the designation notice at that time.

If the agency requires a release to return to work, the agency must indicate so in the designation notice and should include the Medical Release Form (NPD-81) and the essential functions of the employee's position. The designation notice must be in writing.

If the information provided in the designation notice changes, the agency must provide, within 5 business days of the receipt of the employee's first notice of need for leave following any change, written notice of the change. The agency must notify the employee of the amount of leave counted against the employee's FMLA leave entitlement. If it is not possible to provide this information on the form, then the agency must provide notice of the amount of leave counted against the employee's entitlement upon the request of the employee, in writing.

B. Americans with Disability Act (ADA) and Amendments (ADAAA)

1. Interpretation of Disability

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.

An individual with a disability is a person who:

1. Has a physical or mental impairment that substantially limits one or more major life activities;

2. Has a record of such an impairment; or

3. Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

1. Making existing facilities used by employees readily accessible to and usable by persons with disabilities.

2. Job restructuring, modifying work schedules, reassignment to a vacant position;

3. Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:

4. A deaf applicant may need a sign language interpreter during the job interview.

5. An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.

6. A blind employee may need someone to read information posted on a bulletin board.

7. An employee with cancer may need leave to have radiation or chemotherapy treatments.

An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. If an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation. Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

C. Worker Adjustment and Retraining Notification Act (WARN)

The Worker Adjustment and Retraining Notification Act (WARN) was enacted on August 4, 1988, and became effective on February 4, 1989. The Worker Adjustment and Retraining Notification Act (WARN Act) is a federal law that protects employees, their families, and communities by requiring most employers with 100 or more employees to provide 60 days written notice in advance notification of a covered plant closings and covered mass layoffs so that employees can transition for loss of income, seek new employment or secure necessary training or retraining.. This notice must be provided to either affected workers or their representatives (e.g., a labor union), to the State Dislocated Worker Unit, and to the appropriate unit of local government. The

WARN Act is administer by the United States Department of Labor. While some states have a separate WARN law that enhances the federal regulations, Louisiana does not and strictly follows federal requirements.

To determine how many employees an employer "has" under the WARN Act, an employer must count all employees at every location, not just the location where employees are being laid off. However, employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are not included when tabulating the number of qualifying employees. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. However, regular federal, state, and local government entities which provide public services are not covered. Although part-time employees are not counted in determining whether a reduction in force affects enough employees to trigger the WARN Act, they are entitled to WARN Act notice if they are being laid off.

Layoff notice is required as follows:

- **Plant Closing:** A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice (discussed later).
- **Mass Layoff:** A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer's active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees who work an

average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

The term "employment loss" means:

1. An employment termination, other than a discharge for cause; voluntary departure; or retirement;
2. a layoff exceeding 6 months; or
3. a reduction in an employee's hours of work of more than 50% in each month of any 6-month period.

An employer who fails to comply with WARN Act may be liable for back pay up to sixty (60) days. In addition, $500 per day for each violation to local government.

D. OLDER Workers' Benefit Protection Act (OWBPA)

An employee who is 40 years old or older, is entitled to the protections under the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA amends the Age Discrimination in Employment Act ("ADEA"), entity older workers to benefits such as severance pay. Further, cannot pressure into signing legal waivers. The OWBPA also requires employers to provide additional, detailed information when two or more employees are terminated at or around the same time. Although the OWBPA most commonly applies in the context of involuntary terminations and reductions-in-force, its strict rules apply equally to early retirement plans, exit incentive plans, and other voluntary departures where an employee is asked to sign a release.

Under the OWBPA, for a release of age discrimination claims to be valid, the release must be "knowing and voluntary." At minimum, this means that the release must:

- be in writing;
- be written in a manner that the employee would understand;

- be in plain, clear language that avoids technical jargon and long, complex sentences;
- not mislead or misinform the employee executing the release;
- not exaggerate the benefits received by the employee in exchange for signing the release, or the limitations imposed on the employee as a result of signing the release;
- specifically refer to the ADEA;
- specifically advise the employee to consult an attorney before signing the release; and
- not require the employee to waive rights or claims arising after the date the employee signs the release.

As with all releases, the employee also must receive additional consideration, above and beyond anything of value to which he or she was already entitled. This means that an employer cannot, for example, require an employee to sign a release to receive his or her final pay for hours worked.

The OWBPA requires employers to give employees a specific amount of time to consider the release. For a single employee, the employee must be given 21 days to consider the release. The consideration period starts to run from the date of the employer's final offer to the employee. Although material changes to that offer will restart the clock, the employer and employee may agree that changes, whether material or not, do not restart the running of the consideration period.

After considering and signing the release, an employee has seven days to change his or her mind and revoke his or her agreement to the release. If these time periods are not specifically included in the release, then the release is unenforceable.

Additional Requirements for Two or More Employees Over 40

When an employer requests release agreements from a group or class of employees (i.e., two or more employees) age 40 or over, those employees receive additional protections. First, the required consideration period increases from 21 to 45 days. Second, the employer must provide the over-40 employees with detailed information about each of the other employees who have been offered severance and asked to sign a release. This requirement applies even when the departures are spaced out over a period of time, as long as it is part of the same decision-making process. For example, if an employer's expense reduction plan calls for staggered terminations over a six-month period, all of the terminations that are part of the plan count as multiple terminations under the OWBPA. The employer must provide the following information to the employees:

- the class, unit, or group of employees that were covered by the exit program (whether voluntary or involuntary);
- the eligibility factors for the program;
- the time limits applicable to the program;
- the job titles and ages of all of the individuals who (in the case of a voluntary exit incentive program) are eligible for the program, or who (in the case of an involuntary termination program) were selected for the program; and
- the ages of all individuals in the same job classification or organizational unit who are not eligible for, or who were not selected for, the program.

E. Age Discrimination in Employment Act (ADEA)

The federal Age Discrimination in Employment Act (ADEA) protects the rights of older workers. In a nutshell, workers over the age of 40 cannot be harassed because of their age or arbitrarily discriminated against because of age in any employment decision. Perhaps the single most important rule under the ADEA is that no worker can be forced to retire.

The Act also prohibits age discrimination in hiring, discharges, layoffs, promotion, wages, health care coverage, pension accrual, other terms and conditions of employment, referrals by employment agencies, and membership in and the activities of unions. It requires that there must be a valid reason not related to age—for example, economic reasons or poor job performance—for all employment decisions, but especially firing. Accordingly, of all the possible claims of workplace discrimination, age discrimination has the broadest potential reach; most workers will live to be over 40. And the protection is likely to become even more important. We live in a time where the life expectancy is increasing, the older population is expanding rapidly, and many older workers stay in the workforce for a long time—a growing number of them past age 70.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. ADEA protections include:

1. **Apprenticeship Programs**: It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an

individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

2. Job Notices and Advertisements: The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business.

3. Pre-Employment Inquiries: The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

4. Benefits: The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers. Employers are permitted to coordinate retiree health benefit plans with eligibility for Medicare or a comparable state-sponsored health benefit.

5. Waivers of ADEA Rights: An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- be in writing and be understandable;
- specifically refer to ADEA rights or claims;
- not waive rights or claims that may arise in the future;
- be in exchange for valuable consideration;
- advise the individual in writing to consult an attorney before signing the waiver; and
- provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

F. Title VII and Related Law

Title VII of the Civil Rights Act of 1964 prohibits discrimination in hiring, promotion, termination, compensation, and other terms and conditions of employment because of race, color, sex, natural origin, religion, age, disability or genetic information.

1. Race or Color

This category of protected individuals is normally associated with African Americans. However, the courts have included Caucasians, Latinos, and Asians, along with Indigenous Americans, Eskimos, Native Hawaiians, and Native Americans. The courts have also held that this prohibition on discrimination based on a color to mean that a light skinned Black worker could pursue a discrimination case based on the actions of her darker skinned supervisor, *Walker v. Secretary of Treasury*, 742 F.Supp. 670, 506 U.S. 853 (1992).

An employer commits racial discrimination when it makes job decisions on the basis of race, or when it adopts neutral job policies that disproportionately affect members of a particular race. For example, an employer discriminates when it refuses to hire Latinos, promotes only white employees to supervisory positions, requires only African-American job applicants to take a drug test, or refuses to allow Asian-American employees to deal with customers. An employer that discriminates on the basis of physical characteristics associated with a particular race -- such as hair texture or color, skin color, or facial features -- also commits race discrimination.

In addition, employment policies or criteria that seem neutral may be discriminatory if they have a disproportionate impact on members of a particular race. For example, a height requirement may screen out disproportionate numbers of Asian-American and Latino job applicants. Also an employment policy requiring men to be clean-shaven may discriminate

against African-American men, who are more likely to suffer from Pseudofolliculitis barbae (a painful skin condition caused and exacerbated by shaving).

Rules or policies that have a disproportionate impact on people of a certain race will pass legal muster only if you can show that there is a legitimate and important work reason for the policy. For example, a height requirement might be legitimate if you can show that an employee must be at least a certain height to operate a particular type of machinery.

2. Sex

This protected class of individuals prohibits discrimination based on gender and is normally associated with the protection of woman, but may apply in certain circumstances to men. This provision also prohibits discrimination based on pregnancy as set forth in the Statute at 42 U.S.C.A. 2000e(k) which states in its pertinent part:

> It is an unlawful employment practice to discriminate against a person on the basis of pregnancy, child birth, or related medical conditions, and women affected by pregnancy, child birth, or related medical conditions shall be treated the same for all employment related purposes.

The courts have held that an employer's rules or policies that apply only to one gender, violate Title VII. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).
However, not all employment policies and procedures violate Title VII if they apply only to one gender. For instance, if the policies and procedures are based on a bona fide occupational qualification (BFOQ) for the job in question, the courts will not find sex discrimination.

3. Religion

Religion is defined in Title VII as all aspects of religious observance and practice, as well as belief. The Equal Employment Opportunity Commission (EEOC) has issued various guidelines and interpreted regulations which state that religious practices

include moral or ethical beliefs as to what is right and wrong and which are sincerely held with the strength of traditional religious views. The EEOC has also determined that the definition of religion includes established and organized faiths such as Roman Catholic, Baptist, Lutheran, Presbyterian, Judaism or Islam.

An employer is prohibited from discriminating against an employee on the basis of the employee's religious beliefs. Therefore, Title VII imposes a duty to reasonably accommodate an employee's or perspective employee's religious observance or practice unless doing so would impose an Undue hardship on the conduct of the employer's business. See 42 U.S.C. '2000e(j). However, the courts do distinguish religion from a person's social or political views, or views that are not part of a moral or ethical system. For instance, the court in *Seshadri v. Kasraian*, 130 F.3d. 798 held that a professor who described his religion as a Creed requiring scrupulous honesty in the pursuit of scientific knowledge was not a religion as defined by Title VII. The proclaimed religion views racist and anti-Semitic ideology of the Ku Klux Klan was not defined as religion.

4. Natural Origin

The Supreme Court has defined and interpreted natural origin as referring to the country where a person was born, or, more broadly, the country for which his or her ancestors came. See *Espinoza v. Farah Manufacturing Company*, 414 U.S. 86 (1973). Similarly, in *Fortino v. Quazar* held that the term natural origin does not include discrimination based solely on a person's citizenship. 950 F.2d 389.

Natural origin cases generally arise when an employee is required to speak only English at work. The EEOC has held at 29 C.F.R. '1606.7(a) that requiring bi-lingual employees only to speak English at work is a burdensome term and condition of employment that presumably violates Title VII and should be closely scrutinized. However, the Federal courts have ruled that requiring employees to speak in English only does not violate Title VII. See *Garcia v. Spunstak Company*, 998 F.2d 1480 (9th Cir.).

An employer discriminates on the basis of national origin when it makes employment decisions based on an employee's or potential employee's ancestry, birthplace, or culture, or on linguistic characteristics or surnames associated with a particular ethnic group. For example, an employer who refuses to hire anyone with a Hispanic last name discriminates, as does an employer who won't allow anyone with an accent to work with the public.

Another instance of national origin discrimination involves employers prohibiting on-duty employees from speaking any language other than English. However, if the employer has a legitimate business reasons, employers may impose an English-only rule. For instance, a policy requiring employees to speak English-only when communicating with customers may be acceptable. However, a rule that forbids workers from ever speaking another language, even during breaks or when a customer who speaks that language is present, is probably too broad.

Similarly, as it relates to accents**,** employers must also tread carefully when making employment decisions. For instance, an employer may decide not to hire or promote an employee to a position that requires clear oral communication in English if the employee's accent substantially affects his or her ability to communicate clearly. However, if the employee's accent does not impair his or her ability to be understood, you may not make job decisions on that basis.

G. Pregnancy Discrimination Leave

If an employee works for an employer with less than 50 employees and according FMLA does not apply, the state of Louisiana provides coverage for expecting mothers working for employers with more than 20 employees.

LSA-R.S. §23: 341 states:

> A. The provisions of this Part shall apply only to an employer who employs more than twenty-five employees within this state for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.

B. (1) For purposes of this Part, pregnancy, childbirth, and related medical conditions are treated as any other temporary disability. However, no employer shall be required to provide a female employee disability leave on account of normal pregnancy, childbirth, or related medical condition for a period exceeding six weeks.

(2) Nothing in this Part shall be construed to require an employer to provide his employees with health insurance coverage for the medical costs of pregnancy, childbirth, or related medical conditions. The inclusion in any such health insurance coverage of any provisions or coverage relating to medical costs of pregnancy, childbirth, or related medical conditions shall not be construed to require the inclusion of any other provisions or coverage, nor shall coverage of any related medical conditions be required by virtue of coverage of any medical costs of pregnancy, childbirth, or other related medical conditions.

C. The provisions of this Chapter shall apply to the awarding of a contract or subcontract for providing goods or services. Acts 1997, No. 1409, §1, eff. Aug. 1, 1997; Acts 1999, No. 1366, §1.

and LSA-R.S. §23:342 provides:

Unlawful practice by employers prohibited; pregnancy, childbirth, or related medical condition; benefits and leaves of absence; transfer of position

It shall be an unlawful employment practice unless based upon a bona fide occupational qualification:

(1) For any employer, because of the pregnancy, childbirth, or related medical condition of any female employee, to refuse to promote her, or to refuse to select her for a training program leading to promotion, provided she is able to complete the training program at least three months prior to the anticipated date of departure for her pregnancy leave, or to discharge her from employment or from a

training program leading to promotion, or to discriminate against her in compensation or in terms, conditions, or privileges of employment.

(2) For any employer to refuse to allow a female employee affected by pregnancy, childbirth, or related medical conditions either:

(a) To receive the same benefits or privileges of employment granted by that employer to other persons not so affected who are similar in their ability or inability to work, including taking disability or sick leave or any other accrued leave which is made available by the employer to temporarily disabled employees.

(b) To take a leave on account of pregnancy for a reasonable period of time, provided such period shall not exceed four months. Such employee shall be entitled to utilize any accrued vacation leave during this period of time. "Reasonable period of time" means that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions. Nothing herein shall be construed to limit the provisions of R.S. 23:341(C) or Subparagraph (2)(a) of this Section. An employer may require any employee who plans to take a leave pursuant to this Section to give the employer reasonable notice of the date such leave shall commence and the estimated duration of such leave.

(3) For an employer who has a policy, practice, or collective bargaining agreement requiring or authorizing the transfer of temporarily disabled employees to less strenuous or hazardous positions for the duration of the disability to refuse to transfer a pregnant female employee who so requests.

(4) For any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employer shall be required by this Part to create additional employment which the employer would

not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job. Acts 1997, No. 1409, §1, eff. Aug. 1, 1997

H. UNIFORM SERVICES EMPLOYMENT REEMPLOYMENT RIGHTS ACT (USERRA)

The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) was signed into law on October 13, 1994. USERRA clarifies and strengthens the Veterans' Reemployment Rights (VRR) Statute. The Act itself can be found in the United States Code at Chapter 43, Part III, Title 38. USERRA is intended to minimize the disadvantages to an individual that occur when that person needs to be absent from his or her civilian employment to serve in this country's uniformed services. Specifically, USERRA guarantees an employee returning from military service or training the right to be reemployed at his or her former job (or as nearly comparable a job as possible) with the same benefits.

USERRA covers virtually every individual in the country who serves in or has served in the uniformed services and applies to all employers in the public and private sectors, including Federal employers. The law seeks to ensure that those who serve their country can retain their civilian employment and benefits, and can seek employment free from discrimination because of their service. USERRA provides protection for disabled veterans, requiring employers to make reasonable efforts to accommodate the disability.

All employers must be cognizant of legal issues which arise under USERRA. Probably the most important liability issue is individual liability. A federal district court held that those who violate USERRA may face individual liability even if they took the actions at issue in their official employer capacity.

In *Bello v. Vill. of Skokie*, 151 F.Supp.3d 849 (2015), a police officer who also was a staff sergeant in the United States Marine Corps Reserve sued his employer as well as several supervisors in their individual capacities, for violations of USERRA. The court expressly rejected the employer's argument that several supervisors could not be personally liable under USERRA and held: "If the individual defendants are held liable for violating USERRA, the Court may enjoin them from implementing a discriminatory policy in the future, and it may require them to compensate Bello for the monetary damages he incurred." HR managers cannot be fond of that holding.

Note these litigation hazards always remain because **USERRA has no statute of limitations.** Penalties for USERRA violations can result in the payment of lost wages and/or benefits. Attorney's fees are also awarded to the prevailing party. In addition, liquidated damages may be available for willful violations.

Employment and Reemployment Rights

The Uniformed Services Employment and Reemployment Rights Act of 1994, enacted October 13, 1994 (Title 38 U.S. Code, Chapter 43, Sections 4301-4335, Public Law 103-353), as amended, provides for the employment and reemployment rights for all uniformed service members.

Who's Eligible

"Service in the Uniformed Services" and "Uniformed Services" Defined (38 U.S.C. Section 4303, 13 & 16)

Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty and active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty
- Absence from work for an examination to determine a person's fitness for any of the above types of duty
- Funeral honors duty performed by National Guard or Reserve members
- Duty performed by intermittent employees of the National Disaster Medical System (NDMS), which is part of the Department of Health and Human Services, when activated for a public health emergency, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, Section 300hh-11(d).

The "uniformed services" consist of the following [20 CFR 1002.5 (o)]:

- Army, Navy, Marine Corps, Air Force and Coast Guard
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve and Coast Guard Reserve
- Army National Guard and Air National Guard
- Commissioned Corps of the Public Health Service
- Any other category of persons designated by the President in time of war or emergency

Notice Requirement

The law requires employees to provide their employers with advance notice of military service, with some exceptions. Thus, notice may be either written or oral. It may

be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- Military necessity prevents the giving of notice; or
- The giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exception is defined in regulations of the Secretary of Defense as "a mission, operation, exercise or requirement that is classified, or a pending or ongoing mission, operation, exercise or requirement that may be compromised or otherwise adversely affected by public knowledge." See 32 CFR 104.3.

Duration of Service

USERRA reemployment rights apply if the cumulative length of service that causes a person's absences from a position does not exceed five years. Most types of service will be counted in the computation of the five-year period.

Exceptions – Eight categories of service are exempt from the five-year limitation. These include:

1. Service required beyond five years to complete an initial period of obligated service – Section 4312 (c) (1). Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years.

2. Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit – Section 4312 (c) (2). For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea. Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in the Global War on Terror.

3. Required training for Reservists and National Guard members – Section 4312 (c) (3). The two-week annual training sessions and monthly weekend drills

mandated by statute for Reservists and National Guard members are not counted toward the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development.

4. Ordered to involuntary service, or retained on active duty during domestic emergency or national security related situations – Section 4312 (c) (4) (A). For example, as a result of the attacks on the World Trade Center in New York City, President Bush declared that a national emergency existed and members of the Ready Reserve were called to active duty.

5. Ordered to service, or to remain on active duty (other than for training) because of a war or national emergency declared by the President or Congress – Section 4312 (c) (4) (B). This category includes service not only by persons ordered to involuntary active duty, but also service by volunteers who receive orders to active duty. For example, since September 11, 2001, Reservists were involuntarily called to active duty under Federal orders for Operations Noble Eagle, Enduring Freedom and Iraqi Freedom. Additionally, Reservists and retirees (who were not called) volunteered for active duty.

6. Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent – Section 4312 (c) (4) (C). Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty under Title 10, U.S.C. Section 12304.
This sixth exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons ordered to involuntary active duty for operational missions would be covered by the fourth exemption.

7. Service by members who are ordered to active duty in support of a "critical mission or requirement" of the uniformed services as determined by the Secretary involved – Section 4312 (c) (4) (D). The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement.

8. Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States – Section 4312 (c) (4) (E).

Disqualifying Service

When would a person's service disqualify him or her from asserting USERRA rights? The statute lists four circumstances:

1. Separation from the service with a dishonorable or bad conduct discharge.

2. Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable."

3. Dismissal of a commissioned officer in certain situations involving a court martial or by order of the President in time of war. (Section 1161 (a) of Title 10.)

4. Dropping an individual from the rolls when the individual has been absent without authority for more than three months or is imprisoned by a civilian court. (Section 1161 (b) of Title 10.)

Reporting Back to Work

To qualify for USERRA's protections, a service member must be available to return to work within certain time limits. These time limits for returning to work depend (with the exception of fitness-for-service examinations) on the duration of a person's military service.

Service of 1 to 30 Days

The person must report to his or her employer by the beginning of the first regularly scheduled work period that begins on the next calendar day following completion of service, after allowance for safe travel home from the military duty location and an 8-hour rest period. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 6:00 a.m. shift the next morning.

If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible after the expiration of the 8-hour period.

Fitness Exam

The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person's absence.

Service of 31 to 180 Days

An application for reemployment must be submitted to the employer no later than 14 days after completion of a person's service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible on the next day when submitting the application becomes possible.

Service of 180 or More Days

An application for reemployment must be submitted to the employer no later than 90 days after completion of a person's military service.

Disability Incurred or Aggravated

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of an injury or illness incurred or aggravated during the performance of military service.

The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual's control that would make reporting within the two-year period impossible or unreasonable.

Unexcused Delay

A person's reemployment rights are not automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits. In such cases, the person will be subject to the employer's established rules governing unexcused absences.

Documentation Upon Return

An employer has the right to request that a person who is absent for a period of service of 31 days or more provides documentation showing that

- the person's application for reemployment is timely;
- the person has not exceeded the five-year service limitation; and
- the person's separation from service was other than disqualifying under Section 4304.

Unavailable Documentation

If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person and any rights or benefits that may have been granted.

Pension Contributions

If a person has been absent for military service for 91 or more days, an employer may delay treating the person as not having incurred a break in service for pension purposes until the person submits satisfactory documentation establishing reemployment eligibility. However, such contributions have to be made promptly for persons who are absent for 90 or fewer days.

Reemployment Position

Length of Service

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person's military service.

1 to 90 Days

A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

1. (A) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; Section 4313 (a) (1) (A), or

(B) in the job in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person. Section 4313 (a) (1) (B).

2. If the employee cannot become qualified for either position described in (A) or (B) above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person must be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is qualified to perform, with full seniority. Section 4313 (a) (4).

91 or More Days

The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

1. (A) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer; Section 4313 (a) (2) (A), or

(B) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of a position referred to in subparagraph (A) after reasonable efforts by the employer to qualify the person. Section 4313 (a) (2) (B).

2. If the employee cannot become qualified for either position described in (A) or (B) above: in any other position that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority. Section 4313 (a) (4).

"Escalator" Position

The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member be reemployed in the position the person would have occupied with reasonable certainty if the person had remained continuously employed, with full seniority.

The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, depending on economic circumstances, reorganizations, layoffs, etc., the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status. In other words, the escalator can move up or down.

Qualifying for the Reemployment Position

Employers must make reasonable efforts to qualify a returning service member for the reemployment position. Employers must provide refresher training, and any other training necessary to update a returning employee's skills so that he or she has the ability to perform the essential tasks of the position.

If the employee has a disability incurred or aggravated during the performance of uniformed service, the employer must make reasonable efforts to accommodate the disability and to help the employee become qualified to perform the duties of the reemployment position. If the disabled person cannot become qualified for the reemployment position despite reasonable efforts by the employer to accommodate the employee, and qualify him or her to perform the duties of the position, the employee must be reemployed in a position according to the following priority: (a) a position that is equivalent in seniority, status, and pay to the escalator position, or (b) a position that is the nearest approximation to the equivalent position, consistent with the circumstances of the employee's case. Such a position may be a higher or lower position, depending on the circumstances. See 20 CFR 1002.225.

"Prompt" Reemployment

Returning service members must be "promptly reemployed." "Prompt reemployment" means as soon as is practicable under the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require reassigning or giving notice to an incumbent employee who has occupied the service member's position.

Employee Handbooks and Policies in The 21st Century

Submitted by Monica Vicky Bowers

HUMAN RESOURCE LAW FROM START TO FINISH:

Safeguarding the Employment Lifecycle: What You Need to Know

II. EMPLOYEE HANDBOOKS AND POLICIES IN THE 21ST CENTURY

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A. Guidelines for Whether Your Organization Should or Should Not Have an Employee Handbook

Employee Handbooks are an invaluable corporate organizational tool, setting forth expectations of employment, outlining benefits, and giving notice of mandated federal and state employment rights. A well written Employee Handbook complemented by properly trained management and consistent application is an employer's most effective tool for increased productivity and good morale. More importantly, a well written and consistently implemented Employee Handbook is tantamount to a formidable defense to many employee complaints and employment related lawsuits for wrongful termination or discrimination. For instance, the EEOC's initial inquiry is a request for the policy manual or corresponding policy that was allegedly violated. However, a poorly drafted and inconsistently applied Employee Handbook is ripe for complaints, unintended contractual obligations, and exposure to costly and unnecessary litigation.

Nonetheless, many Louisiana employers fail to update or consistently apply their Employee Handbook. This seminar and the accompanying materials will address the

benefits of having an Employee Handbook; the most common Employee Handbook pitfalls, and; examples of employment policies that every Employee Handbook should include. Remember, however, there is no "one-size-fits-all" Employee Handbook and the policies included herein are only examples and should not be substituted for experienced legal counsel or advice. All Employee Handbooks will look slightly different due to variances in industry, location, hours and specific policies endorsed by a particular employer.

B. Ensuring handbook Style Fits With Corporate Culture

As previously stated, there is no one-size-fits-all for Employee Handbooks. Employee Handbooks should be created based on a company's specific culture. Below are seven considerations when drafting an Employee Handbook**:**

1. The organization's culture, mission and values

One of the most important aspects of an Employee Handbook is the introduction of new employees to corporate culture and how the employee will fit in with the company. This helps to foster a sense of pride and belonging, which studies show will help employees become more productive. The introductory section of an Employee Handbook should answer the following questions:

- "How is this company set apart from others?"
- "How the company was built and on what philosophy?"
- "What the company is passionate about?"
- "How can a new hire become a part of this culture?"

2. Organizational Structure

Organizational structure relative to the hierarchy of management and the company objectives relative to the interaction of employees with management is imperative for a

successful and cohesive work environment. The Employee Handbook should include the management structure from the Chief Executive Officer/President to the managers and supervisor. In addition, employee communication with upper and lower management is governed by proper reporting for absenteeism and tardiness. Also, timekeeping requirements, required hours of work, authorization of overtime, pay periods, and other payroll related issues provide employees with clear avenues for addressing any concerns with the aforementioned. The Employee Handbook should also inform employees of their various entitlements under applicable federal and state employee leave laws, such as FMLA, ADA or Jury Service Leave. Not all federal and state law are applicable to every company. For instance, if a company employs less than fifty (50) employees, there are several federal and state laws that will not apply.

3. Expectations of New and Current Employees

An Employee Handbook is also an excellent opportunity to clarify the roles of new and current employees relative to expectations and responsibilities. For instance, if a company utilizes an introductory period, the Employee Handbook can set forth the length of the introductory period and the expectations for a successful completion of same. The Employee Handbook should also advise employees what the procedures are for requesting paid time off or sick leave. It also advises employees whom they should contact when they have an unscheduled absence (and what the timing should be). It also tells employees whom to go to if they have questions about any of the specific policies in the handbook.

4. Clear Communication of Key Company Policies

No policy is effective if it is practiced inconsistently or **Not Published**. A well written Employee Handbook will clearly communicate an organization's policies regarding employment, conduct and behavior, compensation, and other policies and procedures. More importantly, managers can refer to the Employee Handbook when answering questions or making decisions regarding the application of company policies to employees, and ensure their answers and actions are consistent with company policies and fairly implemented.

5. Compliance with Federal and State Laws

All companies, regardless of how many employees they have, will be subject to certain state and federal employment laws. Further, many federal and state laws require applicable federal and state rights to be communicated in the Employee Handbook or in some written form or posting. For example, if an employee is called away to active-duty military service, said employee should understand their rights and obligations when communicating their need for leave. A Military Leave Policy should clearly set forth the parameters to the employee. Similar policies should communicate rights and obligations regarding state disability leaves, federal FMLA leave, and fair labor standards act rights. Failure to post or notify employees via an Employee Handbook of the state and federal laws can lead to unnecessary and expensive daily notification penalties.

6. Employee Discrimination Claims

Unfortunately, employment lawsuits are inevitable, and every employer, at some point, will face a lawsuit or similar challenge from a current or former employee and sometimes even a potential employee. Not surprisingly, one of the most useful documents

to defend against such claims is the Employee Handbook. A thorough and compliant Employee Handbook will help to show that the organization has a policy supporting equal employment for all and against discrimination in hiring, firing, promotion, disciplinary actions and compensation. Also, the employee's signed acknowledgement page will show that the employee had an opportunity to familiarize himself with the organization's policies, a chance to ask related questions, and agreed to follow the terms and conditions of employment set forth by the organization.

7. Company Representative for Giving Notice and Making Complaints

Thoughtful consideration of appropriate personnel for the reporting of complaints is important. For instance, requiring all complaints to be made to the Human Resource Director who may be located in a different location or is not readily accessible may not be the best choice for immediate complaints. Thus, an employee's immediate supervisor may be a more appropriate representative for reporting certain complaints. Also, consider qualifications for company representative that employees will feel comfortable reporting workplace violations to and seeking workplace-related assistance. Untrained management can be ineffective relative to timely and appropriate responses. Without appropriate and available designated company representatives, the alternative is for an employee to seek assistance from an outside third party, like the EEOC or DOL, which could trigger a costly and time-consuming investigation. Thus, when an Employee Handbook not only identifies one or two management individuals for an employee to turn to with employment related issues, the aggrieved employees are more likely to keep their complaints in-house, and this is a positive for employers.

C. REVISING THE OLD vs STARTING ANEW

The Employee Handbook is a living organism that needs to be changed constantly. Thus, the maintenance of an effective Employee Handbook demands your attention. A handbook typically has a long shelf life, and mistakes, misstatements and ambiguity can come back to haunt a company when legal problems arise. To ensure compliance with applicable laws and regulations and to mitigate risk in the event of litigation or government audit, a handbook must take into account federal, state and local laws and regulations. Laws vary by state and locality, but federal laws and regulations are generally uniform. Accordingly, an Employee Handbook should be written in compliance with federal workplace laws and regulations such as the Fair Labor Standards Act, the Civil Rights Act of 1964, the Occupational Safety and Health Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, to name a few. National Labor Relations Board rulings should also be taken into account. Other laws and regulations should be addressed on state-by-state and locality-by-locality bases.

Further, with the rise of employee labor law claims and lawsuits, an up-to-date and accurate employee handbook is not really an option. Reviewing and revising your company policies is good practice. Consider the following when determining whether to revise your Employee Handbook or start anew:

1. **Multiple Separate Policies**: Employers often draft new policies as laws change and new situations arise in the workplace. If those new policies are important

enough to put in writing, they likely need to be included in the Employee Handbook. Employees should not have to review the bulletin board in the break room, old e-mails and other miscellaneous policies distributed with new hire paperwork in addition to the Employee Handbook to learn the company's policies. Depending on the number of new policies, starting an Employee Handbook anew may be the most efficient choice.

2. Cumbersome Employee Handbook: Consider the length of your current Employee Handbook. Employers should keep the sections of the Employee Handbook as short and readable as possible. There's no need to overwhelm (read: scare) employees with copious pages of information on policies, penalties, and rules. If you want them to read it, focus on the positive aspects of working for your company, while weaving in vital information.

Historically, Employee Handbooks are lengthy formal documents full of legalese. However, it has been proven that a concise document using an active voice to eliminate potential ambiguity is preferable and easily digestible by employees. Therefore, if your current Employee Handbook is verbose and lengthy it is most likely advisable to start anew.

3. Increase in the Number of Employees: Consider the number of employees you had when you first opened the doors compared to the number of employees you currently have on payroll. Consider the number of exempt versus nonexempt employees you currently have. Whether or not you are deemed a covered employer under certain state or federal laws is determined by the number of employees you

have. Therefore, if you have grown significantly from the first implementation of your Employee Handbook, it is advisable that you start anew to ensure that you are in compliance with all state and federal laws.

4. Smoking Policy: Gone are the days when HR had to worry only about hammering out clear rules regarding cigarette smoking at work. Today, the use of e-cigarettes and new laws legalizing medical or recreational marijuana necessitate more-complex and more-nuanced policies. Handbooks that do not mention e-cigarettes specifically should be revised to do so, treating them like any other tobacco product. The text should set forth restrictions on where tobacco can be used, such as not inside the building and at least 30 feet from an external door, and should clearly state that e-cigarettes and other tobacco products are covered under the smoking policy.

Generally, marijuana used for recreational and medical purposes can be treated like other drugs. In addition to barring consumption at work, employers in most—but not all—states can dictate that employees not be under the influence of alcohol, illegal drugs and even legal drugs that impair them significantly while on the job. This policy may be accomplished with a revision to the smoking policy.

5. Multistate Employer: You may have started as a small local company that has now grown to have offices across several states. It can be challenging, cumbersome and expensive for multi-state employers to maintain an Employee Handbook that complies with laws and regulations for each state in which employees are located. One approach is to consider maintaining a single handbook that addresses federal laws and regulations, with addendums for each state where employees are

located. This allows employers to maintain a uniform set of policies and procedures, and also address state and locality-specific laws and regulations, without the need to extend state and locality-specific policies across state lines.

6. **Digital or Printed Employee Handbook:** In this era of multigenerational employee populations, many of your employees depend on their mobile devices, tablets and laptops for all communications. However, there are others that refuse to evolve and incorporate technology or simply do not have the skill to do so. In any event, to address the various needs and abilities of your diverse employee population and to ensure access, it may be advisable to have both an electronic and printed version of your Employee Handbook.

In addition, many employers allow employees to work from home or have abbreviated work weeks. A digital Employee Handbook can make sure that employees with alternative working arrangements remain connected to the office and have access to the employment policies.

D. TOPICS THAT SHOULD BE INCLUDED

1. Employment-at-Will
2. Harassment and Discrimination
3. Equal Employment Opportunity
4. Non-Compete
5. Family and Medical Leave Act
6. Arbitration
7. Social Media

8. Jury Duty Leave

9. Overtime and Safe-Harbor Policy

10. Acknowledgment Form

11. Fraternization

12. Exempt/Non-Exempt

13. Timekeeping

14. Progressive Discipline

15. Cellphone Policy

16. Vehicle Operation

17. Weapons

18. Final Paycheck Deduction

19. Outside Employment

20. Email/Computer

21. Inclement Weather

22. Breaktime for Nursing Mothers

23. Vacation/Sick/Personal Leave

Employment-At-Will

Employment with the Company is employment at-will and accordingly voluntarily entered into and based on mutual consent, and the Employee is free to resign at will at any time, with or without cause. Similarly, the Company may terminate the employment relationship at will at any time, with or without notice or cause, so long as there is no violation of applicable federal or state law. No representative of the company has any authority to enter into an agreement contrary to the employment at-will relationship. Nothing contained in this handbook creates an expressed or implied contract of employment.

STATEMENT OF ARBITRATION
POLICY AND AGREEMENT TO ARBITRATE

In order to encourage the speedy, costs-effective resolution of any disputes between [redacted] ("the Company") and its employees concerning any of the terms, conditions or benefits of employment, including disputes arising from termination of the employment relationship, arbitration shall be the exclusive remedy for any such disputes. Arbitration supplants, replaces and waives any right that the employee or the Company may have to pursue any dispute, claim or controversy relating to employment with the Company, or the termination of employment from the Company (including claims for employment discrimination and termination and harassment), in any court, agency, tribunal or other forum, including a civil action before any jury. This agreement to arbitrate includes, without limitation, employment-related claims against both the Company and any other party whose conduct can create liability on behalf of the Company, including but not limited to the employee's co-workers or supervisors as well as the Company's contractors, customers and visitors. Notwithstanding the foregoing, nothing herein is intended to nor shall preclude any employee from filing any administrative charge of discrimination with the Equal Employment Opportunity Commission or any similar state or local agency with jurisdiction to hear and determine such administrative charges, nor is this agreement intended to provide for arbitration of (i) claims for worker's compensation benefits, or (ii) administrative claims for wage and hour disputes.

Nothing in this Statement of Arbitration Policy and Agreement to Arbitrate is intended to mean that an employee's status is anything other than **At-Will**. Notwithstanding anything contained herein, employment is not guaranteed for any specific term or duration and either the Company or the employee can terminate employment at any time, with or without cause.

PROCEDURE:

1. Except to the extent specifically modified herein, all arbitrations under this policy shall be conducted by and in accordance with the employment dispute resolution rules of the American Arbitration Association ("AAA") as are in effect at the time the dispute arises (the "Arbitration Rules")(except as such rules may be modified by this policy) and the Arbitration Rules are specifically incorporated herein by this reference. Copies of the Arbitration Rules shall be made available to employees upon request and also are available on the AAA website at www.adr.org.

2. Either the employee or the Company may initiate arbitration. The employee may initiate arbitration by delivering to the Company through personal delivery, certified or registered mail, a written demand for arbitration. The demand shall include a concise statement of the issue(s) to be arbitrated, along with a statement setting forth the relief requested. Along with the demand for arbitration, the employee shall submit a check or money order payable to "American Arbitration Association" in the amount of one hundred fifty dollars ($150) as his or her portion of the administrative fees of the arbitration. Thereafter, the remaining costs of arbitration, such as arbitrator's fees, costs of a court reporter, and room rental fees, if any, shall be paid by the

Company. Any remaining fees and costs, including but not limited to attorneys fees shall, subject to any remedy to which the prevailing party may be entitled to under the law, be borne by each party to the same extent as that party would be responsible for such fees and costs should the matter be litigated in court.

3. If the Company initiates arbitration, it shall do so by delivering to the employee, through personal delivery, certified or registered mail, a written demand for arbitration. The demand shall contain a concise statement of the issue(s) to be arbitrated, along with a statement setting forth the relief requested. In all respects, any arbitration initiated by the Company shall proceed in the same manner as set forth in paragraph 2 above, with the exception that the employee shall not be required to pay the initial $150 administrative fee.

4. The Arbitrator shall be empowered to award either party any remedy at law or in equity that the prevailing party would otherwise have been entitled to had the matter been litigated in court, recoverable costs, attorneys' fees (where provided by statute or contract) and injunctive relief; *provided*, however, that the authority to award any remedy is subject to whatever defenses or limitations, if any, exist in the applicable law on such remedies. The arbitrator shall have no jurisdiction to issue nay award contrary to or inconsistent with law.

5. In any arbitration conducted pursuant to this policy, either party may request the presence of a court reporter for the hearing, the costs of which shall be allocated as provided in paragraph 2 above. Either party may avail itself of any summary judgment and/or summary adjudication of issue procedures that would be available to the party had the action been filed in court. Following the evidentiary portion of the hearing, either party shall have the right to prepare and file with the arbitrator a post-hearing brief, not to exceed fifty (50) pages in length. Any such brief shall be served on the arbitrator and the other party within thirty (30) days of the close of the evidentiary portion of the hearing, unless the parties agree to some other time period. Either party may also request and shall be granted one extension of this time period not to exceed fifteen (15) days. The arbitrator shall have the authority to grant other extensions, or to increase the page limitation set forth above, upon the request of any party for good cause shown.

6. Any disputes concerning the enforcement, scope, and/or applicability of this policy shall in the first instance be determined by the arbitrator. Should either the Company or an employee disregard this arbitration policy and pursue an action subject hereto in any court or administrative agency, upon application of the aggrieved party to a court of competent jurisdiction, the court shall order the matter to arbitration and shall award the prevailing party in any such hearing its reasonable costs and attorney's fees incurred in connection therewith.

7. Any demand for arbitration by the Company or any employee shall be filed within the statute of limitation that is applicable to the claim(s) upon which arbitration is sought or required. Any failure to demand arbitration within this time frame and according to these rules shall constitute a waiver of all rights to raise any claims in any forum arising out of any dispute that was subject to arbitration.

8. Should any part of this Statement of Arbitration Policy and Agreement to Arbitrate be declared by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect or for any reason, the validity, legality and enforceability of such provision in every other respect and of the remaining provisions shall not be in any way impaired and the part that is declared to be invalid, illegal or unenforceable shall be reformed by the court so as to give maximum legal effect to the intention of the parties as expressed above.

I have read this Statement of Arbitration Policy and Agreement to Arbitrate carefully and I understand and agree to its terms. I have been hereby advised that I may consult with an attorney and to ask questions about its meaning, and I have had a full and fair opportunity to do so.

_____	_____	_____
Signature	Print Name	Date

Accepted:

[redacted], Human Resources

_____

Equal Employment Opportunity

EEO Policy

The Company is an equal opportunity employer that is committed to maintaining a workplace that is free of inappropriate or unlawful conduct on the basis of race, color, religion, sex, national origin, age, disability, or other protected group status as provided by law. In keeping with this commitment, we prohibit the unlawful treatment of employees, including harassment, discrimination, and retaliation, by anyone, including any supervisor, co-worker, vendor, client, visitor, or customer. It is our policy to comply with all applicable federal, state, and local laws.

Prohibited Conduct

This policy applies to all aspects of employment, including but not limited to, recruitment, hiring, promotion, demotion, transfer, layoff, recall, discipline, compensation and benefits. Misconduct also includes unwelcome conduct, whether verbal, physical, or visual, that is based upon a persons protected status or activity (e.g. opposition to prohibited discrimination or participation in the statutory complaint process) as provided for by law. This includes conduct by someone to another of the same gender. The Company prohibits unlawful conduct that affects tangible job benefits, that interferes unreasonably with an individual's work performance, or that creates an intimidating, hostile, or offensive working environment. No one, including any supervisor, has authority to engage in such conduct.

This policy of equal opportunity applies at all organization levels and to every aspect of employment, including recruitment, hiring, training, promotion, termination, leave of absence, compensation and benefits and all other personnel actions and conditions.

Any Employees with questions or concerns about any type of discrimination in the workplace are encouraged to bring these issues to the attention of Management. Employees can raise concerns and make reports without fear of reprisal.

Employment Categories

Each employee at the Company is in one of the employment categories described below:

Full-Time Employees are regularly scheduled to work an average of forty (40) per week. They are eligible for all legally-mandated benefits and for the Company's full benefit package, subject to the terms, conditions, and limitations of each benefit program as specifically outlined in plan documents and/or summarized in the BENEFITS plan documents.

Part-time employees normally work thirty (30) hours or less each week. Part-time employees receive all legally mandated benefits but are ineligible for the Company's other benefits.

Seasonal employees are hired to perform a specific job for a specified period of time, normally less than one year. Seasonal employees receive all legally mandated benefits but are ineligible for the Company's other benefits.

In addition to the categories outlined above, each job is designated as either exempt or non-exempt pursuant to the Federal Fair Labor Standards Act and State Wage and Hour Laws.

Non-exempt: Employees in non-exempt jobs are paid on an hourly basis and are entitled to overtime pay for hours worked over forty (40) in a work week.

Exempt: Employees in exempt positions are paid on a salary basis and are excluded from specific provisions of federal and state wage and hour laws and are not eligible for overtime pay but may be entitled to other benefits under the Company's policies.

See Management if you are unsure of your position's designation.

Family & Medical Leave Act (FMLA) Leave

The Family and Medical Leave Act of 1993 ("FMLA") provides unpaid, job-protected leave to eligible employees for certain family and medical reasons, without loss of health insurance benefits. The existence of this policy shall not alter or expand the statutory requirements of FMLA, and application of this policy is correspondingly limited to those employers and employees who are protected based on the provisions of FMLA.

I. General FMLA Leave Information

A**.** Eligible Full-Time Employees may be qualified to take up to 12 weeks of unpaid leave during a 12-month period for any of the following reasons:

1. the birth of a son or daughter of the employee and in order to care for such son or daughter;
2. the placement of a son or daughter with the employee for adoption or foster care;
3. to care for the spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition;
4. because of the employee's own serious health condition that makes an employee unable to perform the functions of the position of such employee; or
5. to care for qualifying exigency arising out of an employee's immediate family member's military deployment to a foreign country.

B. Leaves are limited to 12 workweeks for reasons one(1) through four(4) referenced above or up to 26 workweeks of leave of leave in a single 12 month period for the care of covered service members ***per calendar year or rolling 12-month period measured backward from the date an employee uses any FMLA leave***.

C. An eligible employee who is the spouse, son, daughter, parent or next of kin of a covered service member shall be entitled to a total of 26 workweeks of

leave during a 12-month period to care for the service member. The leave described in this paragraph shall only be available during a single 12-month period.

D. Spouses employed by the same employer are limited in the **amount of** family leave they may take for the birth and care of a newborn child, placement of a child for adoption or foster care, or to care for a parent who has a serious health condition to a combined total of 12 workweeks (or 26 workweeks if leave to care for a covered service member with a serious injury or illness is also used). Leave for birth and care, or placement for adoption or foster care, must conclude within 12 months of the birth or placement.

E. Any questions about FMLA leave can be addressed by the Human Resources Director.

II. Eligibility

For the purposes of FMLA leave:

Eligible employee: An employee who has completed 12 months of employment and has worked 1,250 hours of service in the preceding 12-month period.

Serious health condition: An illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.

Son or daughter: a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

Covered Service member: a member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.

III. Requesting FMLA Leave

Eligible Employees should:

a. Make requests for FMLA leave to the Human Resources Director at least 30 days in advance of foreseeable events and as soon as possible for unforeseeable events so that coverage for the employee's position can be arranged and so that the appropriate FMLA paperwork can be arranged.

b. Employees taking FMLA *medical* leave (to care for the spouse, son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition; or because of the employee's own serious health condition) must submit a health care provider's statement verifying the need for medical leave and its beginning and expected ending dates. Any changes in this information should be promptly reported to the Company.

IV. FMLA Leave in relation to paid leave

FMLA LEAVE SHALL RUN CONCURRENT WITH ANY OTHER APPLICABLE ACCRUED PAID LEAVE TIME, WHICH MUST BE USED.

V. Employee Benefits during FMLA Leave

Subject to the terms, conditions, and limitations of the applicable plans, the Company will continue to provide health insurance benefits and other applicable benefits for the full period of the approved leave subject to employee's timely remittance of the employee share. Benefit accruals, such as vacation, sick leave, and holiday benefits, will continue during the approved leave period.

VI. Intermittent or reduced schedule leave FMLA Leave

Intermittent leave may be allowed where the employee's condition or circumstances do not require that he or she be off work on a full-time basis. However, the total time off may not exceed the 12-week period.

VII. Return to Work after FMLA Leave

So that an Employee's return to work can be properly scheduled, an Employee taking FMLA leave is required to provide the Human Resources Director with at least two weeks advance notice, when foreseeable, of the date the Employee intends to return to work.

Employees returning from FMLA leave due to their own serious health condition must submit a health care provider's verification of their fitness to return to work.

When FMLA leave ends, the Employee will be reinstated to the same position, if it is available, or to an equivalent position for which the Employee is qualified. If an Employee fails to report to work promptly at the end of FMLA leave, the Company may assume that the Employee has resigned.

VIOLENCE AND WEAPONS

Any and all acts or threats of violence by or against any Company employees, customers, vendors, or other visitors to Company premises are strictly prohibited. This policy applies to all of Company's employees whether on or off Company property.

The possession of firearms, weapons, explosives, and ammunition is prohibited on all of Company's premises and work sites and in all of Company's vehicles or personal vehicles used for Company business.

Possession or use of any and all weapons, including but not limited to, knives, handguns and martial arts weapons, regardless of licensure or concealment, is prohibited on Company's premises.

Company's employees are prohibited from possessing or using a weapon of any type while conducting off-site business on behalf of Company.

OUTSIDE EMPLOYMENT

Employees may hold outside jobs in businesses or professions *unrelated* to the business of the Company as long as the Employee meets the performance and attendance standards of the job description with the Company, the outside job does not create a conflict of interest with the Company, and outside employment has been pre-approved by Management. Unless an alternative work schedule has been approved by the Company, Employees will be subject to the Company's scheduling demands, regardless of any existing outside work assignments.

The Company's office space, equipment, and materials are not to be used to obtain and/or perform outside employment.

VEHICLE OPERATION

Employees driving on company business may not use wireless telecommunications devices for text messaging and networking while operating a vehicle, whether the vehicle is in motion, stopped at a traffic light, or stopped in traffic consistent with LSA: R.S. § 32:300.5 and LSA R.S. § 32: 300.8. This prohibition includes but is not limited to, answering or making phone calls, engaging in phone conversations, using mobile applications, browsing the internet, and reading or responding to emails, instant messages, and/or text messages.

If Employees need to use their hand-held communication devices while driving on company business, they must use a speaker or hands-free device, or in the absence of a hands-free device, pull over safely to the side of the road or another safe location to use the hand-held device.

Employees must comply with all applicable motor vehicle laws, which may impose duties and/or restrictions in addition to this policy. Where there is a discrepancy between a motor vehicle law and this policy, the more restrictive of the two shall apply.

Drug-Free Workplace

The Company goal is to promote a drug-free workplace. The use of controlled substances is inconsistent with the behavior expected or our employees, subjects all employees and visitors tour facility to unacceptable safety risks and undermines our ability to operate effectively and efficiently. Abuse of drugs and alcohol decreases productivity and increases accidents, absenteeism, medical and disability costs. [redacted] policy is to prohibit employees' use, sale, possession, or distribution of (a) alcohol on company property or on company time, and (b) illegal drugs, anywhere at any time. Employees shall also be required to comply with [redacted] drug testing policy. This policy applies to illegal drugs, use of prescription drugs by a person to whom a prescription has not been issued, or use of a prescription or over-the-counter drug in a manner other than its intended use. This policy does not prohibit employees from lawfully possession or taking controlled substances under the supervision of a doctor if you discuss your job duties with your doctor. Immediately advise your manager of any restriction or safety hazard and if use prevents you from performing your job safely and effectively.

Acknowledgment of Receipt

Please read before signing.

I acknowledge that I have received a copy of the Company's Employee Handbook and I accept responsibility for reading this handbook and becoming familiar with its contents. I also acknowledge that I had an opportunity to review and discuss the Employee Handbook with management.

I further understand that all policies, procedures and benefits in the Employee Handbook are subject to change at the discretion of the Company and that I will be notified of any such change within a reasonable amount of time. I accept responsibility for keeping informed of such changes.

I understand that the information contained in this Employee Handbook is designed as an advisory guide to assist the Company and our supervisors with the effective management of personnel. The provisions and guidelines contained in this Employee Handbook are not binding on the Company and may be changed, interpreted, modified, revoked, suspended, terminated, or added to by the Company, in whole or in part, at any time, at the Company's sole option, and without prior notice to employees. This Employee Handbook is not intended to cover every situation which may arise or to create specific policy to be applied in every instance.

I further understand that the Employee Handbook does not create, comprise, or define, nor should it to be construed to constitute, any type of oral or written contract, promise, or guarantee, express or implied, between the Company and any one or all of its employees. Nothing in the Employee Handbook is intended to provide any assurance of continued employment.

In the absence of a specific agreement to the contrary, authorized in writing by the Company, employment with and compensation from the Company are for no definite period of time and may be terminated by the Company or the employee at any time,

with or without cause, and with or without notice. Any written or oral statements or promises to the contrary are hereby expressly disavowed and should not be relied upon by prospective or existing employees.

I also understand that Louisiana is an at-will employment state and that my employment can be terminated at-will.

I further understand that the Company's policies and procedures and all employment terms and conditions, including those described in any publications, letter, poster, handout, or other communication, are subject to modification without notice.

Do not sign if you have not read this agreement and the Employee Handbook.

Employee Signature_____Date_____

Employee Name (Print)_____

Supervisor Signature_____Date_____

E. **BOILERPLATE LANGUAGE**

Beware, the internet is replete with sample Employee Handbooks encouraging employers to just substitute the name of their company, print and implement. This would be an enormous mistake! As previously discussed, Employee Handbooks are not one-size-fits-all and are in fact make-or-break road maps for organizations. In the end, your company is unique and your handbook should be specifically tailored to your organization's policies.

Beyond the obligatory rules and policies, consider adding more engaging elements to your handbook, such as interviews with executives and current employees, photos of employees and company events.

In other words, think creatively about assembling an Employee Handbook that will not only inform your employees—but also entice them to read the handbook and help them feel good about choosing you as their employer.

Employment Law Update

Submitted by James E. Sudduth III

National Business Institute

Human Resource Law from Start to Finish
Continuing Legal Education Seminar
Baton Rouge, Louisiana

Speaker: *James E. Sudduth, III*
Sudduth & Associates, LLC
Lake Charles, Louisiana

DAY 1: EMPLOYMENT LAW UPDATE

August 7, 2018, 9:00 - 10:10
James E. Sudduth III

1. **The Affordable Care Act: The Latest Developments**
    a. Introduction
        i. Recent Turbulence in Promulgation of the Affordable Care Act
        ii. Trump Administration: Ongoing Reform Efforts
        iii. The Affordable Care Act: Basics
    b. Significant Changes to the Health Insurance Market from 2017
        i. New Tax Law & Repeal of the Individual Mandate
    c. Higlights of the Centers for Medicare & Medicaid Services' (CMS) Final 2019 ACA Marketplace
        i. Only Rate Hikes of 15% or More Will Get a Review

ii. More ‘Get Out of Health Insurance Free’ Cards & Hardship Exemptions

1. License to Innovate
2. Loosening up the Medical-Loss Ratio (MLR)
3. Income Verification for Premium Subsidies
4. Miscellaneous Guidance

2. **Same-Sex Benefits Update**

a. Introduction: *Obergefell v. Hodges*, the 14th Amendment’s Due Process Clause, and the Equal Protection Clause

i. Overarching Issues

b. Domestic Partnerships

i. Statistics : Double Digit Drop in Offering Coverage

ii. Same-Sex Health Insurance Coverage by Employer Size

1. Company Culture and Health Insurance Coverage
2. Perceived Fairness & Marriage Equality

a. Practical Guidance: A Choice for Employers

3. Immigration Reform: What Businesses Need to Understand

a. Introduction: Understanding Past Reform Efforts & Current Law

b. Administration of U.S. Immigration Laws: Immigration and Nationality Act (INA)

i. “Unauthorized Alien” Defined

ii. Effects of Immigration Reform in the Employment Landscape

iii. Statutorily Mandated Obligations of the Employer

c. Congress' Goal: Preclude Potential for Employers to Circumvent IRCA under *Any Scenario*

i. IRCA Anti-discrimination Provisions

ii. Penalties Imposed

d. Landscape for Change Under the Trump Administration

i. Proposed Framework: Four Pillars of Reform H-1B Reform via Executive Order of the Trump Administration

ii. Relevant Impact on Employers

4. Other State and Federal Updates

a. The Louisiana Fourth Circuit Court of Appeals: *Brown v. The Blood Center*

i. Key Takeaways:

1. Broadening interpretation of the LEDL and LPDA.

b. 2018 Developments Louisiana Supreme Court: *La. Dep't of Justice v. Edwards*, 239 So. 3d 824 (La. 2018)

i. Practical Guidance to Employers

1. Develop policies Prohibiting Sexual Harassment

2. Train employees on Preventing Sexual Harassment

3. Report Complaints of Sexual Harassment

5. **Closing Remarks**

a. General Guidance: Employment Relations in Anticipation of Impending Legal Reform

Day 1:

I. The Affordable Care Act: The Latest Developments

1. Introduction

1. 2017 was a turbulent year for the Affordable Care Act
2. Legislative battles in Congress, fluctuating support from healthcare stakeholders, and threats of repeal have left many payers facing an uncertain future
3. Even though Congress has not yet succeeded in scrapping the law entirely, the ACA's opponents will likely continue to use all available powers to weaken the bill, piece by piece, throughout 2018.
4. The 2017-2018 open enrollment period say 8.82 million plan selections, indicating strong interest from consumers in getting or remaining covered in the new year.
5. In coming years, however, payers should expect the changes in the ACA to impact premium rates, add challenges to the individual health plan market, and adjust how states leverage customized solutions for their Medicaid programs.
6. On December 22, 2017, President Trump signed a new tax reform bill, the Tax Cuts and Jobs Act (P.L. 115-97), into law.
    1. The main ACA change comes in the form of negating the individual mandate: while the individual mandate of the ACA remains, the new tax law reduced the amount of the penalty for those who go without health coverage to $0.00.

2. The Affordable Care Act: Basics

1. The Patient Protection and Affordable Care Act, often shortened to the Affordable Care Act (ACA) and/or referred to as "Obamacare," was signed into effect on March 23, 2010.
2. The law has 2 Parts: (1) the Patient Protection and Affordable Care Act and (2) the Health Care and Education Reconciliation Act
3. The ACA includes provisions to take effect from 2010 to 2020, although most took effect on January 1, 2014
4. In December 2016, Senate Majority Leader Mitch McConnell relayed that the Senate would begin voting to repeal the ACA as early as January 1, 2017. The goal was to repeal the ACA with small bills that would tackle one part of the health system at a time.

3. Significant Changes to the Health Insurance Market from 2017

1. New Tax Law

*1. **Repeal of the Individual Mandate***

1. In late December 2017, the House voted 227-203 and Senate voted 51-48 to pass a national tax bill that repealed the ACA's individual mandate
    1. Starting in 2019, individuals will no longer face a tax penalty if they do not enroll in an ACA compliant health plan for a full year

2. The H.R.1 (115) law reduces the penalty for not carrying minimum essential coverage to $0.00, beginning in January 2019.

2. The Congressional Budget Office (CBO) and Joint Committee on Taxation (JCT) predicted that repealing the mandate would disincentivize 13 million beneficiaries from participating in the individual health plan market by 2027 in exchange for a $328 billion reduction in the federal budget from 2018 to 2028.
3. With no mandate in the ACA to spur individuals to purchase coverage, the healthiest individuals may forgo the high cost of health coverage by choosing to self-insure. The loss of these individuals will leave only those using the highest amount of services in the healthcare pool, resulting in a continuing escalation of premium costs.

2. ***Medical Expense Deduction***

1. H.R.1 (115) allows a deduction for non-reimbursed qualified medical expenses exceeding 7.5% of adjusted gross income for tax years 2017 and 2018
2. Applies to taxpayers or spouses who are 65 or older for tax years 2012-2016

3. ***Paid Family Leave***

1. H.R.1 (115) creates a temporary tax credit for employers who provide paid family and medical leave to employees
    1. A business tax credit is equal to 12.5%-25% of wages employers pay to certain employees on qualified family and medical leave
    2. To obtain the credit, employers must:
        1. Pay at least 50% of hourly pay rate (or a prorated amount for non-hourly paid employees) for employees on leave; and
        2. Provide at least two weeks of paid leave per year.
    3. The amount of the credit increases by .25% for every percent above the 50% rate of pay capping at 25% for leave pay equaling 100% of pay.
    4. The temporary tax credit applies to tax years 2018 and 2019.

4. ***Transit and Parking***

1. Per H.R.1 (115), employers may continue to offer qualified transportation fringes to employees on a tax-free basis, except for bicycle commuter reimbursements.
    1. Applicable between 2018 and 2025.
2. The employer deduction for all qualified transportation fringe is eliminated for amounts paid or incurred for tax years beginning after December 31, 2017.

2. **Other Changes**
    1. **Elimination of the Cost-Sharing Reduction (CSR)**
        1. In October 2017, President Trump issued an executive order that ends the CSRs to payers selling individual health plans
            1. Previously, the funds had offset increases in consumer premiums needed to keep the health plans financially profitable while compensating for the pre-existing conditions protections of the ACA
        2. Payers in individual markets experienced only moderate premium growth of around 6.9 percent with the CSRs in place; without the CSRs, premiums are expected to grow by 20 percent for individual health plans.
        3. Many payers sponsoring individual health plans recently hiked their 2018 premium rates as a way to compensate for the loss of CSRs.
            1. Pennsylvania cited premium rate increases of 30 percent.
            2. California had payers that increased premiums by 12 percent.
            3. Washington state approved multiple rate increases that ranged from 9 to 27 percent.
    2. Increased Promotion and Use of State 1115 Medicaid Waivers
        1. In March 2017, former HHS Secretary Tom Price and CMS Administrator Seema Verma penned a letter to governors urging states to use 115 Medicaid waivers to develop Medicaid programs that address unique state healthcare needs.
            1. 1115 waivers follow provisions in the ACA such as requiring essential health benefits, but allows states to customize Medicaid eligibility and the program's resource allocation.
            2. State governments can use the 1115 waivers to expand Medicaid eligibility or construct member eligibility requirements.
                1. Missouri, Vermont, and New Jersey had waivers that expand federal poverty level (FPL) guidelines for populations with economic healthcare barriers. These waivers increase the allowable income levels so that many individuals who previously did not qualify for Medicaid benefits can now receive them
                2. Other 1115 waivers would allow state governments to add accountability requirements for individuals seeking Medicaid benefits.

        1. For example, Maine submitted a 1115 waiver that adds work requirements, charges individuals for missed healthcare appointments, and offers lower copays when beneficiaries utilize an urgent care center or primary care provider instead of the ED.
    3. States also use waivers to address wide-reaching population health concerns. In fact, many states have supported or pursued waiver approvals that increase the number of beds in drug treatment facilities and allow their Medicaid programs to facilitate substance use disorder (SUD) treatments.
3. Expansion of Association Health Plan (AHP) Availability
    1. In October 2017, President Trump issued an executive order that increases the length of time association health plans (AHPs) can cover individuals. The order also allows individuals to pay for AHP coverage with health reimbursement agreements like HSAs and related savings accounts.
    2. The AHPs are expected to disrupt the individual insurance market by unbalancing risk pools and could make it more difficult for sick individuals to receive essential health benefits (EHBs).
    3. AHPs have low-cost consumer premiums but are not required to provide EHBs. Experts believe that healthy consumers that normally balance individual risk pools will flock to the lower-cost premium plans even though they do not have comprehensive benefits.
        1. If short-term plans are allowed to be sold as long-term alternatives to regular health insurance, they may attract healthier consumers away from regular insurance risk pools and endanger peoples' access to comprehensive coverage.
    4. Application large employers (ALEs) who must provide employees with statements regarding their benefit plan offers for 2017 must now furnish those statements to affected employees by March 2, 2018, rather than January 31, 2018.
4. Health Insurance Tax (HIT)
    1. HIT is the annual tax levied on all health insurers that insurance carriers pass through to employers and employees in their premium rates.

2. There was a moratorium placed on the HIT for 2017 but it returns in 2018.
3. In anticipation for the return of HIT, carriers raised premiums in 2018.
4. Many states allowed carriers to file dual rates -- ones that anticipate the inclusion of the tax and ones that assume there is no tax.

5. Excise "Cadillac" Tax
    1. The Cadillac tax assesses a fee on high-cost health insurance plans, effectively capping the cost of plans by assessing a 40% tax penalty on plan costs that exceed a certain dollar amount.
        1. Although delayed in 2015, the new implementation date for the Cadillac tax is 2020.
6. Children's Health Insurance Program Funding
    1. Planned funding for the Children's Health Insurance Program (CHIP) expired September 30, 2017, and the federal government has been assisting in some states in meting payment obligations for participants.
    2. Contained with the recently passed Continuing Resolution (CR), granting government funding through January 19, 2018, is authorization for CHIP funding. The new funding lasted through the end of March 2018.
    3. Employers are encouraged to continue to provide CHIP notices annually to their employees at the time of open enrollment or upon initial health plan enrollment.

4. **Centers for Medicare and Medicaid Services' Final 2019 ACA Marketplace Rule – the Highlights**
    1. On April 9, 2018, the U.S. Department of Health & Human Services (HHS) released its final Notice of Benefit and Payment Parameters for 2019, referred to as the "Payment Notice." This is an annual rule that includes a wide range of policy and operational changes to the ACA marketplaces, insurance market reforms, and premium stabilization programs.
    2. Among other things, the final rule aims to expand the role of state departments of insurance and marketplaces in ACA oversight and administration.
    3. **Important Provisions**
        1. ***States Given Leeway on how to cover the ACA's Essential Health Benefits***.
            1. The CMS handed states reins to determine which essential health benefits individual and small-group plans must offer, starting in 2020.
            2. States will be able to:
                1. Adopt another state's 2017 benchmark plan;
                2. Replace one or more of its benefit categories with that of another state's; or

3. Completely build a new essential benefits package from scratch so long as the new plan is not too generous and is in line with a "typical employer plan."
    1. Typical employer plan: either one of the state's 10 base-benchmark plan options from the 2017 plan year, or one of the give largest group health insurance products by enrollment, not including self-insured plans
3. Plans still have to offer the 10 essential health benefits required by the ACA, including:
    1. Outpatient care;
    2. Emergency services;
    3. Hospitalization;
    4. Maternity care;
    5. Mental health;
    6. Prescription drugs;
    7. Rehabilitations;
    8. Laboratory services;
    9. Preventative care; and
    10. Pediatric services

2. ***Only Rate Hikes of 15% or More Will Get a Review***
    1. The CMS is upping the rate increase threshold that triggers a review by state regulators to premium hikes of at least 15% for 2019.
    2. This is viewed as a way to reduce states' and insurers' regulatory burden, given the significant rate increases over the past few years.
    3. Currently, insurers who planned to increase rates by 10% were required to submit their rates to regulators for review.
    4. CMS has now exempted student health insurance coverage from rate review requirements, made effective July 1.
3. ***More 'Get Out of Health Insurance Free' Cards - Hardship Exemptions***
    1. HHS is allowing numerous Obamacare customers to drop their insurance in 2018 without having to pay an individual mandate penalty.
    2. CMS is allowing insurance exchanges to extend exemptions to the penalty based on a lack of affordable coverage in the area.
    3. Additional CMS guidance allows anyone who lives in a region with just one health insurer or none at all to claim a "hardship" exemption from the penalty for as far back as 2016.
        1. The final rule adds a number of "hardship exemptions": which could allow more customers to

avoid the penalty this year and retroactively for the past two years.

4. Those who only have access to an insurance plan that covers abortion may also get out of the penalty if they object abortion coverage.
5. There are no counties without at least one insurer offering exchange plans in 2018 (1, 478 counties)
    1. Still, eight states and about a quarter of ACA enrollees have only one insurer to choose from.
        1. Three states – California, Oregon, and New York – require nearly all of their insurance plans to cover abortion services.

4. ***License to Innovate***
    1. The CMS now promotes innovative plan designs by eliminating standardized options from the federal marketplace in 2019.
        1. Standardized option share cost-sharing structures and benefit designs, and were initially proposed as a way to simplify shopping for consumers.
    2. This is viewed as a major "win" for the health insurance industry, which opposed the introduction of standardized options in 2017, viewing them as stifling competition and creativity.
        1. Insurers previously were not required to offer standardized plans, though the CMS encouraged them to do so and displayed the plans on HealthCare.gov.
5. ***Loosening up the Medical-Loss Ratio (MLR)***
    1. Starting in 2019, the CMS is relaxing the rules surrounding how much of an insurer's premium income must be spent on medical claims and quality improvement activities, the medical-loss ratio (MLR).
    2. Insurers covering individuals and small business today must spend at least 80% of their premiums on healthcare and quality improvement.
    3. In 2019, states will be able to request changes to the minimum individual market MLR that insurers must meet if states can demonstrate that a lower MLR would help stabilize their markets.
    4. Additionally, to relieve insurers of the burden of identifying, tracking and reporting actual expenses related to quality improvement activities, the CMS will allow insurers the option of reporting a standard of 0.8% of earned annual premium for a minimum of three consecutive years" without having to separately track such expenses.
6. ***Income Verification for Premium Subsidies***

1. The rule now allows CMS to more easily cut off customers from receiving subsidies when they have failed to file a tax return or reconcile subsidies paid in prior years.
2. The customers will still have to be notified.

5. Conclusion

1. The Payment Notice is the first one issued by the Trump administration. The final rule reflects the administration's interest in expanding the role of states in providing oversight and administering the ACA. With that expanded roles comes a need for states to make important decisions about plan benefit design, affordability, and marketplace operations, in some cases within a very short timeframe.

II. Same-Sex Benefits Update

1. Introduction

1. On June 26, 2015, the Supreme Court held that marriage is a constitutionally protected right for all Americans, ensuring same-sex couples could legally marry in all 50 states.
    1. The ruling in the case, *Obergefell v. Hodges*, provided that the 14th Amendment's Due Process Clause and the Equal Protection Clause gave same-sex couples the same right to marriage as anyone else.
2. The same-sex marriage issue had been politically divisive for years; however, for employers and HR departments, the ruling simplified benefits administration in numerous ways.

2. Domestic Partnerships Post-Obergefell

1. While *Obergefell* did not directly impact federal or state domestic partnership laws, it may affect an employer's decision to offer domestic partnership benefits.
    1. Historically, some employers offered coverage for same-sex domestic partners because same-sex couples could not legally marry in some states.
    2. Prior to *Obergefell*, more than half of employers offered same-sex or opposite-sex domestic partnership benefits, but those numbers have dropped over since the decision.
    3. Post-*Obergefell*, some employers are considering removing domestic partnership benefits because they can now offer spousal coverage to legally married opposite-sex and same-sex spouses.
        1. Rationale: There is no need to continue to offer domestic partner coverage now that same-sex partners can marry.
2. Since *Obergefell*, the Human Rights Campaign (HRC), one of the leading organizations to battle for legalizing same-sex marriage, has expressed concerns about how domestic partners are covered, especially in the 28 states which do not have laws protecting LGBT rights.
3. Growing numbers of employers have eliminated domestic partner health coverage and been requiring same-sex couples to be married before an employee's partner can receive health care benefit.

3. **Double Digit Drop in Offering Coverage**
    1. When same-sex marriage was not universally legal, many employers offered domestic partner benefits to provide consistent and inclusive benefits to their employees.
    2. Recently however, there was a 20 percent drop in employers providing health care benefits to same-sex partners in civil union and an 11 percent drop offering them to same-sex domestic partners.
4. **The Debate: Pros and Cons of Providing Domestic Partner Benefits**
    1. ***Pros:***
        1. Employers are under pressure to attract and retain the most effective workforce possible. Including domestic partner benefits in a comprehensive benefit package is a valuable tool to recruit and retain the best talent for an organization.
        2. In the public sector, some states (plus DC) have a law, policy, court decision or union contract that provide state employees with domestic partner benefits.
            1. Many more counties, cities, school districts, colleges and universities offer domestic partner benefits.
        3. Fairness
            1. Employers are focusing on equality and nondiscrimination in their employment practices. Providing domestic partner benefits is consistent with promoting this message.
        4. Recognition of all types of families
            1. Employees are choosing not to marry and are staying in domestic partnerships.
        5. Diversity
            1. Attracting gay and lesbian employees leads to an increased diversification of the workforce.
        6. Government contracting
            1. Many government contracts require winning bidders to provide domestic partner coverage to their employees.
    2. ***Cons:***
        1. One of the concerns employers have is the cost of providing domestic partner benefits. Cost is dictated, in pertinent part, by:
            1. How many domestic partners will be enrolled;
            2. The risk associated with domestic partners; and
            3. What benefits will be provided
        1. Utilization of domestic partner benefits is generally much lower than anticipated. This may be due, in part, to the high number of domestic partners with professional careers and comprehensive benefit packages through their own employers.
        2. It is estimated that fewer than 5% of employees in domestic partnerships will enroll their domestic partner.
5. **Same-Sex Health Insurance Coverage: Employer Size**
    1. Deciding whether to continue the coverage of give domestic-partner benefits the boot often depends on the size of the company.

1. Not offering same-sex domestic partner benefits is more common among small and midsize employers.
2. Domestic partner benefits can be complex to manage and smaller employers can ease some of the administrative burden by discontinuing them.
3. In contrast, it is likely that large employers and those in tightly-competitive markets - like high tech companies, for example -- will continue offering the benefit to attract the key talent necessary to remain competitive.
4. More than half of employers with 5,000 or more employees will still offer coverage in 2018 to same-sex domestic and opposite-sex domestic partners, according to the National Business Group on Health 2018 Large Employers' Health Care Strategy and Plan Design Survey.

6. Same-Sex Health Insurance Coverage: Company Culture

1. Company culture is a determining factor in whether an employer will continue to offer domestic partner health benefits: some employers continue to offer domestic partner benefits because they want to be inclusive and equitable; they do not care how family is defined.
2. Employers eliminating unmarried same-sex partner benefits are those that previously offered unmarried partner benefits to only same-sex partners. In other words, employers that previously offered unmarried partner benefits to both same-sex and opposite-sex unmarried partners are leaving their benefits "as is" and are not making any changes in light of marriage equality.
3. It generally comes down to perceived fairness: most employers that offered unmarried partner benefits to same-sex couples only did so because they wanted to provide a makeup benefit to employees who could not legally marry and obtain benefits that way.
    1. Now that there is marriage equality, employers feel they cannot keep their policies as same-sex only because doing so could lead to a risk of reverse discrimination claims by opposite-sex unmarried couples who legally can marry, choose not to and then are denied the benefits that their same-sex counterparts receive.

7. The 2 Choices Employers Face

1. To avoid reverse discrimination claims, employers really have two (2) choices: (1) they can eliminate same-sex partner benefits and require all employees to marry to obtain health benefits; or (2) they can add for the first-time benefits coverage for opposite-sex unmarried partners.
    1. While the option is inclusive, the negative is that it costs additional money to cover more people and is very burdensome to administer - unmarried partner benefits must typically be offered on an after-tax basis and require ongoing administrative procedures that are not required when offering benefits to married couples.

III. Immigration Reform: What Businesses Need to Understand

1. Introduction and Basic Terms

1. The statute generally governing the administration of U.S. immigration laws is the Immigration and Nationality Act ("INA").
    1. Employers are required to comply with the amendments to the INA, otherwise known as the Immigration Reform and Control Act (IRCA), signed into law on November 6, 1986 by President Reagan.

2. IRCA established a framework which sought to punish employers who knowingly hire illegal immigrants
    1. To ensure the effectiveness of the provisions, IRCA attempted to set up a mandatory compliance and record-keeping system for employers to report the status of their employees

3. Congress amended select provisions of IRCA with the Immigration Act of 1990, and in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act.
    1. Sought to balance burden former provisions placed on employers to report immigrant status of employees, while still maintaining deterrent effect as to unauthorized aliens.

4. "Unauthorized Alien" Defined
    1. *Any applicant who has not followed appropriate procedures, even despite legal entry into the United States.*

2. Effects of Immigration Reform in the Employment Landscape
1. Employers bear the burden to verify status of job applicants; curbs illegal immigration by removing the "drawing" effect (i.e., influx of immigrants drawn to border states, areas with established immigrant communities, and favorable economic conditions each locality may offer which a potential worker might seek to leverage) of employment opportunities on Employers
2. Significant penalties are imposed on Employers who fail to comply with IRCA and its subsequent statutory progeny

3. Statutorily Mandated Obligations of the Employer

1. Employers (*all employers - without regard to number of employees)* must maintain a procedure sufficient to ensure compliance with the relevant provisions governing the employment process.
    1. Only occasional or casual in-home service is excluded from the regulations.
    2. Essentially, employers must effectuate a compliance program which documents "good faith effort" to operate within statutory guidelines.

2. IRCA's employment provisions make it unlawful for a person or company to hire, recruit, continue to employ, or refer for a fee an "unauthorized" alien, if the employer, recruiter, or referrer knows that the person is unauthorized for employment. Further, IRCA prohibits employers from hiring or recruiting anyone without first taking certain verification steps.
    1. Liability may be imposed upon an employer who has "reason to know" his or her employee is seeking work as an illegal alien
        1. Sanctions apply in instances where the employer has actual or constructive knowledge that an applicant or current employee is not authorized to work in the United States, and

despite the former's good faith efforts hire only those applicants legally authorized to work in the country.

4. **Congressional Goal: Preclude Potential for Employers to Circumvent IRCA Under *Any* Scenario**
    1. Efforts to contract or subcontract labor in any way is considered "hiring" for purposes of the provisions
        1. As such, agreements that employ (no pun intended) any contractual equivalent by which an employer may benefit from labor of an unauthorized alien will violate the regulations
            1. Caveat: verification requirements when referring, hiring, or recruiting do not strictly apply to the contract or subcontract situation
                1. When an employer fails to check credentials in this scenario, entering such a contract with knowledge of a violation does not necessarily encroach upon bounds of illegal conduct
        2. A Form I-9 *must* be completed and signed by both the employer and employee, the latter under penalty of perjury; employer must retain the form on file until later of three (3) years after date of hire or one (1) year from employee's departure
        3. The 1990 Act expanded the protected class of individuals to include those as refugees under § 207 and individuals seeking asylum under § 208
            1. Changes apply retroactively to employment practices occurring before, on, or after the 1990 Act's date of enactment
5. **Public Law No. 108-390:**
    1. Enacted in October of 2004
    2. Allows employers to both fill out and store Form I-9s electronically
    3. Includes handwritten or electronic signatures to suffice for the attestations for employment authorization verification
    4. Allows employers to retain verification records in either a paper or electronic version.
6. **Forgeries in Documentation**
    1. Originally, IRCA did not have a specific provision relating to forged documents; the law merely provided that a person or entity complies with the verification process if the document "reasonably appears on its face to be genuine"
    2. 1990 Act specifically modified requirements to prohibit document fraud, employing special investigations, special hearings, civil penalties, and cease-and-desist orders to achieve these ends.
7. **IRCA Anti-Discrimination Provisions**
    1. Congress included special prohibitions against national origin discrimination in formulating IRCA's statutory framework. As a result, employers that fail to hire or recruit someone who looks or sounds "foreign"

may face potentially severe penalties for immigration-related discrimination.

2. IRCA's anti-discrimination rules extended federal employment discrimination laws to prohibit four types of unlawful conduct:
    1. Citizenship or immigration status discrimination;
    2. National origin discrimination;
    3. Unfair documentary practices during the Form I-9 process ("document abuse"); and
    4. Retaliation.

3. Penalties imposed: Employers that violate the anti-discrimination rules are subject to a number of civil penalties as well as front pay, back pay, reinstatement, removal of false information from an employee record (such as a falsified performance review or warning), and "the lifting of any restrictions on an employee's assignments, workshifts, or movements."
    1. These are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, Department of Justice (OSC).
        1. First-time offenders that knowingly hire or retain unauthorized aliens, or that otherwise violate IRCA's antidiscrimination and employment verification provisions, face penalties of $375 to $3,200 per violation
        2. Second-time offenders face increased penalties of $3,200 to $6,500 per violation. Subsequent violations are subject to penalties ranging from $4,300 to $16,000 per violation.
    2. Penalties for violating IRCA's employment verification rules may be mitigated if the employer acts to rectify the situation, such as:
        1. Alerting the agency to the abuse;
        2. Making attempts to offer jobs to the rejected applicants;
        3. Taking steps to educate managers as to the appropriate and acceptable documents to require; and
        4. Taking any action that would indicate the employer's willingness to comply with IRCA.
            1. Separate penalties, including mandatory fines, apply in instances of document fraud

8. Landscape for Change under the Trump Administration

1. Proposed Framework: Four Pillars of Reform emphasize intent to secure U.S. borders and close legal loopholes that prevent the prompt removal of those who cross the border illegally. This includes a $25 billion trust fund for the border wall system, ports of entry and exit, and northern border improvements.

2. Reform efforts will seek permanent solution for Deferred Action for Childhood Arrivals (DACA) recipients; seeks to provide legal status for DACA recipients and certain other DACA-eligible illegal immigrants - a total population of approximately 1.8 million individuals

3. President Trump has called for termination of the visa lottery program, thereby halting the current practice insofar as it awards legal status without consideration of merit or skill.
    1. Merit-based reform will be structured to relieve certain strains on Federal resources the current system imposes. Per January 2018 statement issued by its Office of Communications, the White House has compiled the following information in support of immigration reform efforts:
        1. Years of mass low-skilled immigration has led to suppressed wages and has strained Federal resources.
        2. Most immigrants who receive green cards every year are low-skilled or unskilled workers.
        3. Almost one-third of all adult immigrants in the United States have not graduated high school.
        4. Only about 1 of every 15 immigrants who come to the United States each year is admitted on the basis of skill.
        5. Our current immigration system strains the resources of our Nation's welfare programs.
        6. More than half of all immigrant households use one or more welfare programs.
        7. Immigrants with a college education or higher, however, are less likely to receive welfare benefits.
        8. Real hourly wages for Americans with a high school diploma or lower have declined since 1979
4. Aimed to promote migration of the nuclear family by allowing immigration sponsorship of spouses and minor children only

9. H-1B Reform via Executive Order of the Trump Administration

1. "Buy American and Hire American" executive order signed by President Trump on April 18, 2017 initiates a wide-ranging administrative review that will likely lead to new regulations and policy.
2. EO directs the Departments of Labor, Homeland Security, Justice and State to propose revisions to employment-based immigration program rules and guidance
    1. Main Goal (per the Administration): To protect and promote the economic interests of U.S. workers in alignment with new guidelines from U.S. Citizenship and Immigration Services indicating that positions with entry-level wages may be ineligible for the H-1B program.
3. The immigration agencies are directed to recommend ways to replace the H-1B cap lottery with an allocation system that gives priority to foreign nationals who have earned advanced degrees or are paid higher wages.
    1. Several bills now pending in Congress propose similar priority systems for H-1B visa allocation:
        1. H.R. 670, the High-Skilled Integrity and Fairness Act of 2017 (to create a three-tiered prevailing wage system and a wage-based allocation of H-1B visas);

2. Bill S. 180, the H-1B and L-1 Visa Reform Act of 2017 (to create a new H-1B allocation system, to impose significant new obligations and limitations on H-1B and L-1 employers; and to toughen eligibility criteria for H-1B and L-1 visas);

2. The Administration also announced its intention to focus on eradicating immigration fraud and abuse and promoting the integrity of the U.S. immigration system.
    1. Recent enforcement warnings from the Departments of Labor, Justice, State and Homeland Security coincide with the opening of the FY 2018 H-1B cap filing season
    2. Essentially, all signs indicate that the agencies will coordinate more closely on compliance and enforcement in employment-based immigration programs generally
        1. Practical Effects Employers Must Consider: More worksite audits and investigations.
3. Administration has indicated that the immigration agencies will pursue higher H-1B filing fees.
4. Relevant Impact on Employers:
    1. As the first step in a transition to a more merit-based immigration system, broad-based changes to the H-1B program and other employer-sponsored immigration programs would require legislation, while new regulations would be subject to federal rulemaking
        1. This process typically takes several months or more; agency guidance can be issued and implemented more quickly.
    2. Increased immigration enforcement under existing rules means it is critical that employers have a comprehensive immigration compliance program in place.

IV. Other State and Federal Updates

1. **February 2, 2018:** The Fifth Circuit Court of Appeals rendered its ruling in *Rayborn v. Bossier Parish School Board*, holding that No. 16-30903 (February 2, 2018), affirming the U.S. District Court for the Western District of Louisiana's grant of summary judgment under La. R.S. § 23:967 in favor of an employer that transferred an employee to a less desirable location after revealing concerns about her employer's handling of a diabetic student.
    1. **Facts:**
        1. Lori Rayborn, a school nurse at Parkway High School, filed suit against Bossier Parish School Board (BPSB) and two school officials alleging, among other claims, that she was retaliated against under the Louisiana whistleblower law.
        2. As a school nurse, Rayborn evaluated a diabetic student, who later committed suicide. Rayborn worked closely with the student to monitor her diabetes and documented the student's glucose and hypo/hyperglycemia levels months before the student's suicide.

3. Rayborn documented several concerns with the school's handling of the student's health needs in her notes.
4. After Rayborn discussed her notes with her supervisors, Rayborn alleged that her supervisors began to give her cold stares, mocked her, and told her that her notes reflected poorly on the school system; (2) that she suffered an adverse employment action when she was reprimanded after two confrontational incidents with her coworkers; and (3)that she suffered adverse employment actions when BPSB transferred her to a different school, issued a false evaluation accusing her of excessive absences and failure to complete a proposed wellness program, and constructively discharged her.
5. Rayborn submitted evidence that her new school was unclean, "devoid of safe disposal for used needles," and ultimately inadequate to provide medical care to students.

2. Analysis:

1. The Fifth Circuit applied federal Title VII of the Civil Rights Act of 1964 standards and found that Rayborn did not have a claim for retaliation under section 967 because neither her transfer nor her reprimand caused her to lose any pay, benefits, or responsibilities.
2. The Court further determined that, although her new school was subjectively less desirable due to the nature of facility, the differences at her new school did not "amount to a demotion" or otherwise cause a significant change in her employment status. Thus, the court found that she did not suffer an adverse employment action.
    1. The Court relied on the "adverse employment action" standard as defined by *Burlington Industries, Inc. v. Ellerth*, a Title VII case, which held that an "adverse employment action" is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."
    2. The Court acknowledged that the Supreme Court of the United States later broadened the definition of "adverse employment action" in the context of Title VII retaliation claims in *Burlington Northern and Santa Fe Railway Company v. White*.
3. The Court noted that no Louisiana case has applied the *White* standard and thus relied on the *Ellerth* standard cited by a Louisiana appellate court, which ignored the newer, less demanding standard of *White*.
4. The Court held that Rayborn's constructive discharge claim lacked merit because "cold stares, rude conduct, and a transfer to a subjectively less desirable location" do not support a constructive discharge claim.

3. Key Takeaways:

1. According to *Rayborn*, an employer is only potentially liable for retaliation under La. R.S. § 23:967 if a transfer amounts to a demotion such that the job conditions are objectively worse as required under *Ellerth*, rather than *White*.
2. The dissenting opinion cautions employers to not only consider pay, title, or responsibilities when determining whether a transfer is considered a demotion, but also whether the conditions of the new location or assignment provide "specific, concrete deficiencies" that interfere with an employee's performance.
3. The Court's ruling that the Rayborn's actions were insufficient to support an emotional distress claim confirms Louisiana's extremely narrow application of that tort in an employment setting.

2. **March 15, 2018:** The Louisiana Fourth Circuit Court of Appeals published its ruling in *Brown v. The Blood Center*, No. 2017-CA-0750 (March 15, 2018), holding that a pregnant employee who suffered from a pregnancy-related illness was ***not*** disabled within the scope and meaning of the Louisiana Employment Discrimination Law (LEDL).
    1. **Facts:**
        1. On August 9, 2014, Shameka Brown, who at the time was approximately seven months pregnant, was working as an on-duty supervisor at a mobile blood donation center for The Blood Center (TBC). During her shift, Brown began feeling ill, and she vomited and urinated on herself. Without notifying her supervisor, Brown left work and went home to shower and change. Brown conceded she did not notify her supervisor of her emergency or that she needed to leave work before she left. Instead, she claimed she informed a coworker of her departure and the reason therefor. Two hours later, Brown contacted her immediate supervisor, Antonio White, and communicated what had transpired. Following the conversation with White, Brown returned to work and completed her shift.
        2. TBC terminated Brown's employment for abandoning her post without first providing proper notification to her supervisor, which constituted a violation of TBC policy. TBC's policy provided that leaving a work station while on duty without first obtaining permission from one's supervisor is cause for immediate dismissal. Brown did not dispute being aware of this policy, nor did she dispute that she left the TBC facility without her supervisor's permission.
        3. Brown alleged that TBC discriminated against her because of a disability and/or pregnancy-related condition by wrongfully terminating her employment when, due to her pregnancy, she suffered from a medical emergency that caused her to temporarily leave work.
    2. **Analysis:**
        1. The Fourth Circuit rejected Brown's attempt to overturn the trial court's holding by arguing that the LPDA's definition and language,

as set forth under La. R.S. § 23:341(B)(1), was applicable to her pregnancy-related LEDL disability claim.

1. Brown argued that because under La. R.S. §23:341(B)(1), the definition of disability sets forth that "pregnancy . . . related medical conditions are treated as any other temporary disability," the trial court erred in finding she had failed to establish that she suffered from a disability.
2. The court rejected Brown's argument, explaining that because La. R.S. § 23:341(B)(1) begins with the words "[f]or purposes of this Part," the LPDA's language defining pregnancy as a disability was ***not*** applicable to her LEDL claim.

2. The court noted that, even if Brown had established that TBC considered her disabled, her LEDL claim would still fail because she could not show that her employment had been terminated "solely because of" any alleged disability.
3. As to Brown's pregnancy discrimination claim, the court held that because Brown could not establish pretext, her pregnancy discrimination claim failed.
    1. The court explained that because Brown did not dispute TBC's rationale for discharging her, she could not possibly establish that her employment was terminated because she was pregnant or because she suffered from a pregnancy-related illness.

3. Key Takeaways:

1. While state courts have tended to broadly construe state discrimination claims -- even more broadly than federal courts construe their mirroring federal counterparts -- the court in *Brown* did just the opposite, instead applying a narrow interpretation of the LEDL and LPDA.
2. *Brown* should serves as a reminder to Louisiana employers that under both the LPDA and the Americans with Disabilities Act Amendments Act of 2008, pregnant workers may have impairments arising from their pregnancies that qualify as disabilities.

3. **March 23, 2018:** In a 4–3 decision, the Louisiana Supreme Court refused to consider Louisiana Governor John Bel Edwards's appeal of the Louisiana First Circuit Court of Appeal's November 1, 2017, decision holding that he lacked the constitutional authority to issue an executive order protecting lesbian, gay, bisexual, and transgender (LGBT) state employees from discrimination.
    1. The Louisiana Supreme Court upheld the First Circuit's ruling that Executive Order JBE 2016 – 11, which sought to protect the rights of LGBT individuals and other protected classes from discrimination by Louisiana agencies, departments, and contractors, was unconstitutional.
    2. **Analysis:**
        1. The First Circuit held that the Governor's Executive Order went beyond a mere policy statement or a directive to fulfill law,

highlighting the fact that there is no current state or federal law specifically outlining anti-discrimination laws concerning and/or defining sexual orientation or gender identity.

2. The current laws simply prohibit discrimination based on a person's biological sex
    1. Louisiana Constitution Article I, Section 3, provides that no person shall be denied the equal protection of the laws and that no law shall "arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."
    2. Louisiana law concerning intentional discrimination in employment declares it unlawful for an employer to engage in discrimination because of a person's "race, color, religion, sex, or national origin." *See* La. R.S. 23:332.
3. The Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the state Constitution to specifically add "sexual orientation" or "gender identity" to the list of protected persons relating to discrimination. Further, there is no binding federal law or jurisprudence banning discrimination on the basis of sexual orientation or gender identity.
4. Ultimately, the First Circuit held that the Governor's Executive Order constituted an unconstitutional interference with the authority vested solely in the legislative branch of the Louisiana state government by expanding the protections that currently exist in anti-discrimination laws rather than directing the faithful execution of the existing anti-discrimination laws of Louisiana.

3. **Citations:**
    1. Supreme Court Citation: *La. Dep't of Justice v. Edwards*, 239 So. 3d 824 (La. 2018).
    2. First Circuit Citation: State *DOJ v. Edwards*, 233 So. 3d 76 (La. App. 1 Cir. 11/1/17).

4. **May 17, 2018:** Governor John Bel Edwards signed legislation (H.B. 524), creating a mandatory policy prohibiting sexual harassment and providing for mandatory sexual harassment prevention training for public officers and employees. (Act 270 of 2018)
    1. The bill only covers Louisiana's state agencies and public employees; however, this Act may presage efforts in the 2019 legislative session to enact similar requirements for private employers in Louisiana.
        1. The legislature's action coincided with the resignation of Louisiana's former secretary of state, Tom Schedler, who resigned amid allegations that he sexually harassed an employee and later retaliated against her when she rebuffed his advances.
    2. The law has 3 main components, which require state agencies to:
        1. **Develop policies prohibiting sexual harassment**
            1. Each state agency's policy must explicitly prohibit sexual harassment

2. It must include descriptions and examples of inappropriate conduct
    1. Each state agency must adopt a procedure by which to report complaints of sexual harassment
3. Each state agency must provide a clear prohibition on any form of retaliatory action against individuals who complain of or participate in the investigation of sexual harassment.
4. The heads of each state agency are required to notify each public employee of the agency's sexual harassment policy

2. **Train employees on preventing sexual harassment**
    1. On an annual basis, all public employees and elected officials will be required to receive at least one hour of education and training on preventing sexual harassment.
    2. Records must be kept and maintained to reflect each employee's compliance with and receipt of such training
        1. These records will be public records
3. **Report complaints of sexual harassment**
    1. The heads of each state agency will be required to make annual reports, which are to be publicly available. The reports must provide the following:
        1. The percentage of public servants in the agency who have completed the training requirements;
        2. The number of sexual harassment complaints received by the agency;
        3. The number of complaints that resulted in a finding that sexual harassment occurred;
        4. The number of complaints in which a finding of sexual harassment resulted in discipline or corrective action; and
        5. The amount of time it took to resolve each complaint.
    2. The law is effective January 1, 2019.

5. **May 20, 2018**: Governor John Bel Edwards signed Senate Bill 308.
    1. Directs the Bureau of Criminal Identification and Information to create a criminal history system that may be used by businesses that provide care or care placement services to conduct background checks on employees, applicants, and volunteers.
    2. The new law becomes effective on January 1, 2019.
6. **May 30, 2018:** Governor John Bel Edwards signed House Bill 830. The new law requires sexually oriented businesses to verify the age and work status of all employees and independent contractors. It also requires sexually oriented business to post notices containing information regarding human trafficking and the telephone number of the National Human Trafficking Resource Center Hotline.

Legal Issues in Recruiting and Hiring

Submitted by Sunny Mayhall West

A. Creating Legally Effective Job Descriptions

Written job descriptions are important because they provide clarity for employers and employees. They communicate to all parties what is required.[1] Moreover, they are useful in preparing job postings. By specifying the required skills and qualifications, positions are accurately described and qualified candidates are identified. Job seekers can determine if they are right for a particular role.[2]

Job descriptions typically consist of six components- title, classification, duties, qualifications, physical requirements, and additional information. The job description should state the title, the job code (if applicable), pay grade, and to whom the position reports. It should specify whether the job is exempt or nonexempt from minimum wage and overtime pay requirements, whether it is full- or part-time; or whether it is temporary, seasonal, contract, or regular. The job description should clearly define the duties and responsibilities of the position. It should also include the required qualifications such as education; professional or other required licenses or certifications; prior work experience in a particular field; skills, such as proficiency in computer software or word processing systems; or traits, such as attention to detail or the ability to manage deadlines. The job description should specify any physical requirements, such as standing, sitting, or lifting. Additionally, it should provide information relative to the physical work environment, such as a workplace with dust, fumes, or loud noises. If the job requires travel or unusual working hours, the job description should include this information as well.[3]

Signatures are important too. On the employer's side, they show the job description has been approved by the appropriate authority. On the employee's side, it establishes that the employee understands the requirements, essential functions, and

[1] Importance of Job Descriptions, Practical Law Practice Note 2-616-6045.
[2] *Id*.
[3] *Id*.

duties of the position. Signatures should include those of the supervisor and of the employee.[4]

So, why should a job description contain these various elements? The simple answer is that each of the components listed above implicates a potential source of liability for an employer. A legally effective job description can better position an employer in the event it is sued.

Americans with Disability Act ("ADA"): The ADA requires covered employers to provide qualified individuals with a disability with a reasonable accommodation unless doing so poses an undue hardship.[5] To be a qualified individual under the ADA, an employee or applicant must: possess the skills, experience, education, and other job-related requirements necessary for the position and be able to perform the essential functions of the job with or without a reasonable accommodation.[6] Consideration is given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[7] Thus, written job descriptions are very important. They can help defend against a disability discrimination claim. Whether the individual can perform the essential functions of the job is a threshold issue and a well written job description can aid the employer in establishing that the individual cannot perform one or more of those functions, even with a reasonable accommodation.[8] Notably, deference toward employer-drafted job descriptions is not absolute. "The inquiry into whether a particular function is essential initially focuses on whether the employer actually requires employees in the position to perform the functions that the employer asserts are essential. For example, an employer may state that typing is an essential function of a position. If, in fact, the

[4] *How to Develop a Job Description*, Society for Human Resources Management, February 14, 2018, https://www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/developajobdescription.aspx
[5] 42 U.S.C. §§ 12101-12213.
[6] 29 C.F.R. § 1630.2(m).
[7] 42 U.S.C. § 12111.
[8] Importance of Job Descriptions, Practical Law Practice Note 2-616-6045.

employer has never required any employee in that particular position to type, this will be evidence that typing is not actually an essential function of the position."[9]

Fair Labor Standards Act ("FLSA"): The FLSA generally requires employers to pay nonexempt employees minimum wage and overtime compensation.[10] There are several potentially applicable exemptions. Employees who are properly classified as exempt may not be entitled to minimum wage or overtime pay.[11] For the executive, administrative, and professional exemptions, an employee's primary duty is necessary to satisfy the requirements for exemption.[12] An employee's primary duty is the "principal, main, major or most important duty that the employee performs."[13] Neither job titles nor job descriptions are determinative of exempt status. Nevertheless, they prove beneficial if an employer's classification is later challenged.[14]

Title VII of the Civil Rights Act of 1964 ("Title VII"): Title VII prohibits employers from expressing a preference or requirement based on a protected class, such as the employee or applicant's race, religion, or sex. This general prohibition extends to written job descriptions.[15] Preferences based on an employee or applicant's religion, sex, national origin, or age, however, can be used in extremely limited circumstances where the employer can demonstrate that the characteristic is a bona fide occupational qualification ("BFOQ") that is "reasonably necessary to the normal operation" of the business.[16] In *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, at 235 (5th Cir.1969), the United States Fifth Circuit Court of Appeals stated: "We hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and

[9] *E.E.O.C. v. LHC Group, Inc.*, 773 F.3d 688, 698 (5th Cir. 2014).
[10] 29 U.S.C. §§ 206(a), 207(a).
[11] 29 U.S.C. § 213; 29 C.F.R. §§ 541.1 to 541.710.
[12] 29 C.F.R. §§ 541.100, 541.200, 541.300.
[13] 29 C.F.R. § 541.700.
[14] Importance of Job Descriptions, Practical Law Practice Note 2-616-6045.
[15] 42 U.S.C. § 2000e-3.
[16] 42 U.S.C. § 2000e-2(e)(1); 29 U.S.C. § 623(f)(1).

efficiently the duties of the job involved." In *Kern v. Dynalectron Corp*., 577 F. Supp. 1196 (N.D. Tex. 1983), *aff'd*, 746 F.2d 810 (5th Cir. 1984), the requirement that a helicopter pilot convert to Moslem religion as a condition to continuing employment as a pilot in Saudi Arabia was a bona fide occupational qualification which warranted the employer's religious discrimination. The requirement was not merely a response to a preference of the contractor performing the work in Saudi Arabia, but reflected the fact that non-Moslem employees caught flying into Mecca would be beheaded.

Family Medical Leave Act ("FMLA"): Per the FMLA, "[i]f the employer will require that the fitness-for-duty certification address the employee's ability to perform the essential functions of the employee's position, the employer must so indicate in the designation notice, and must include a list of the essential functions of the employee's position.[17] The employee then provides the list of essential functions to his physician responsible for completing the fitness-for-duty certification. A properly written job description assists the certifying doctor in assessing the employee's ability to return to work. "Job descriptions also avoid having to generate a list of essential functions for each fitness-for-duty certification request and the potential inconsistency associated with describing the same position on multiple, separate occasions."[18]

Preparing job descriptions is just the first step. It is well known that as an employer's business evolves the jobs within the organization evolve as well. Out-dated job descriptions may be of little benefit and could even be harmful. Employers should consider the following proactive measures to maintaining job descriptions: Include the effective date on every job description and ensure that the date is revised when changes are made; confirm that the job description is current before posting any open position; verify that the job description is up-to-date as part of the performance review process; and review all job descriptions on a set schedule or through spot audits.[19]

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[17] 29 C.F.R. § 825.300.
[18] Importance of Job Descriptions, Practical Law Practice Note 2-616-6045.
[19] Muskovitz, Melvin J., *The Importance of Job Descriptions*, The National Law Review, April 18, 2011, https://www.natlawreview.com/article/importance-job-descriptions

B. Writing Job Offers and Rejection Letters that Repel Lawsuits

Similar to job descriptions, offers letters can be beneficial in that they provide clarity for employers and employees. However, they can also be a basis for liability. An employer must be prepared to stand behind the offer letter and deliver on its contents.

In *Rose v. Computer Scis. Corp*., CV 15-813, 2017 WL 5148799, at *4 (E.D. La. Nov. 6, 2017), plaintiffs brought suit against Computer Sciences Corporation ("CSC") seeking unpaid wages. Each plaintiff executed an offer letter, which quoted an hourly rate for his or her employment, specifically stating, "your compensation will consist of an hourly rate of [between $29 and $33], which will be paid biweekly." The offer letter also mentioned other benefits available to the candidate upon acceptance, including health insurance, enrollment in a 401(k) plan, and tuition reimbursement. The plaintiffs contended they received less compensation than they should have under the terms of the offer letter. Specifically, they argued that CSC paid them a fixed amount each pay period regardless of how many hours they worked, rather than at the hourly rate stated in their offer letter. The court held, "The offer letter unequivocally states in its opening paragraph, 'compensation will consist of an hourly rate of [dollar amount], which will be paid bi-weekly'… [T]he Plaintiffs are entitled to summary judgment on their breach of contract claim."[20]

An offer letter should include the title or position; the reporting relationship; the start date; the term of employment (if applicable); the rate of pay and frequency of pay; the manner of pay (such as salary, wage or commission, including whether the employee is exempt or nonexempt from federal minimum wage and overtime requirements); hours of work, including whether full-time or part-time; eligibility for benefits; conditions of employment, including Form I-9 compliance, successful completion of background and reference checks (if used), verification that employment does not violate a non-compete

[20] *Id*. at *3.

or restrictive covenant with another employer; signing a confidentiality or non-compete agreement; and at-will confirmation.[21]

Not all employers send rejections letters. Some elect not to for fear of being sued. A poorly crafted letter can become evidence of discriminatory motive if improperly based upon a protected characteristic. Even a seemingly benign rejection letter can become an issue in litigation.

In *Kobrin v. U. of Minnesota*, 34 F.3d 698, 703–04 (8th Cir. 1994), the University, in its rejection letter to a female professor, indicated it hired a male professor instead of her because he had experience "…in areas of critical theory—especially psychoanalysis—and in French." Upon receipt of the rejection letter, the female professor alleged sex discrimination. On its motion for summary judgment, the University argued the male professor was better qualified for the advertised position that the female professor. The court denied summary judgment, stating:

> [W]e believe that the University's explanations for hiring Canning instead of Kobrin have changed significantly over time. Substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext. Here, soon after it hired Canning, the Department wrote Kobrin a letter stating that Canning worked in "areas of critical theory—especially psychoanalysis —and in French." Thus, initially, the Department emphasized Canning's background in psychoanalysis as evidence of his expertise in critical theory. Now, however, the University argues that Canning was more qualified for the position because Kobrin's expertise in critical theory was too focused on psychoanalysis. In other words, the Department first claimed that it hired Canning primarily because of his expertise in psychoanalysis, but now asserts that Kobrin was not as qualified because her emphasis in critical

[21] Employment Law Issues for Startups, Entrepreneurs, and Growing Businesses: Overview, Practical Law Practice Note Overview 5-572-3825.

> theory was on psychoanalysis. Moreover, the University now asserts that Kobrin's expertise in psychoanalysis "was not one of the areas the Department was attempting to fill as a result of the search." In addition, Kobrin produced evidence that, when he began his job, the Department assigned Canning courses in psychoanalysis and literature that Kobrin had developed. Considering the evidence in the light most favorable to Kobrin, we hold that a reasonable jury could reject the University's proffered reasons for hiring Canning. For this reason, we hold that the University is not entitled to summary judgment on Kobrin's sex discrimination claim.

Id. at 703-04. (Internal citations omitted)

Employers should keep in mind the following when drafting rejection letters: be succinct; do not provide specifics about why the rejected candidate did not get the job; do not mention the experience or qualifications of other candidates or of the person who ultimately landed the position; and do not make empty promises. Employers do not owe a rejected candidate an explanation about why someone else was hired. Litigation may be prompted by perceptions that the reasons proffered were a pretext for something else.[22]

C. Legal Aspects of Gaining Information Through Criminal Background Checks and Social Media Accounts

Employers may conduct background checks on employees before extending an employment offer, during the course of employment or both.[23] In some situations, background checks are mandatory. They are generally used to: verify information provided on an employment application; ensure that an applicant or employee has not been involved in criminal conduct, such as a crime involving immorality, violence, or financial misconduct; and investigate suspected criminal conduct, such as when an

[22] Mukherji, Aditi, *5 Tips for Rejection Letters, Emails*, FindLaw, February 27, 2014, https://blogs.findlaw.com/free_enterprise/2014/02/5-legal-tips-for-rejection-letters-emails.html.
[23] Privacy in the Employment Relationship, Practical Law Practice Note 6-517-3422.

employer believes that a current employee has been charged with a criminal offense that impacts his ability to do his job.[24]

The various rules applicable to background checks vary depending on whether the employer or a third-party performs the check. If an employer intends to conduct the background check internally (that is, gather information themselves from publicly accessible records and information), some states only require that the applicant or employee sign a basic form indicating that he consents to the background check.[25] In Louisiana, any employer who has conducted a background check of an employee or prospective employee after having obtained written consent from the employee or prospective employee is immune from civil liability for any and all claims arising out of the disclosure of the background information obtained. The limitation of liability extends to all claims of the employee based upon a failure to hire, wrongful termination, and invasion of privacy, as well as third party claims for negligent hiring or negligent retention.[26]

If an employer engages a third-party service to conduct the background check, in most cases it must ensure that it complies with the Fair Credit Reporting Act ("FCRA").[27] The FCRA regulates the collection, dissemination and use of consumer information, including information such as credit ratings and criminal history.[28] The FCRA only regulates the use of information obtained from a consumer reporting agency. A consumer reporting agency is an entity that collects and disseminates information about consumers to be used for credit evaluation and certain other purposes, including employment-related purposes.[29] Entities that use information obtained from consumer reporting agencies for employment purposes, including background checks, must comply with the FCRA by: obtaining the consumer's consent to conduct the background check using a consent form

[24] *Id.*
[25] *Id.*
[26] La. Stat. Ann. § 23:291.
[27] Louisiana does not have a state equivalent of the FCRA.
[28] 15 U.S.C.A. § 1681.
[29] 15 U.S.C.A. § 1681a.

containing specific information required by the FCRA, notifying the consumer when an adverse action is taken on the basis of a report obtained from a consumer reporting agency, and identifying the consumer reporting agency that provided the credit report so that the consumer may contest the accuracy and completeness of the report.[30]

Employers should be mindful when using the information returned from a background check in making employment decisions. Title VII does not specifically protect individuals with arrest or conviction records. However, the use of criminal history in employment decisions may have a disparate impact on the basis of race or national origin. The Equal Employment Opportunity Commission ("EEOC") generally disfavors the use of criminal background checks, especially when the practice is not narrowly tailored to a particular job. The EEOC strongly cautions employers against using *arrest* records in employment decisions under almost all circumstances, because the fact that an applicant was arrested in the past is insufficient evidence to conclude the applicant actually committed a crime; advises employers not to ask about criminal conviction history on job applications; and presumes that exclusions based on criminal convictions have a disparate impact based on race and national origin in violation of Title VII. The EEOC indicates that an employer may justify a policy of using conviction records, even if there is disparate impact, by validating the criminal conviction exclusion policy as described under the Uniform Guidelines on Employee Selection Procedures[31]; or individually assessing an applicant's criminal conviction history based the nature of the crime, the time elapsed since the crime, and the nature of the position sought.[32]

In Louisiana, employers engaged in certain health and safety-related occupations must request a security check, which will provide information on whether the prospective employee is a sex offender, and criminal record information. The Louisiana State Police will only provide information that is necessary to specify: whether the person has been

[30] 15 U.S.C.A. § 1681m.
[31] 29 C.F.R. §§ 1607.1-1607.18.
[32] EEOC: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII and EEOC: Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII.

arrested for, convicted of, or pled nolo contendere to any crime; the related crimes; and the dates on which the crimes occurred. The records are confidential and may only be disclosed by court order or with written consent. The employer must destroy these records one year after the employee's termination of employment.[33]

Under Louisiana's Child Protection Act, employers must ask the Louisiana Bureau of Criminal Identification and Information whether applicants or employees for positions involving supervisory or disciplinary authority over children have been arrested for, convicted of, or pled nolo contendere to any criminal offense, regardless of when the offense was committed.[34] The applicant or employee must sign a form giving permission for the release of the information.[35] Private employers of persons in elementary and secondary educational institutions may receive a record of all criminal convictions from before the date of the request.[36]

Similar to background checks, social media can be a useful tool for employment purposes.[37] Employers can use it to publicize job openings and to conduct background checks to confirm a candidate's qualifications.[38] The Society for Human Resource Management ("SHRM") surveyed its members in 2008, 2011 and 2013 on the use of social media for employee recruitment and selection. In 2013, seventy-seven percent of respondent companies used social networking sites. That figure was up from fifty-six percent in 2011 and thirty-four percent in 2008.[39] While the law on social media use in the hiring process is developing, employers should keep an eye out for anti-discrimination laws, the Fair Credit Reporting Act, and password protection laws.[40]

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[33] La. Stat. Ann. § 40:1203.2 and § 40:1203.4.
[34] La. Rev. Stat. Ann. §§ 15:587.1 and 15:587.1.1.
[35] La. Rev. Stat. Ann. § 15:587.1(A)(1)(a).
[36] La. Rev. Stat. Ann. § 15:587.1(A)(2).
[37] Social Media in the Hiring Process, Practical Law Practice Note 9-535-2907.
[38] Segal, Jonathan A., *Legal Trends Social Media Use in Hiring: Assessing the Risks*, https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx.
[39] *Id*.
[40] Social Media in the Hiring Process, Practical Law Practice Note 9-535-2907.

Viewing a prospective employee's social media during the hiring process can reveal information about protected class status that can later become the basis for a discrimination claim.[41] From a candidate's picture, an employer may learn his or her race, approximate age, and more.[42] People also commonly post personal information such as medical or family problems.[43]

Using targeted advertising to post a job on social media may overly narrow recruiting efforts to a certain age group, gender, or race.[44] The individuals using those sites tend to be similar. Employers should avoid being too specific with advertisements and must not indicate a preference for employees of a certain protected class. Also, it is important that social media is part of a larger recruitment plan that includes traditional recruiting avenues.[45]

As with traditional background and credit checks, employers using social media background checks can choose to outsource searches to third-party providers.[46] Before providing the results of the search, the background checkers redact information regarding a prospective employee's protected class status. This may help insulate an employer from liability. Critically, employers must be aware that social media background check companies are considered consumer reporting agencies under the FCRA.[47] As such, employers must comply with the requirements of the FCRA.[48]

States, including Louisiana, have enacted laws addressing employer access to current and prospective employees' social media accounts. Under Louisiana's Personal Online Account Privacy Protection Act, employers are prohibited from: (1) requesting or requiring employees or applicants to disclose usernames, passwords, or other

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[41] *Id*.
[42] Segal, Jonathan A., *Legal Trends Social Media Use in Hiring: Assessing the Risks*, https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx.
[43] *Id*.
[44] Social Media in the Hiring Process, Practical Law Practice Note 9-535-2907.
[45] *Id*.
[46] *Id*.
[47] Letter to FTC, 2011 WL 2110608 (May 9, 2011).
[48] 15 U.S.C.A. § 1681b(b)(2)(A)(i) (West).

authentication information that allows access to their personal online accounts; or (2) discharging, disciplining, failing to hire, or otherwise penalizing or threatening to penalize employees or applicants for failure to disclose such information.[49]

There are exceptions. Nothing in the law precludes employers from requesting that employees: (1) disclose log-in credentials for any employer-provided system or equipment; or (2) divulge content in any accounts or services provided by the employer or by virtue of the employee's employment relationship with the employer.[50] The law does not prohibit employers from conducting an investigation into misappropriation of proprietary information, violations of the law, or workplace policies where the investigation arises from the receipt of specific information about activity on the employee's personal account.[51] Louisiana's law explicitly states that employers are not prohibited from viewing, accessing, or utilizing information about employees or applicants that is already publicly available.[52] However, as outlined above, caution is necessary to make sure that employers does not run afoul of equal employment opportunity laws when accessing otherwise public information.

D. Drafting Employment Contracts

The essence of an employment contract is services for labor subject to control of the employer. The employer and employee may agree to any terms not prohibited by law or public policy. The provisions of an employment contract must be definite and certain as to essential terms, such as the identity of the parties, the nature and extent of the services, the location of the services, and the compensation. Once executed, the contract becomes the law between the parties.[53] While there are several components to consider when drafting an employment contract, the agreement's term, the description of the employee's position and duties, compensation, termination events, restrictive covenants, and arbitration require due attention.

[49] La. Rev. Stat. Ann. § 51:1953.
[50] La. Rev. Stat. Ann. § 51:1953(B).
[51] La. Rev. Stat. Ann. § 51:1953(B)(3).
[52] La. Rev. Stat. Ann. § 51:1953 (E).
[53] § 3:19.Stated terms, La. Prac. Employment Law § 3:19.

Term:

There are three classifications of employment contracts by duration: (i) terminable at-will; (ii) limited duration; and (iii) lifetime.[54]

An employment contract is terminable at-will when it is silent or indefinite as to its duration. If employment is for an indefinite period it may be terminated at-will by either party even if the employee has agreed to other concessions such as a non-compete agreement.[55]

Where an employment contract specifies a certain term, neither the employee nor the employer may terminate the employment contract without "just cause" or "serious grounds of complaint." Such an employment contract is a limited duration or "fixed-term" employment contract.[56] If an employer terminates a limited duration or "fixed-term" employment contract without just cause, it must pay its employee for the full term of the employment contract[57] and damages,[58] even if the employee finds other employment during that term. Similarly, if the employee terminates a limited duration employment contract without just cause, he is liable for damages.

Permanent employment contracts are generally against public policy. The courts have been reluctant to enforce them.[59] A contract for "permanent" or "lifetime" employment is considered one of indefinite duration and, therefore, terminable at-will.

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[54] § 3:9.Classification of employment contracts according to duration, La. Prac. Employment Law § 3:9.
[55] § 3:10.Terminable at-will, La. Prac. Employment Law § 3:10.
[56] § 3:11.Limited duration or "fixed-term", La. Prac. Employment Law § 3:11.
[57] Louisiana Civil Code art. 2749; *Barton v. Jefferson Parish School Bd.*, 171 So. 3d 316 (La. Ct. App. 5th Cir. 2015); *Saacks v. Mohawk Carpet Corp.*, 855 So. 2d 359 (La. Ct. App. 4th Cir. 2003).
[58] Louisiana Civil Code arts. 1944, 2004.
[59] *Simmons v. Westinghouse Elec. Corp.*, 311 So. 2d 28 (La. Ct. App. 2d Cir. 1975); *Griffith v. Sollay Foundation Drilling, Inc.*, 373 So. 2d 979 (La. Ct. App. 3d Cir. 1979); *Pechon v. National Corp. Service, Inc.*, 234 La. 397, 100 So. 2d 213 (1958); *Page v. New Orleans Public Service*, 184 La. 617, 167 So. 99 (1936); *Pitcher v. United Oil & Gas Syndicate*, 174 La. 66, 139 So. 760 (1932); *Baynard v. Guardian Life Ins. Co. of America*, 399 So. 2d 1200 (La. Ct. App. 1st Cir. 1981).

Similarly, employment "until retirement" establishes employment for an indefinite period terminable at will by either party.[60]

When deciding on an appropriate term, the employer must consider its expectations for the employee. A fixed term may be appropriate if the employee either has been continuously employed by the employer and is approaching retirement or is expected to serve in a transitional role for an interim period until someone else is hired. If an employee is new and the employer expects the relationship to be for an extended period, an agreement with a term that automatically renews may be preferable. When negotiating the term of the agreement, the employer should also consider what will happen once the agreement ends. If the agreement will not provide for severance if the employer declines to renew employment, then the expiration date of the agreement gives the employer an opportunity to terminate the employee's employment without triggering severance obligations. In addition, the employer should consider the consequences of terminating employment before the agreement's expiration date. For example, if the agreement provides that if the employee is terminated without cause, the employee will receive severance for the rest of the term of the agreement, the term is important in calculating potential severance costs for the employer.[61]

Description and duties:

The employment agreement should describe the employee's position and employment duties. The description should be specific enough for the parties to understand the employee's intended functions and roles but general enough to accommodate any changes to the employer or its business that may occur during the term of the agreement. Additionally, the description of the position should include the person

[60] § 3:12.Lifetime employment contracts, La. Prac. Employment Law § 3:12.
[61] Negotiating and Drafting an Executive Employment Agreement, Practical Law Practice Note 2-504-5403.

(or entity) to whom the employee will report. This person should be specified by position rather than by name to avoid confusion should there be future personnel changes.[62]

Compensation:

Compensation is a paramount employment contract issue.[63] There are multiple points to consider. For instance, should the base salary increase each year of the contract; should the agreement provide for a signing bonus; should the employee earn a quarterly or annual bonus; is the bonus guaranteed, dependent upon various milestones, or discretionary; and the circumstances in which the employee's base salary can be reduced.[64] Other matters to consider are eligibility for equity awards, severance packages, and perquisites and participation in employee benefit plans.[65]

Pursuant to Louisiana's Final Wage Payment Act, upon the discharge of an employee, it is the duty of the employer to pay the amount then due under the terms of employment on or before the next regular payday or no later than fifteen days following the date of discharge, whichever occurs first.[66] An employer's failure to timely pay the amounts due can have significant effects as employees are statutorily eligible to receive penalty wages and attorneys' fees.[67]

Termination events:

Common termination events include: death, disability, termination by the employer without cause, termination by the employee for good reason, and the

[62] *Id.*
[63] La. Rev. Stat. Ann. § 23:633.
[64] Harroch, Richard, *Negotiating Employment Agreements: Checklist Of 14 Key Issue*s, November 11, 2013, https://www.forbes.com/sites/allbusiness/2013/11/11/negotiating-employment-agreements-checklist-of-14-key-issues/#440fbb0224c6.
[65] Negotiating and Drafting an Executive Employment Agreement, Practical Law Practice Note 2-504-5403.
[66] La. Rev. Stat. Ann. § 23:631(A)(1)(a).
[67] La. Rev. Stat. Ann. § 23:632.

employer's failure to renew the term of the agreement. When negotiating the agreement, the parties must consider how to define each of the triggering events.[68]

As to termination for cause, the employer should consider what conduct amounts to cause. The definition of cause generally covers a range of acts or omissions of the employee that can adversely affect the employer or its business. For example, cause can include: willful failure to perform employment duties; fraud, embezzlement, or other theft; conviction of a felony or plea of guilty or nolo contendere to a felony; misconduct or gross neglect that causes harm to the employer; and habitual abuse of drugs or alcohol. Because of the severe consequences of a for-cause termination, employment agreements often include procedural protections for the employee. The extent of the protections is generally negotiated and can include: written notice of the reason for termination; a cure period during which the employee can remedy the circumstances constituting cause, if curable; and the opportunity to appear and discuss the circumstances constituting cause.[69]

Restrictive covenants:

Employers typically impose on the employee a confidentiality restriction, which prohibits the employee from disclosing the employer's trade secrets and confidential information. A confidentiality restriction frequently includes a requirement that the employee return all of the employer's information and property on termination of employment.[70]

A non-compete imposes professional restrictions on the employee for a period following his termination of employment by prohibiting the employee from working for the employer's competitors for a specific time period. In Louisiana, the validity of non-compete agreements is strictly controlled by one statutory provision, La. Rev. Stat. Ann § 23:921, and its judicial interpretations.

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[68] *Id.*
[69] Negotiating and Drafting an Executive Employment Agreement, Practical Law Practice Note 2-504-5403.
[70] *Id.*

The statute begins with generally prohibiting any agreement where someone is restrained from exercising a lawful profession, trade, or business, unless one of the narrow exceptions to the general prohibition is satisfied. The list of exceptions is based on relationships and includes: employee/employer relationship; sale of the goodwill of a business; dissolution of a partnership; franchisor/franchisee relationship; employer/computer employee relationship; corporation/shareholder relationship; partnership/partner relationship; and limited liability company/member relationship.[71] Louisiana has long had a strong public policy against non-compete agreements. Because these agreements are in derogation of the right to work in a chosen field, Louisiana courts have narrowly construed the exceptions to the general prohibition.

Most Louisiana courts require a valid non-compete agreement to contain an area of prohibition described by parishes, municipalities, or parts thereof, together with a term of no longer than two years from date of termination of the relationship. These requirements are derived from statutory language. While not contained within the statute, some Louisiana courts also require a valid non-compete agreement to define narrowly and accurately the business in which the individual is prohibited from competing.[72] Other Louisiana courts deny the need for this additional non-statutory-based requirement.[73] If the business is defined within the agreement, however, the definition must be narrow and accurate.[74]

Drafting non-compete agreements to comply with Louisiana law is critical to their enforceability. It is wise for employers to annually audit their non-compete agreements. In doing so, employees are reminded that they are subject to these agreements, and it

[71] La. Rev. Stat. Ann § 23:921.
[72] *Lafourche Speech & Language Services, Inc. v. Juckett*, 94-1809 (La. App. 1st Cir. 3/3/95), 652 So.2d 679, writ denied, 95-0850 (La. App. 1st Cir. 5/12/95), 654 So.2d 351.
[73] *Baton Rouge Computer Sales, Inc. v. Miller-Conrad*, 99-1200 (La. App. 1st Cir. 5/23/2000), 767 So.2d 763; *Vartech Systems, Inc. v. Hayden*, 05-2499 (La. App. 1st Cir. 12/20/06), 951 So.2d 247; *Henderson Implement Company, Inc. v. Langley*, 97-1197 (La. App. 3rd Cir. 2/4/98), 707 So.2d 482.
[74] *Moores Pump and Supply, Inc. v. Laneaux*, 98-1049 (La. App. 3rd Cir. 2/3/99), 727 So.2d 695.

allows for consideration of any newly decided cases affecting the enforceability of the agreements.[75]

A non-solicitation agreement is distinct from a non-competition agreement, but the requirements of La. Rev. Stat. Ann § 23:921 are applicable to both. Similar to non-competition agreements, non-solicitation agreements restricting the hiring of employees are disfavored and must meet the requirements set forth above.[76]

Arbitration:

Arbitration agreements requiring employees to pursue work-related claims in arbitration, rather than in court, have long been enforced under the Federal Arbitration Act ("FAA"). In 1991, the United States Supreme Court in *Gilmer vs. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), held that by agreeing to arbitrate, parties trade "procedures and opportunity and review of the courtroom for the simplicity, informality, and expedition of arbitration." In *Circuit City Stores vs. Adams*, 532 U.S. 105, 122-123 (2001), the Court said there are "real benefits" to arbitration, and those benefits do not "somehow disappear" in the "employment context." "Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation." Just recently the Court held that class action waivers in employment arbitration agreements are enforceable.[77]

There are advantages and disadvantages to implementing an alternative dispute resolution policy that includes binding arbitration. Some of the advantages include: a potential reduction in the number of claims filed as many plaintiff lawyers shy away from matters which can only be arbitrated; a potential reduction in employment practice insurance (EPLI) premiums; a reduced risk of a "runaway" jury verdict; a quicker and more streamlined process than civil litigation; and findings that are, for the most part,

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[75] Bursavich, Jude, *2018 is Here: NOW is the Time to Utilize Non-Compete Agreements*, November 2017, http://www.bswllp.com/2018-is-here-now-is-the-time-to-utilize-noncompete-agreements.
[76] § 3:27.Statutory requirements, La. Prac. Employment Law § 3:27.
[77] *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP, et al. v. Morris, et al*., No. 16-300; *National Labor Relations Board v. Murphy Oil USA, Inc., et al*., No. 16-307 (May 21, 2018).

final and binding. On the other hand, some of the disadvantages include: employees may choose to pursue arbitration on a pro se basis; many states require mutuality of the right to arbitrate, meaning employers may not be able to fully carve out claims for injunctive relief for violations of trade secrets, restrictive covenants, non-compete clauses, or other instances when they may wish to resort to a court instead of arbitration; arbitration proceedings are less likely to be decided by a dispositive motion than are court proceedings; and an arbitration policy generally will be ineffective and unenforceable with regard to the filing of claims and charges before administrative agencies. An arbitration provision cannot prevent the United States Department of Labor, the EEOC, or similar agencies from bringing suit, including class and collective actions.[78]

Arbitration agreements must specify the claims that are covered, the time allowed to assert a claim, and the process to be followed to resolve a claim. It should also provide for the selection of a neutral arbitrator; permit reasonable and meaningful discovery; be signed by both employer and employee; acknowledge availability and standards of a summary judgment procedure; contain class/collective action waivers; include a savings clause; and set forth a delegation clause that provides for the arbitrator to decide whether the arbitration agreement covers a particular dispute or is otherwise enforceable.[79]

[78] Foster, Murphy J., *Mandatory Employee Arbitration and Class Action Waivers*, June 2018, http://www.bswllp.com/mandatory-employee-arbitration-and-class-action-waivers#3
[79] *Id.*

Wage and Benefit Issues

Submitted by James E. Sudduth

National Business Institute

Human Resource Law from Start to Finish
Continuing Legal Education Seminar
Lafayette, Louisiana

Speaker: *James E. Sudduth, III*
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Lake Charles, Louisiana

DAY 1: WAGE AND BENEFIT ISSUES

November 12 & 14, 2018, 1:15 - 2:15 p.m.
James E. Sudduth III, Sudduth & Associates, LLC

A. State-Specific Wage and Hour Laws

1) Louisiana Wage Payment Statutes (La R.S. 23:631-635)
    a) Regulate differently than the FLSA. These statutes are founded on the basic premise that employers may not pay employees after termination, discharge, or quitting.
    b) Employees can only sue under these statutes when they are *separated* from the employer (employment terminated) (usually dealing with the EE's last paycheck).
        i) 23:631 Payment of amounts due: (gives private ROA)
            (1) When EE is *discharged or resigns,* they shall be paid the amount of money due to them at that time by the ER either at (1) the next regular payday or (2) no later than 15 days following the date of discharge, whichever comes first.
            (2) EE must be paid in the manner which has been customary during employment (*Boudreaux v. Hydraulic Rebuilders and Service Company, Inc.*), or EE can be paid by mail (statute only provides for USPS) (If not paid according to statute, it's a violation under the statute and employee can get penalty wages).
            (3) c. (A)(2) Payments shall be made in the *place and manner* customary during the employment (or *U.S. Mail*).

(a) What if ER offers to pay *not* in the manner customary and the EE accepts? EE can still sue saying ER required EE to do other things to get $ and EE can be due penalty wages only.

(4) (3)(b) Example: EE says they are due $1000; ER says they are due $500. ER is implicitly agreeing to $500 (undisputed portion). So that $500 *should be paid right away* and then the rest is subject to litigation instituted by the EE.

(5) (D)(1)(a)-(b)*Vacation Pay*: considered an amount then due only if:

(a) EE deemed eligible for and accrued right to take vacation with pay; and

(b) EE has not taken or been compensation for vacation time as of the date of discharge.

(6) Controversies arise concerning bonuses and commissions (Example: Forfeiture Provision- you must be an EE at the time to be paid your commission/bonuses).

c) 23:632 Liability for failure to pay (*Penalty Wages*):

i) If ER doesn't comply or refuses to pay outside the time limits above, ER liable to the EE for 90 days at the EE's daily rate of pay (subject to a defense of good faith).

(1) ER can stop the running of the 90 days cap by paying immediately after they realize they should've paid and are late. If ER 20 days late, tell them to pay now!

(2) Usually what happens is ER doesn't pay, gets to trial months and months away, and court orders payment up to the date of the 90-day cap.

ii) Penalty wages will not be assessed against ER when there was a dispute of amount of wages and ER was in good faith for not paying.

iii) Attorney fees *are awarded* if EE is right and you recover. Not discretionary; EE gets them.

B. What Qualifies as Overtime?

1) General Rule: Covered persons may not be employed more the 40 hours/week without receiving time and a half their regular rate of pay for the overtime hours.
2) Exceptions
   a) Executive, administrative and professional employees working in a "bona fide executive capacity"
      i) Salary of $455/week
      ii) Primary duty is management of the enterprise or a subdivision thereof

(1) "Primary duty" – principle, major main or most important duty performed by the employee
(a) Emphasis on job as a whole
(2) 5 Factors
(a) The amount of time spent in the performance of managerial duties (guideline is +50%)
(b) The relative importance of the managerial duties as compared to other types of duties
(c) Relative freedom from supervision
(d) The relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by supervisor
(3) Concurrent performance of exempt and non-exempt duties do not disqualify the employee from the exemption

iii) Work includes customary and regular direction of work of 2+ employees
iv) Has authority to hire and fire, or whose suggestions regarding hiring and firing or promotion, etc. are given particular weight.

3) Public Employees + Compensatory Time Off
a) Public employees can be given compensatory time off instead of overtime if…
i) The agreement was set up before the overtime was worked
ii) The employee received 1.5 hours of compensatory time off for every hour of overtime worked
iii) The time accrued does not exceed the established limit
iv) The employer grants the employee's request to use his compensatory time off, unless doing so would be "unduly disruptive"

4) Implementation Issues
a) How do you determine hours and wages, and resulting violations?
i) What is compensable time/hours worked?
(1) 29 CFR 785.11: Work not requested, but suffered and permitted is time worked
(2) 29 CFR 785.18: An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes in working while "on call."
(3) Waiting time is time worked when the employee is "engaged to wait" (required to wait). It is not time worked when the employee is not engaged to wait.
ii) What is the employee's base rate of pay?
(1) Pay period cannot be aggregated
(2) Bonuses are considered as wages only for the week they are paid

(3) The reasonable cost of facilities customarily furnished to employees may be considered as part of their wages
(a) Must be for the primary benefit and convenience of the employee not the employer
(b) Must be accepted voluntarily by the employee
(c) Must be of the kind customarily provided by employers engaged in similar activities

5) Remedies
a) Basic remedies for minimum wage/overtime precisions
i) Amount owed as wages and an equal amount in liquidated damages 216(b).
(1) Employer can avoid liquidated damages by satisfying the good faith and reasonable grounds defense.
ii) Creates a private right of action
(1) Can be filed in a state or federal court (concurrent jurisdiction)
(2) Individual has 2 courses of action
(a) File first with the Department of Labor.
(i) The employer can settle with the DOL.
(ii) The DOL can investigate and choose to file a lawsuit itself
(iii) The DOL can choose not to file the lawsuit, and the individual is free to file

6) Statute of Limitations
a) 2 years, 3 years for a "willful violation" (willful violation 255 definition)
b) The law "reaches back" because of the general tendency of FLSA violations to be repeated/ongoing.

C. Differences to be Aware of: Salaried Exempt vs. Salaried Non-Exempt

1) Merely because an employee is salaried does not mean that they are exempt.
a) *White Collar Exception:* Executive, administrative and professional employees working in a "bona fide executive capacity."
b) Employers should not that the FLSA exemptions are narrowly construed against employers and are withheld except as to persons plainly and unmistakably within their terms and spirit. 29 C.F.R. § 201 (1999).
i) Salary of $455/week
ii) Primary duty is management of the enterprise or a subdivision thereof
(1) "Primary duty" – principle, major main or most important duty performed by the employee

(a) Emphasis on job as a whole

(2) 5 Factors

(a) The amount of time spent in the performance of managerial duties (guideline is +50%)

(b) The relative importance of the managerial duties as compared to other types of duties

(c) Relative freedom from supervision

(d) The relationship between the employee's salary and the wages paid to other employees for the kind of non-exempt work performed by supervisor

(3) Concurrent performance of exempt and non-exempt duties do not disqualify the employee from the exemption

iii) Work includes customary and regular direction of work of 2+ employees

iv) Has authority to hire and fire, or whose suggestions regarding hiring and firing or promotion, etc. are given particular weight.

2) The FLSA *does not* require that a non-exempt employee be paid hourly.

a) Paying an employee a salary, as opposed to an hourly wage, ***does not*** exempt the employee from FLSA protections.

i) Employers who attempt to skirt FLSA liability by classifying an employee as "salary," as opposed to hourly, are still susceptible to the liquidated and other damages, as provided by the FLSA and state law.

b) Salaried employees who are non-exempt are still entitled to overtime pay to the extent that they actually work more than 40 hours in a work week.

i) If the employer is challenged on the classification, the employer bears the burden of proof that an exemption applies. If the employer has failed to properly classify the employee, it is liable for back wages, liquidated (double) damages for violations that were not made in good faith, and attorney's fees.

ii) Principals and managers may also be personally liable for misclassifying employees

c) To determine whether a salaried employee is exempt or not, the employer must utilize the salary-level test, the salary-basis test, and the duties tests.

i) The salary basis test measures the method and amount of payment

ii) The duties test examines the duties and responsibilities of the employee, as well as the employee's degree of independence from supervision.

(1) Again, this is a narrow construction applied against the employer, who must prove, *without a doubt*, that the employee in question qualifies for exempt status.

d) Exempt employees *must* be paid their full salary in any week they work, no matter how little they work in any given week (even an employee working a single hour in the week is entitled to payment of full salary when he or she is exempt).

i) Nonexempt hourly employees are paid on a salary basis, but employers can deduct from the employees pay for working fewer hours than the standard amount.
ii) Non-exempt hourly employees are paid by the hour
(1) No deductions are needed for working fewer hours in a week; the employer simply adds up the hours worked in the week and pays the employee on that basis.

D. Options for Employees Reporting Time Worked

Preliminary Note: Louisiana law does ***not*** require employees or employers to record working time using a specific method.

The Fair Labor Standards Act imposes an obligation upon the employer to keep accurate and adequate records

1) The FLSA imposes an affirmative duty on employers to keep *accurate and adequate* records of all individuals employed, wage rates, hours worked, as well as other conditions of employment. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946); *Kline v. Wirtz*, 373 F.2d 281 (5th Cir. 1967).
a) As an FLSA claimant/employee may establish his claim solely through his own testimony, the onus is wholly born by the employer to keep adequate records. *Moran v. Al Basit LLC,* 788 F.3d 201(6th Cir. 2015).
i) Courts recognize that employees often do not record time worked and further acknowledge that it is not the employee who is punishable for a failure to do so.
ii) An employee must only present "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Brown v. Family Dollar Stores of IN*, *LP,* 534 F.3d 593 (7th Cir. 2008).
(1) In order to rebut such evidence, the employer must then present either:
(a) (precise evidence of the amount of work performed, or
(b) evidence to negate the reasonableness of the employee's evidence
(2) Though testimony is sufficient, a prudent employee may find it in their own interest to maintain a separate, written log of hours worked.
iii) Constructive knowledge of overtime work hours based on access to records indicating employees were working overtime is not a foregone

conclusion. *Craig v. Bridges Bros. Trucking LLC*, 823 F.3d 382 (6th Cir. 2016).

b) Practical Notes: Investigations of FLSA records violations will typically span the two (2) years prior to the alleged violation.
   i) Employers choose, at their own peril, which employees are not exempt from provisions of the FLSA and for whom they must track records in accordance with provisions thereof.
   ii) Willful employer violations of FLSA record-keeping provisions are subject to a three (3) year statute of limitations.
   iii) Employers are required to track ***all*** time employees work, included after-hours work.

c) Courts have acknowledged that, while it "may be difficult or commercially impractical for employer to keep proper records showing regular hourly rate of pay, total daily pay or weekly straight time earnings or total weekly overtime excess compensation paid to employees does not excuse employer's failure to keep records required by regulation promulgated under this chapter." *Walling v. Lippold*, D.C.Neb.1947, 72 F.Supp. 339.
   i) Employers are charged with knowledge of requirements demanded in respect to "records," though the concept of "accurate and adequate records" is not defined with specificity.
      (1) Time records based on estimated project or industry norms and averages are insufficient - employee testimony or other self-maintained records will overcome such employer estimations. *Wirtz v. Williams,* C.A.5 (Tex.) 1966, 369 F.2d 783.

2) Adequacy of records:
   a) Employer's time records were deemed inaccurate, and the employer had burden to come forward with evidence of precise amount of work performed or with evidence to negate reasonableness of inference to be drawn from employee's evidence where:
      i) Employees' allegations that they were required to work "off the clock" before and after their standard shifts and having time deducted for meal breaks even though they were unable to take bona fide half-hour break to eat, where, for first couple of weeks on project, and
      ii) Employer's time log records showed employees signing in and signing out at disparate times, but afterward, records consistently showed employees as having worked from exactly 7:30 a.m. *McGlone v. Contract Callers, Inc.*, S.D.N.Y.2014, 49 F.Supp.3d 364.
   b) Records that do not reflect the date or hours worked have been deemed inadequate for purposes of the FLSA; where none of employee time cards reflected the rate of pay, employer records declared inaccurate and unreliable

under the FLSA. *Solano v. A Navas Party Production, Inc.*, S.D.Fla.2010, 728 F.Supp.2d 1334

c) The inadequacy and uncertainty of employer's records are his responsibility; he cannot escape liability for unpaid minimum wages or overtime compensation under this chapter by his own dereliction. *Smith v. Superior Casing Crews*, E.D.La.1969, 299 F.Supp. 725

d) What Happens When an Employer's Records are Deemed Inadequate?

i) Employee must approximate the number of overtime hours they worked and produce sufficient evidence in a claim for overtime compensation under the FLSA to show the amount and extent of hours worked as a matter of just and reasonable inference;

ii) The burden then shifts to the employer to negate the reasonableness of the inference to be drawn from the employee's evidence,

(1) if the employer fails to negate the reasonableness of the inference, the employee is entitled to compensation for a reasonable time, rather than actual time, required for the task. *Bull v. U.S.*, Fed.Cl.2005, 68 Fed.Cl. 276, appeal filed, affirmed 479 F.3d 1365.

3) *An employer cannot escape record-keeping provisions of this section by delegating that duty to his employees. Castillo v. Givens*, C.A.5 (Tex.) 1983, 704 F.2d 181, certiorari denied 104 S.Ct. 160, 464 U.S. 850, 78 L.Ed.2d 147.

E. Handling Deductions from Wages

In most cases, the FLSA does not prohibit deductions from wage payments, but regular rates and overtime pay must be figured before the deductions are made.

1) As a preliminary matter, the legality of many deductions depends on how it affects the employee's "regular rate" or pay.

a) Regular Rate = Total Compensation (before deductions) ÷ total hours worked in workweek

i) 29 C.F.R. § 778.304(a) does not offer a formal definition of what constitutes a deduction, but instead offers the following:

b) "the word "deduction" is often loosely used to cover reductions in pay resulting from several causes:

i) Deductions to cover the cost to the employer of furnishing "board, lodging or other facilities," within the meaning of section 3(m) of the Act.

ii) Deductions for other items such as tools and uniforms which are not regarded as "facilities."

iii) Deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishments).

iv) Reductions in a fixed salary paid for a fixed workweek in weeks in which the employee fails to work the full schedule.
v) Deductions for disciplinary reasons.

c) 29 C.F.R. § 778.304(b) states: "[i]n general, where such deductions are made, the employee's 'regular rate' is the same as it would have been if the occasion for the deduction had not arisen. Also, as explained in part 531 of this chapter, the requirements of the Act place certain limitations on the making of some of the above deductions.

2) **"Other facilities"** can mean things like board or lodging that primarily benefit the employee.
   a) The definition of "facilities can include meals, tuition, general merchandise, fuel, etc.
      i) There is **no limit** on these deductions, whether during regular or overtime hours
         (1) These deductions are allowed so long as they only represent the "reasonable cost" of the facilities furnished.
   b) Subject to certain limitations, an employer may make "deductions for other items such as tools and uniforms which are not regarded as 'facilities.'"
      i) Deductions for items not considered "facilities" may be illegal to the extent they reduce the employees wage rate below the required minimum wage, nor may such deductions come from payment of overtime due to the employee.
   c) An employer also may make "deductions authorized by the employee (such as union dues) or required by law (such as taxes and garnishment)."5 Finally, an employer may make deductions from fixed salaries paid for a fixed workweek in weeks in which the employee fails to work the full schedule, and an employer may make deductions (within limits) for disciplinary reasons.
3) An employer may only make deductions for bona fide reasons. An employer may not make deductions in an attempt to avoid the minimum wage or overtime requirements of the Act.
   a) Such deductions will be treated as "kickbacks" and are expressly prohibidado.
4) An employer also must add back any deductions or pre-tax salary reductions to purchase employee benefits (e.g., 401(k) contributions, supplemental life insurance premium payments, and supplemental disability benefits premiums) to determine the employee's regular rate of pay.
5) Further, the total amount deducted for items *not defined as "facilities"* (discussed *supra*) may not exceed the amount which could be deducted on the number of straight-time hours worked for any given workweek; disciplinary deductions are subject to the same limitation as well.

a) Example 1: Employee A works a 40 hour workweek at a wage of $20.00/hr, thus earning $800.00 in a normal workweek. Assuming a minimum wage of $7.25/hr, $290.00 ($7.25 x 40) represents the minimum wage portion of Employee A's pay for that workweek.
    i) The remainder of the total pay, $510.00 ($800.00 - $290.00) represents the total amount that may be deducted for the workweek as "facilities."
        (1) Note: If Employee A had worked 10 hours of overtime (overtime rate of $20.00 x 1.5, or $30.00), earning $300.00 of overtime pay, though the employee earned a total of $1100.00 during the pay period, facilities deductions still cannot exceed the straight-time total pay, reduced by the portion represented by the minimum wage (again, $800.00 - $290.00)
            (a) This is because the employer is not allowed to deduct from overtime pay.

6) Cautionary Approach to Salaried Employees:
    a) Deductions based on an employee's failure to work a full schedule are not considered deductions allowed by law.
    b) Such a deduction may convert the employee's status to hourly, as compensation of the salaried employee is reduced by the amount of the average hourly earnings for each hour lost by the employee, and the employee is essentially employed at an hourly rate.
7) Caveat for Incentive Compensation and Early Employment Contract Termination
    a) An agreement is enforceable whereby an employee agrees to return incentive compensation (e.g. bonuses, commissions) in the event he prematurely terminates employment.
        i) An employer and employee may contract that advances are to be repaid only from a source contemplated by them and, if the source proves to be insufficient to reimburse the advances, personal liability thereafter attaches to the employee.
        ii) Otherwise, advances to an employee cannot be recovered by the employer upon termination of the employee's employment absent an express or implied agreement or promise to repay the excess.

8) Pursuant to 29 C.F.R. §788.304, employee deductions and contributions are permissible, but overtime is calculated on the regular rate before the deductions are made.

Allowable Deductions:

1) Taxes - statutory mandates typically require an employer to make certain deductions, including those required by federal and state tax codes

2) Tardiness and Willful Absence - Missed time deductions are not prohibited per se, but a cautionary approach is advised to ensure such deductions do not result in an effective, below-minimum wage regular rate.
    a) NOTE: Employer and employee generally must have notice and agree to accept this penalty as a term of employment.
3) Garnishment - Wages can be deducted pursuant to a garnishment order, but only once they become due to the employee, not at the time of the order itself.
4) Pre-hire Medical Examination - Employee may, in some instances, require an employee to reimburse employer for drug or medical screening costs *if* the employee resigns within 90 days of starting work.
5) Physician Fees - Employer may not retain more than 10% of a physician fee paid by the employee, and at least 90% of the fee must be paid out to the physician.
    a) Employees have the right to elect their physician at an annual meeting if more than 10 employees contribute towards the physician's fees.
        i) La. R.S. 23: 894-895 create a right for employees to elect a physician if more than 10 employees contribute towards the physician's fees.
            (1) This election is to occur at an annual meeting.
6) Workers' Compensation - Amounts paid, but not owed under a workers' compensation law plan may be deducted from that employee's future compensation pursuant to La. R.S. 2306, though principles of setoff may be relevant to the determination in particular circumstances.
7) Union Dues - Employee may authorize employer to withhold these dues.
8) Employment Agency Fees - Direct payroll deductions for employment service fees of any employment application *may not* exceed 25% of the applicant's gross wage during the pay period.
9) Setoff - Employer may deduct overpayments (or other amounts concurrently owed to each other), but should take caution to avoid such an arrangement that reduces the employees wage during the pay period below minimum wage.
    a) Practical Note: Pay employee minimum wage, rather than withholding payment completely to lawfully exercise all setoff rights in accordance with FSLA.
    b) Public employees *may not* setoff compensation of its employees
10) Damages Caused by Negligent Employee - Deductions allowed for willful or negligent causation of damage, or if employee pleads guilty to, or is convicted of, theft from employer.
    a) Deduction cannot exceed actual damage
    b) Employer is statutorily authorized to assess to employees a deposit on employer property in order to ensure return of that property.
        i) Employer *may not* deduct cost of damage, theft, or missing equipment without evidence of the employee's wrongdoing.

c) Caution to Employers - Fining FLSA exempt employees *can* result in loss of exemption; fining non-exempt employees can violate FLSA provisions (even deductions for theft or willful/negligent damage) when the deduction effectively reduces the employee's wage below minimum wage or amounts to an effective denial of overtime.

Expressly Prohibited Deductions:

1) Training and Other Mandatory Costs Required for Employment - An employer *may not* require employees to incur expenses in order to remain employed (i.e., training expenses, etc.) and refuse to reimburse the employee in the event he/she is terminated.
    a) Uniforms - cost and maintenance expense for required uniforms cannot be deducted where it effectively reduces the employee's wage below the minimum wage.
        i) Caution to Employers - be wary of the liberal definition of what constitutes a "uniform."
            (1) "Uniform" can refer to any specific type and style of clothing that must be worn at work rather than a general type of ordinary, basic street clothing with permitted variations in details.
2) Amounts Loaned by Employer - Money loaned by an employer to his or her employee should *never* be setoff against the employee's wages.
3) Wage forfeitures - An employer may not require an employee to sign a contract by which the employee forfeits his wages if discharged before the contract is completed or if the employee resigns before the contract is completed.
    a) In instances of an employer's violation, the employee is entitled to full wages earned up to discharge or resignation.
4) Fines - Other than theft and willful/negligent damage, the employer may not impose fines that constitute pecuniary penalties.
5) Certain Contributions Mandated by Employer - Mandatory political contributions or policy requiring contributing to a retirement plan any bonuses earned by the employee. La. R.S. 23:634.
6) Kickbacks - Kickbacks are expressly prohibited by federal law, specifically, the Copeland "Anti-Kickback Act.
    a) The Act requires a contractor and subcontractor to submit weekly employee wage statements pertaining to covered work by employees during the preceding payroll period.

F. Leave Policies

Preliminary Considerations: FMLA, the ADA and state laws mandate that employers provide employees leave under certain conditions, though employers have some discretion over how leave is administered.

Practical Notes:

- FLSA statutes apply in Louisiana as Louisiana State law is silent on many labor and employment matters.
- Formulating uniformly implemented leave policies in alignment with state and federal law will eliminate ambiguity employers often face in defining how, when, and which employees may take leave.

1) Categorical Limitations on Leave and Eligibility Requirements:
    a) Employers are often free to set eligibility requirements for leave such as limiting eligibility to full-time employees or only employees in certain job categories.
        i) Note: Employers with fewer than 50 employees that do business in states without leave laws applicable to the private sector are not bound by the FMLA's requirements to determine employee eligibility for leave.
            (1) Employers with more than 15 workers may be required provide leave as an accommodation under the ADA.
            (2) When the FMLA applies to the employer, an employee is eligible for leave only if he or she has worked for the employer at least 12 months (though not necessarily consecutively) for at least 1,250 hours in the previous 12 months.
            (3) Eligibility is determined as of the date the leave will actually begin, not when the employee requests the leave.
    b) If the employee meets these eligibility requirements, the employer has no discretion to deny FMLA leave to an employee who suffers from a serious health condition.
2) Employers not covered by FMLA (or related state leave law) may cap the duration of leave to less than 12 weeks, as long as the worker is not covered by workers' compensation
    a) Example: Employer policy may provide four weeks of paid leave to a full-time employee after three years of employment and up to eight weeks of unpaid leave for personal reasons.L
        i) Leave beyond that time may be a required ADA reasonable accommodation for an employee with a disability.
3) Advantages and Disadvantages of Structured Leave Policies

a) Liberal policies will generally nurture favorable morale, commitment, and relationships of trust between the employer and employees.
b) Employers may suffer detrimental impact if several employees need to take leave at the same time for extended periods and the employer is forced to hire replacement workers or reassign tasks to the remaining employees.
    i) Employers may tailor and restrict leave within subcategories of employees to alleviate these concerns

4) Practical Note: Employer's designation of an employee's leave time should be carefully considered
    a) Prudent employers should require employees to first use any paid sick time and designate that time as FMLA leave in order to ensure employee's bank of total leave time is not excessive or duplicitous.

Disability Leave in Louisiana

1) A leave of absence may be required as a reasonable accommodation for a disabled employee under the Americans with Disabilities Act and the Louisiana Employment Discrimination Law (La. R.S. 23:323).

Statutorily Established Leave in Louisiana

1) Jury Duty - Monetary fines may imposed on employers who deny employees a leave of absence in violation of the statute; Employer must pay the employee wages unlawfully withheld (for maximum of one day of jury duty without reducing other leave or benefits).
    a) Notice: Employee must give the employer notice of his call to service within a reasonable period of time after receipt of the summons and before his jury appearance (La. R.S. 23:965(A)(1)).
2) Military Service Relief Act (La. R.S. § 29:401-26) - Unpaid leave, though employee continues to accrue other leave as if he had remained continuously employed.
    a) Any person employed by a covered employer who is or has applied to be a member of the military or performs, is performing, has performed, or has an obligation to perform military service is eligible for this leave.
    b) Notice: To be entitled to reemployment, an employee must give an employer advance written or verbal notice of the call to military service (La. R.S. 29:410(A)). However, no notice is required if giving notice is precluded by military necessity or, under all of the relevant circumstances, the giving of notice is otherwise impossible or unreasonable (La. R.S. 29:410(B)).
    c) To return following the end of military service, the employee must also provide verbal or written notice of his intent to return.

3) Bone Marrow Donation Leave: (La. R.S. § 40.1263.4) - Applies to employers with at least 20 employees working an average of at least 20 or more hours per week, an employee entitled to up to 40 hours of paid leave (at employee's discretion), unless there is agreement to additional leave between the parties.
    a) Notice: No notice required.
4) Maternity Leave (La. R.S. § 23:341-324) - Unpaid leave; applies to employers with more than 25 employees in Louisiana (for 20 or more calendar weeks in the current or preceding calendar year):
    a) Female employees disabled by pregnancy, childbirth, or related medical conditions are eligible for this leave.
    b) Six (6) weeks of leave for a normal pregnancy, childbirth, or related medical condition.
        i) Four (4) months for leave for disability caused by the same (i.e., experiences a pregnancy, childbirth, or other related medical condition that is not normal).
    c) For employer violation, employee can recover:
        i) Compensatory Damage;
        ii) Back pay;
        iii) Benefits;
        iv) Reinstatement
        v) Frontpay
        vi) Reasonable attorneys' fees; and
        vii) Court costs.
    d) Notice: An employer may require an employee who plans to take maternity leave to give the employer reasonable notice of the date this leave commences and the estimated duration of this leave (La. R.S. 23:342(2)(b)).
5) Note: Under the Louisiana Employment Discrimination Law (LEDL), employers may need to provide leave as an accommodation of an employee's disability if, in similar circumstances, leave would be provided as an accommodation under the Americans with Disabilities Act of 1990.

<u>Workers' Compensation Leave</u>

1) Louisiana law does not specifically require workers' compensation leave for employees who incur on-the-job injuries or illnesses.
    a) Accordingly, employers implementing such policies need not include specific language in workers' compensation leave policies.

Vacation Time:

1) Nothing in the provisions of La. R.S. 23:631 or 23:634 prevents an employer from restricting an employee's right to accrue vacation and use-it-or-lose-it policies are not inherently unlawful. *Wyatt v. Avoyelles Parish School Bd.*, 831 So. 2d 906, 915 (La. 2002).
2) Employment contracts may not require forfeiture of accrued vacation pay on resignation or discharge. La. R.S. 23:634; see also *Wyatt*, 831 So. 2d at 913.
3) To be paid for accrued vacation on resignation or discharge, an employee must, according to the employer's policy:
    a) Be eligible for and have accrued vacation time.
    b) Not have taken or been paid for the time. *See* La. R.S. 23:631(D); *see also Beard v. Summit Inst. for Pulmonary Med. and Rehab.*, 707 So.2d 1233 (La. 1998).
4) If an employer has a clear, written policy that any paid time off is a "mere gratuity," courts will not uphold a terminated employee's claim for accrued, unused vacation time. *Hess v. Magnolia Behavioral Healthcare, L.L.C.*, 189 So.3d 1183 (La. Ct. App. 2016).

G. Part-Time Employees and Temps: Wage and Benefit Obligations

Preliminary Notes: The FLSA does not define or address part-time employment; whether an employee is considered full or part time does not change the application of the FLSA.

- Generally, part-time employees are still entitled to statutorily mandated benefits.
- Company policy may dictate which employees are considered, “full” and “part-time.”
- Payment must be effected timely, per state and federal law, and the employer must still withhold income, FICA taxes, and the employer must pay unemployment taxes, and worker compensation.
- It is often within the employer’s discretion to determine which non-statutorily mandated benefits to offer to part-time employees (i.e., insurance, paid time off, retirement plans, etc.).
- Employers with fifty (or more) full-time equivalent employees may be required to offer health coverage.
- ERISA law provides employers of part-time employees working 1,000+ hours for a company that offers pension plans to full-time employees must provide part-time employees. access to the same plan.

1) Louisiana Workers’ Compensation statutes (at La. R.S. §23:1021(9)) define a “part-time employee” to mean an employee who as a condition of his hiring knowingly accepts employment that:
    a) customarily provides for less than forty hours per work week, and

b) that is classified by the employer as a part-time position.
c) In 1983, Amendments to the Workers' Compensation statutes reflected that part-time employees were no longer entitled to compensation on the basis of wages he would have earned had he been employed full time.
d) For purposes of Workers' Compensation Benefits, "… If the employee is paid on a hourly basis and the employee is employed for forty hours or more, his hourly wage rate multiplied by the average actual hours worked in the four full weeks preceding the date of the accident or forty hours, whichever is greater …" will be the calculation of his average weekly wage from the hourly basis on which it is paid. La. R.S. 23:1021(10)(a)(i).

2) According to IRS governance, employees who work an average of at least thirty (30) hours per week, or 130 hours per month, can be considered full time.
3) For purposes of determining benefits under the Affordable Care Act (ACA), the IRS definition is the operative rule.

H. Unpaid Internship & Training Programs

1) In the wake of the 2007-2008 financial crisis and recession, the market for unpaid interns has grown considerably.
    a) Seeing internships as valuable learning experiences and even prerequisites to paid jobs in their industries of choice, students with financial means supplanted paid job positions with unpaid positions with prestigious for-profit companies.
        i) Commentators have noted that some unpaid internships may violate the Fair Labor Standards Act of 1938 (FLSA), the United States' national minimum wage law.
    b) Prior to January 2018, the Department of Labor considered six (6) factors to determine whether a particular job satisfies the requirements of an unpaid internship:
        i) The FLSA defines an "employee" as "any individual employed by an employer," (29 U.S.C. § 203(e)(1)) and "[e]mploy" as "to suffer or permit to work." *Id.* at § 203(g).
        ii) In 1947, the Supreme Court found that certain "trainees' were not covered employees under the FLSA." *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).
        iii) The Department of Labor created a "fact sheet" based on Portland Terminal, which enumerated six criteria for determining whether an intern is an employee. *Glatt*, 293 F.R.D. at 531.
            (a) The internship is similar to training that would be given in an educational environment;
            (b) The internship experience is for the benefit of the intern;

(c) The intern doesn't displace regular employees and works under close supervision of existing staff;
(d) The employer doesn't gain an immediate advantage from the intern's activities—and on occasion the employer's operations may be impeded by the intern's activities;
(e) The intern isn't guaranteed a job at the end of the program;
(f) The employer and the intern each understand that the internship is unpaid;

iv) Many courts found one requirement - that the employer derive "no immediate advantage from the activities of the intern" - particularly problematic and some devised their own tests

v) Companies found that standard overly rigid, arguing that it was difficult for most internships to meet that requirement

c) In January 2018, the U.S. Department of Labor implemented new guidelines that make it easier for companies that want to hire interns but do not want to pay them

i) The change is a response in part to a string of intern lawsuits starting in 2011, when two former interns at Fox Searchlight Pictures filed a lawsuit alleging that their employer violated the Fair Labor Standards Act (FLSA) by not paying them for work they did on the movie "Black Swan." In 2013, a court ruled in their favor, finding that their roles fell short of the Labor Department's six criteria for unpaid internships.

(1) That decision was reversed in 2015 by the U.S. 2nd Circuit Court of Appeals in New York, which found the government's standards too rigid.

(a) On a question of first impression, the Court held that whether interns qualify as "employees" under the FLSA depends on whether they or the company that hired them is the "primary beneficiary" of their relationship.
(b) The court established its own criteria, and that became the basis for the new Labor Department rules. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 2d. Cir. 2015).
(c) The Fox Searchlight interns settled with the company for amounts ranging from $495 to $7,500.

d) The new rules establish a "primary beneficiary test" that ratifies programs that help the intern more than the company.

i) Under this test, an employment relationship is created when the "tangible and intangible benefits provided to the intern" are less "than the intern's contribution to the intern's operation."

ii) The test has two (2) central features:

(1) It focuses on what the intern obtained in exchange for his or her work
(2) It examines the "economic reality" between the two parties

e) A List of Seven (7) Non-Exhaustive Factors Determine Whether the Internship Meets the Standard
   i) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
   ii) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
   iii) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
   iv) The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
   v) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
   vi) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
   vii) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.
   viii) No individual factor from the list is dispositive, and all relevant circumstances should be weighed and balanced

2) Takeaway:
   a) There is a problem of fit between the FLSA and the open-ended, case-specific primary beneficiary test.
      i) The reasoning underlying the primary beneficiary test runs contrary to 29 U.S.C. § 214's provision enabling employers to pay "apprentices" and "learners" a subminimum wage, subject to securing a waiver from the relevant agency.
         (1) The consequence of adopting the primary beneficiary test instead of an "immediate advantage" test is a threshold determination of who is an "employee" that fits uneasily with the rest of the FLSA.
         (2) 29 U.S.C. § 214 was designed to ensure that employers were not forced to pay beginners (who were learning) the same as experienced workers, and, relatedly, to ensure that minimum wage

lays did not eliminate training and employment opportunities for beginnings.

(a) The FLSA contemplated a world in which most individuals would be paid a full wage, but those who benefitted from their employment relationships through learning and who provided less advantage to their employers were entitled to a subminimum wage.

ii) The test's case-by-case analysis precludes the use of the class action provision specifically included in the FLSA.

iii) The fact that the outcome of the primary beneficiary test may be uncertain ex ante could make it difficult for interns with legitimate claims to prevail under specific provisions of the law

iv) The primary beneficiary test is premised on the very need for learning and limited value to the employer that justified the inclusion of § 214 subminimum wage allowances in the first place. The test threatens to swallow § 214, which is already in limited use.

b) The FLSA adopted a framework of guarantees, requirements, and remedies to achieve the law's fundamental aim: to increase employment and guarantee all workers a "minimum standard of living necessary for health, efficiency, and general well-being.

c) The primary beneficiary test for determining employee status makes sense in the context of precedent; however, consideration of the test's interaction with particular provisions of the FLSA suggest that such a broad and open-ended threshold test for interns fits poorly with the statutes scheme.

d) Under this more nuanced and employer-friendly test, various courts have ruled that interns in a variety of industries, as the primary beneficiaries of their internships, do not qualify as employees under the FLSA and cannot collectively pursue claims for misclassification and wage violations.

I. Benefits: Health Insurance, Flex Spending & Retirement Plans

1) Modifications to the Consolidated Omnibus Reconciliation Act of 1985 (COBRA)
   a) What is Budget Reconciliation?
      i) The budget reconciliation process is an optional procedure that operates as an adjunct to the budget resolution process established by the Congressional Budget Act of 1974.
      ii) The chief purpose of the reconciliation process is to enhance Congress's ability to change current law in order to bring revenue, spending, and debt-limit levels into conformity with the policies of the annual budget resolution
      iii) Reconciliation is a 2-Stage Process:

(1) Directives are included in the budget resolution, instructing appropriate committees to develop legislation achieving the desired budgetary outcomes.
   (a) Directives instruct specified commits to develop legislation changing existing law in order to alter revenue, spending, or debt-limit levels to conform with budget resolution policies
   (b) Compliance with directives has been determined on the basis of net revenue or spending effects of all legislative changes
   (c) If the resolution instructions more than one committee in chamber, then the instructed committees submit their legislative recommendations to their respective Budget Committees by the deadline prescribed in the budget resolution
   (d) The Budget Committees incorporate them into an omnibus budget reconciliation bill without making any substantive revisions
   (e) If only one committee has been instructed, the process allows that committee to report its reconciliation legislation directly to its parent chamber, thus bypassing the Budget Committee

(2) The House and Senate consider the resultant reconciliation under expedited procedures
   (a) Debate is limited to 20 hours (and 10 hours on a conference report)
   (b) Amendments must be germane and not include extraneous matter
   (c) House Rules Committee typically recommends a special rule for the consideration of a reconciliation measure in the House that places restrictions on debate time and the offering of amendments.

(3) If the House and Senate do not reach final agreement on a budget revision, then the reconciliation process is not triggered

b) Congress passed the landmark Consolidated Omnibus Budget Reconciliation Act (COBRA) health benefit provisions in 1986.

c) The law amends the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Public Health Service Act to provide continuation of group health coverage that may otherwise be terminated

d) Most employers and employees are familiar with COBRA, which allows employees who leave their jobs, whether voluntarily or involuntarily, to continue purchasing health insurance for themselves and their families, at the same rate as what their employer had paid.

e) Continuation coverage typically continues for up to 18 months (or even longer in certain circumstances), as long as the employee paid his or her former employer for the cost of the insurance.

f) Any employer with 20 or more employees are usually required to offer COBRA coverage and to notify their employees of the availability of such coverage. COBRA applies to

plans maintained by private-sector employers and sponsored by most state and local governments.

2) Who is entitled to COBRA Coverage?
   a) There are three (3) elements to qualifying for COBRA benefits.
      i) Plan Coverage:
         (1) Group health plans for employers with 20 or more employees on more than 50 percent of its typical business days in the previous calendar year are subject to COBRA.
         (2) Both full and part-time employees are counted to determine whether a plan is subject to COBRA
         (3) Each part-time employee counts as a fraction of an employee, with the fraction being equal to the number of hours that the part-time employee worked divided by the hours an employee must work to be considered full-time.
      ii) Qualified Beneficiaries:
         (1) Generally, a qualified beneficiary is an individual covered by a group health plan on the day before a qualifying event who is either an employee, the employee's spouse, or an employee's dependent child.
         (2) In certain cases, a retired employee, the retired employee's spouse, and the retired employee's dependent children may be qualified beneficiaries.
         (3) Any child born to or placed for adoption with a covered employee during the period of COBRA coverage is considered a qualified beneficiary.
         (4) Agents, independent contractors, and directors who participate in the group health plan may also be qualified beneficiaries.
      iii) Qualifying Events:
         (1) Qualifying events: certain events that would cause an individual to lose health coverage
         (2) The type of qualifying event will determine who the qualified beneficiaries are and the amount of time that a plan must offer the health coverage to them under COBRA.
            (a) A plan, in its discretion, may provide longer periods of continuation coverage.
            (b) Qualifying events for employees:
               (i) Voluntary or involuntary termination of employment for reasons other than gross misconduct
               (ii) Reduction in the number of hours of employment
            (c) Qualifying events for spouses:
               (i) Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct
               (ii) Reduction in the hours worked by the covered employee
               (iii)Covered employees becoming entitled to Medicare
               (iv)Divorce or legal separation of the covered employee

(v) Death of the covered employee

(d) Qualifying events for dependent children

(i) Same as those for the spouse, with one addition:

(ii) Loss of dependent child status under the plan rules

iv) The American Recovery and Reinvestment Act of 2009 (ARRA) provided a series of changes to COBRA:

(1) COBRA Subsidy

(a) Any employee who is "involuntarily terminated" is now eligible to receive a subsidy from the federal government for 65% of their COBRA premium.

(i) The ARRA did not provide a definition of "involuntary termination."

(ii) While it is clear that employees who resign without prompting from the employer are not covered, it is uncertain whether employees who may have been encouraged to resign in advance of an announced layoff may be covered.

(b) The subsidy must be paid by employers up front. The federal government will then reimburse the employer, dollar-for-dollar, through a credit taken off of the next federal payroll tax submission by that employer.

(c) The subsidy can continue for up to nine (9) months but may end sooner if the employee becomes eligible for health insurance elsewhere (i.e. a new employer).

(d) To receive this subsidy, the employee must pay 35% of the COBRA premium

(e) If an employee has adjusted gross income in 2009 over $125,000 if filing as single ($250,000 if filing jointly), then the subsidy will be recaptured in a phased manner from the employee through the tax system

(2) Retroactive Notice

(a) Intended to go back and help workers who lost jobs in the earlier stages of the economic downturn

(b) The ARRA requires employers to send new COBRA notices out to all employees who were involuntarily terminated after September 1, 2008

(c) If those terminated employees still do not have health insurance on March 1, 2009, they would likewise be eligible for the 65% subsidy, for the same nine-month period.

(d) Employees cannot get retroactive coverage or retroactive subsidies

(e) The subsidy is a strictly going-forward basis.

v) On December 19, 2009, President Obama signed into law the Department of Defense Appropriations Act, 2010, which made several amendments to the COBRA provisions of ARRA.

(1) The Act extends COBRA subsidy eligibility to employees who lost their jobs due to no fault of their own between January 1 and February 28, 2010.

(2) Also extended the nine-month period to fifteen (15) months

vi) On March 3, 2010, President Obama signed into law the Temporary Extension Act of 2010.

(1) The Act extended COBRA subsidy eligibility to employees who lose their jobs due to no fault of their own between March 1 and 31, 2010.

(2) Employees who lost group health insurance due to reduced work hours on or after September 1, 2008, following by involuntary termination between March 2 and March 31, 2010, were now eligible for the COBRA subsidy.

vii) Continuing Extension Act of 2010

(1) Extended premium assistance for COBRA benefits through May 31, 2010.

3) Pursuant to the General Notice (83 FRN 37509), published August 1, 2018, various changes to user fees within COBRA took effect October 1, 2018

4) The Merchandise Processing Fee (MPF) ad valorem rate of 0.3464% will NOT change. The MPF minimum and maximum for formal entries (class code 499) will change.

i. The minimum will change from $25.67 to $26.22 and the maximum will change from $497.99 to $508.70.

ii. The Informal MPF (class code 311) will change to $2.10.

5) The dutiable mail fee (class code 496) will change to $5.77. The surcharge for manual entry or release will change to $3.15.

i) Change to Flexible Spending Accounts

(1) What is a Health Care Flexible Spending Account (FSA)?

(a) According to the IRS, FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans.

(b) Employees have to decide how must to contribute through payroll deductions to their FSA at the beginning of the plan year.

(c) FSAs come in two (2) varieties:

(i) Healthcare FSA

1. Used to pay for expenses such as medications, doctor office visits, and medical equipment (blood sugar monitors, etc.)
2. Employees may use FSA funds to cover certain qualified medical expenses that their employer's plan does not cover (i.e. co-pays and deductibles).
3. Other qualified medical expenses include contact lenses, eye exams, eyeglasses, crutches and hearing aids.
4. Employees may not pay for certain over-the-counter drugs with FSA funds without a doctor's prescription

(ii) Dependent Care FSA

1. Used to pay for child care expenses such as day care, preschool, or summer camp that enable an employee and his or her spouse, if applicable, to work or look for work

(2) Contributions in 2018

(a) An employee may contribute the maximum of $2,650 to their healthcare FSA in 2018

(b) Under the new rules, employees are allowed to give an extra $50 to their employer's healthcare FSA, as the IRS raised the contribution limit from $2,600 in 2017 to $2,650 in 2018

(c) By contributing to an FSA, an employee's take-home pay may not decrease by must because the employee's tax withholding will adjust to reflect the fact that the money saved in the SFA isn't subject to tax.

(d) Notably, the limits for dependent care FSAs, are holding steady at $5,000 for single tax filers and married couples filing jointly and $2,500 for married couples filing separately.

(3) Pros of FSAs

(a) Tax savings: FSAs allow employees to pay for expenses they're already incurring, only with pre-tax dollars, as opposed to post-tax income. The amount of savings is dependent upon the amount the employee contributes coupled with the effective tax rate.

(4) Cons of FSAs

(a) The Typical "Use It or Lose It" Rule: generally, an employee must use all of his or her FSA funds by the end of the plan year or forfeit any remaining funds.

(b) There are two (2) exceptions. An employer can only offer one.

(i) The Carryover Option

1. Allows an employee to transfer $500 of unused contributions from one plan year to the next.

(ii) The Grace Period

1. An employee has 2 ½ months after the end of the plan year in which to use his or her unused contributions.

(5) Key Takeaway:

(a) Employees should try and accurately estimate healthcare and dependent care expenses for the year so that they are not struggling to deplete an FSA account balance.

(b) With the future of tax reform being rather uncertain, it pays to take advantage of tax breaks while you can.

ii) Employee Retirement Income Security Act (ERISA) Pitfalls to be Wary of

(1) Introduction

(a) Of all health insurance regulations, ERISA plan documentation rules can be the trickiest to navigate and the most catastrophically costly for those who take a wrong turn – even one that is unintentional

(b) Passed by Congress in 1974, the Employee Retirement Income Security Act (ERISA) is a federal law requiring employers to follow specific regulations regarding Health and Welfare (H&W) benefit plans.

(c) Companies must submit detailed and time-sensitive documents to the government and to H&W participants

(d) Failure to comply with ERISA rules can result in significant financial penalties and employer lawsuits by current and former employees

(2) What does ERISA do?

(a) Sets minimum standards for most voluntarily established pension and health plans in private industry. It requires plans to:
  (i) Provide plan participants with plan information, including plan features and funding;
  (ii) Provide fiduciary responsibilities for those who manage and control plan assets;
  (iii) Establish a grievance and appeals process for participants to get benefits from their plans;
  (iv) Give participants the right to sue for benefits and breaches of fiduciary duty

(3) Application of ERISA
  (a) Generally, ERISA does not apply to group health plans established or maintained by: government entities; churches (for their employees); or plans maintained solely to comply with workers' compensation, unemployment, or disability laws.
  (b) ERISA does not cover plans maintained outside of the U.S. primarily for the benefit of non-resident aliens or unfunded excess benefit plans.

(4) Pitfalls to Avoid:
  (a) Summary Plan Description (SPD) v. Summary of Benefits and Coverage (SBC)
    (i) SPD: the primary vehicle for informing participants and beneficiaries about their plan and how it operates.
      1. It must be written for the average participant and be sufficiently comprehensive to explain their benefits, rights, and obligations.
      2. It must be sent automatically to participants within 90 days of becoming covered by a plan and to pension plan beneficiaries within 90 days after receiving benefits.
        a. Employees must be given the SPD within 90 days of hiring.
      3. A plan has 120 days after becoming subject to ERISA to distribute an SPD.
      4. An updated document must be furnished every five years if changes are made to the SPD or the plan is amended. Otherwise, it must be furnished every 10 years.
    (ii) SBC: describes the benefits and coverage under the plan, and includes a uniform glossary defining terms as outlined by the National Association of Insurance Commissioners (NAIC).
      1. It must be provided to participants and beneficiaries with enrollment materials and upon the renewal or reissuance of coverage.
      2. The SBC and a copy of the Uniform Glossary must also be provided within seven days following receipt of a request.
    (iii) Failure to provide both documents to plan participants and beneficiaries is a violation of ERISA rules, although sometimes the two documents can be integrated
  (b) Plan Administrator Responsibilities

(i) Compliance with ERISA falls upon the "plan administrator," which is the person designated in the plan documents.
(ii) If no one is designated, the administrator is deemed to be the plan sponsor – i.e., the employer.
(iii) The plan administrator must be identified in the SPD. Generally, the plan administrator cannot avoid liability for SPDs by delegating the responsibility to someone else.
(iv) **Most Third Party Administrators (TPAs) are not responsible under ERISA for the SPD.** TPAs rarely agree to be the plan administrator, although they often agree contractually to assist in the drafting and distribution of SPDs.
(v) An employer's recourse for TPA mistakes is legal action under the TPA contract or state law
(vi) **Insurers are not responsible under ERISA for SPDs**, although they will often furnish benefit descriptions and certificates of coverage to plan participants.

(c) Group Health Plans (GHPs) and SPDs
(i) Virtually all ERISA Group Health Plans (GHPs) must have an SPD.
(ii) This includes employer-sponsored plans providing any of a wide range of medical benefits:
1. Major medical plans
2. Health Flexible Spending Accounts (FSAs)
3. Health Reimbursement Accounts (HRAs)
4. Dental and Vision plans
5. Many wellness programs
(iii) ERISA does NOT cover Health Savings Accounts (HSAs) and certain voluntary programs, nor does it affect group health plans for government entities and most church employers
(iv) Cafeteria plans are not technically required to have an SPD; however, SPD requirements do apply to health FSAs and salary redirection ERISA benefit plans, such as health FSAs and Premium Only Plans (POPs).
(v) Status as an excepted benefit does NOT exempt it from an SPD

(d) SPDs for Others
(i) Certain other individuals should receive automatic SPDs, including:
1. COBRA-qualified beneficiaries;
2. Spouse and/or dependents of a deceased retiree-participant;
3. Representative/guardian of an incapacitated person

(e) Style and Format Requirements – Consideration of Plan Participants
(i) There is no "magic formula" – one size does NOT fit all.
(ii) SPDs must be developed in a way that reflects each employer's practical needs
1. An SPD must NOT be misleading
2. It must be understandable to the average plan participant

3. An SPD for a consulting firm – whose employees mainly have advanced degrees – may be quite different from an SPD prepared for a landscaping company that employs workers who may not have finished high school.
4. Use of “readability” tools, such as the one found in Microsoft Word, may be advisable.
5. Plan limits, exceptions, and restrictions must be obvious and detailed

(f) Non-English Language Assistance
   (i) There is no requirement that SPDs be written in non-English languages, although it is recommended that a translation assistance pathway be provided in the SPD if more than 25% of participants are non-English-speaking employees.

(g) The Golden Rule: An employer who makes any statement about future benefits, whether in response to questions or on the employer's own initiative, will be held liable for any inaccurate information:
   (i) when the statement is materially misleading when made or
   (ii) when the statement is true when made but turns out to be inaccurate because of later decisions and the employer fails to timely provide participants with the correct information.
   (iii) Fortunately, many mistakes of this nature can be corrected if an employer acts quickly.
      1. If an employer becomes aware that it made an incorrect statement, it should "correct" the inaccurate information as soon as possible, determine whether any participant or beneficiary has been harmed and the appropriate action to take.

Workplace Behavior and Privacy – Current Developments

Submitted by Cliff A. LaCour

Workplace Behavior and Privacy

By: Cliff A. LaCour
Partner, NEUNERPATE

Employees are typically afforded far less expectation of privacy in the workplace than in other realms. Indeed, courts have held "operational realities of the workplace may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts." *Aubrey v. Sch. Bd. of Lafayette Par.*, 148 F.3d 559, 564 (5th Cir.1998), *quoting National Treasury Employees v. Von Raab*, 489 U.S. 656, 671 (1989). However, as the modes and methods of employee monitoring increase and become more invasive, questions regarding how far is too far are becoming more pervasive. These materials and the accompanying presentation are a high level view of issues to be mindful of when deciding whether to institute a particular practice in the workplace.

I. Drug Testing

One of the most common questions from employers is whether they can drug test employees and potential employees. Under Louisiana law, the answer is generally yes if you follow the applicable standards. In Title 49 of the Louisiana Revised Statutes, the Louisiana Legislature has set forth specific guidelines which must be followed by "Employers" when an employee drug test may have "negative employment consequences" for "Employees." La. Rev. Stat. 49:1005.

Of course, as in many statutes, the Legislature has set forth specific definitions for the terms in quotation marks above. These definitions, are important to note in determining whether you are subject to this statute.

"Employer"	any person, firm, or corporation, including any governmental entity, that has one or more workers or operators employed, or individuals performing service, in the same business, or in or about the same establishment, under any contract of hire or service, expressed or implied, oral or written. Employers who are subject to federally mandated drug testing programs (such as Department of Transportation), however, are exempted from the

	definition of "Employer" under the Louisiana statute.[1] La. Rev. Stat. 49:1003(4).
"Employee"	any person, paid or unpaid, in the service of an employer. La. Rev. Stat. 49:1001(3).
"Negative Employment Consequence"	any action taken by an employer or an employer's agent which negatively impacts an employee's **or prospective employee's** employment status. Examples of "negative employment consequences" include but are not limited to termination of employment, **refusal to hire**, or altered conditions of employment such as counseling, probation, suspension, and demotion. La. Rev. Stat. 49:1001(6) (emphasis added).
"Prospective Employee"	any person who has made application to an employer, whether written or oral, to become an employee La. Rev. Stat. 49:1001(7).

As you can see from the definitions listed above, the reach of this statute includes potential employees as well as current employees. Many employers operate under the false assumption that potential employees are granted fewer rights in this arena. However, if any "negative employment consequence" is a potential result, then the provisions of this statute apply.

While the definitions of covered employers and employees is broad, the covered scope of drugs tested for is relatively narrow. The statute only covers tests for five types of drugs: marijuana, opioids, cocaine, amphetamines, and phencyclidine. La. Rev. Stat.

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[1] This presentation does not address the requirements of any such federally mandated program.

49:1002(A). Additionally, the statute specifically exempts multiple organizations from its applicability even if they would otherwise be an "employer:"

- Treatment Centers or physicians using drug testing to monitor patients;
- Any entity engaged in the production and distribution of gas or electricity that is regulated by the Louisiana Public Service Commission;
- drug testing mandated by Federal Executive Order 12564 (Drug Free Federal Workplace);
- drug testing conducted by the National Collegiate Athletic Association (NCAA) or the National Football League (NFL)
- any athlete who is currently being drug tested under the auspices of any recognized international, national, regional, or state governing authority; and
- any person, firm, or corporation engaged or employed in the exploration, drilling, or production of oil or gas in Louisiana or its territorial waters.

For the rest of the "Employers" not exempted, the rules are relatively simple. If you are testing for marijuana, opioids, cocaine, amphetamines, or phencyclidine, and the employee or potential employee being testing may suffer negative employment consequences as a result of the test, the drug testing must be performed in a laboratory certified for forensic drug testing by the Substance Abuse and Mental Health Services Administration (SAMHSA-certified), a laboratory certified for forensic urine drug testing by the College of American Pathologists (CAP-FUDT-certified), or a laboratory certified for forensic hair drug testing by the College of American Pathologists (CAP-FDT-certified) and in accordance with SAMHSA guidelines.

The employer has the responsibility to keep information, interviews, reports, statements, memoranda, and test results received as a result of the drug testing program confidential. Such information cannot be used as evidence, obtained in discovery, or disclosed in any public or private proceedings, except in an administrative or disciplinary proceeding or hearing, or **civil litigation where drug use by the tested individual is relevant**. This last section is important as drug test results, in particular post-accident results, may well be useful in civil litigation. However, employers must keep vigilant to

not erroneously turn over such results if the specific employee is not a player in a particular litigation. If such results are accidentally turned over, then the employer may be liable for breach of the statute.[2] When the test results in a positive result, the employee shall have the right of access within seven working days to records relating to his drug tests and any records relating to the results of any relevant certification, review, or suspension/revocation-of-certification proceedings. The employer may also grant the employee an opportunity to undergo rehabilitation without termination of employment, but is not required to do so.

With these provisions in mind, what happens if an employer violates these provisions. Unfortunately, there are only a few cases on this topic, and they generally concern public, as opposed to private, employers. However, below are a few cases on point:

1. *Sanchez v. Georgia Gulf Corp.*, 2002-0904 (La. App. 1 Cir. 11/12/03), 860 So. 2d 277 - Danny Sanchez, an at-will employee of Georgia Gulf, submitted to a random drug screen urinalysis. His employment was terminated after testing positive for a cocaine metabolite. He sued Georgia Gulf alleging it failed to comply with its statutory duties by terminating him prior to granting him an opportunity provide information about prescriptions he could be taking which would have provided an erroneous positive result (this provision was subsequently repealed by the Legislature in 2004). Though Georgia Gulf did not follow the then-applicable guidelines, the Louisiana First Circuit held "… from a plain reading of the drug-testing statute, **the legislature did not specifically provide that an employer was prohibited from discharging an at-will employee if it failed to have the confirmed positive results reviewed by a [Medical Review Officer]"** Rather, the Court held the statute only addresses potential liability for defamation, libel, slander, or damages to reputation or privacy if the results are not kept confidential. The statute, then, did not alter the at-will nature of the employment and the employee had no

[2] Under the provisions of 49:1012(B), this may include defamation of character, libel, slander, or damage to reputation or privacy

cause of action according to the Court. (Note – the decision was a 3-2 *en banc* ruling).

2. *Krupp v. Department of Fire*, 2007-1260 (La. App. 4 Cir. 11/19/08), 995 SO.2d 686 – Captain Phillip J. Krupp, III was subjected to a random drug test by his employer, the New Orleans Fire Department, which tested positive for benzoylecogonine-cocaine metabolites. As a result, following a pre-termination hearing, Capt. Krupp's employment was terminated. Capt. Krupp appealed his termination to the Civil Service Commission which upheld the termination. Capt. Krupp appealed arguing the Department failed to follow SAMHSA guidelines in the collection and testing of the sample he provided. Though SAMHSA guidelines were not strictly adhered to, the Louisiana Court of Appeal for the Fourth Circuit held that the deviations were insufficient to invalidate the positive drug test result and upheld the termination.
3. *Russo v. International Drug Detection, LLC*, 18-93 (La. App. 5 Cir. 5/30/18), 250 So.3d 1100 – Anthony Russo was a communications technician working on offshore oil and gas platforms. In 2015, he was subjected to a sample hair collection for drug testing purposes for his employer. This testing and collection was performed by International Drug Detection, LLC. IDD informed Russo's employer that Russo's sample tested positive for marijuana. As a result, Russo was terminated, removed from the platform he was working on, and banned for life from all work at the facilities of the owner of the platform. Russo sued IDD arguing they failed to perform their duties to the SAMHSA standards. Finding, among other things, that the SAMHSA guidelines are not the applicable standard for hair samples, the Court of Appeal dismissed Russo's claims.

II. Technology Issues

Traditionally, on the job employee surveillance and other monitoring was conducted through managerial staff and/or through camera systems. However, employee surveillance technology has evolved to other forms of surveillance as well. For example, GPS trackers are now routinely placed in company vehicles and apps are now available to centrally track

employees using the GPS and other sensors in the employee's smart phone. Recently, Amazon was awarded a patent for a wristband designed to be worn by employees at its distribution warehouses which would track worker hand movements throughout its plant. An Employee's work can now be monitored through network systems that can store every network resource utilized and, if the employer chooses, every keystroke made by an employee. Indeed, as internal messaging systems (such as email, IM, and app-based messaging) continue to overtake traditional commination, employers increasingly have a written record of many formal and informal discussions from employees

Companies are increasingly employing the monitoring and other technologies in the workplace in an effort to limit loss through theft (whether by employee or customer) and ensure productive use of time by employees, and these technologies are becoming cheaper and more readily accessible. Monitoring is important for companies to increase productivity, decrease "cyber-slacking," protect trade secrets and confidential information, and discourage improper behavior such as bullying, theft, harassment, and fraud. In general, the law permits (and, in some cases, even requires) the monitoring of employees in the workplace.

However, as the ability to monitor employees increase, it does raise the question of how far is too far. It is well known that "[a]n individual cannot have a reasonable expectation of privacy in a desk which belongs to his employer and is located at his place of employment, or in mail which is sent to him at his place of employment through his employer's mail system." *Wheeler v. King*, 1991 WL 195488 (E.D. La. 1991); *See also State v. Lambright*, 525 So. 2d 84, 87 (La. 3 Cir. 1988) (terminated employee who had cleaned out his desk had no reasonable expectation of privacy in desk or in items found in desk). On employer provided devices, the expectation of privacy is even lower. As a result, employees should be careful about placing personal information on company owned devices such as smartphones or company computers.

Nonetheless, in order to avoid any confusion or even the potential for claims, employers should have written policies which notify the employee of the rules of company and the rights of the employer to access potentially personal data on company networks. Employers

should also be cautious about allowing employees to use personal devices to access their networks. It is possible that if an employer inappropriately accesses personal information on a personal device connected to the company network that issues may arise. Again, a good and well communicated policy on such matters goes a long way to stem any potential issues. This includes policies requiring personal device security (such as automatic passcodes and timed locks), remote wiping of personal devices, installation of apps to safeguard information, and other issues.

Technology also raises the potential for inadvertent FLSA overtime issues. The FLSA requires employers to pay non-exempt employees for all time actually worked by the employee. Allowing non-exempt employees to access their work email or other resources on personal devices raises the possibility that employees may be "working" outside of the office without prior knowledge of the employer. If the employee later claims that he was routinely working from his or her phone and not being compensated for this work, the employer may be exposed to substantial backpay and penalties. While policies prohibiting overtime without prior approval and requiring all time worked to be accurately and fully reported will help in addressing potential liquidated damages, they do not preclude an employee from being paid for all time worked – even if they did so against company policy.

III. Off the Clock Monitoring and Social Networking

Employers may be tempted to review off the clock activities of their employees. This is particularly tempting if the employee is putting a vast amount of this information on social networks such as Instagram and Facebook. However, employers should be cautious about discipling (or even having a policy threating to discipline) employees for certain activities. For example, in the Hispanics United of Buffalo, Inc. Decision and Order, the National Labor Relations Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance. The messages at issue were posted from the employee's home computers:

> Lydia Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fel-low coworkers how do u feel?

Four other off-duty employees responded to the message from their personal computers by posting messages and generally objecting to the assertion that their work performance was substandard. In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act.

Compare that decision to the decision of the Board in Karl Knauz Motors, Inc. Decision and Order. There the NLRB found that the firing of a BMW salesman for photos and comments posted to his Facebook page was lawful. The decision hinged on whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a company event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired. The Board found the salesman was fired solely for the photos he posted of a Land Rover incident, which was not concerted activity and so was not protected.

Both of these cases were in 2012. Since that time, in December 2017, the Board issued its Decision and Order in The Boeing Company matter. There, Boeing implemented a work rule that restricted the use of devices with cameras such as cell phones. Though the rule did not explicitly restrict activity protected by Section 7 of the Act, was not adopted in response to NLRA-protected activity, and had not been applied to restrict such activity, the ALJ found that the rule violated Section 8(a)(1) of the Act, which makes it unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." In pertinent part, the referenced 7 states that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . ." Under then-current Board law, a work rule is unlawful if an employee "would reasonably construe" the rule to restrict protected concerted activity, and the judge so found.

On appeal to the full Board, the majority overruled the existing precedent and created a new test for evaluating employers' work rules. Under the new test, a rule will be found unlawful if it *explicitly restricts* employees' protected concerted activity. If the rule is not explicitly unlawful, the Board will review the rule under 2 prongs: (1) the rule's potential impact on protected concerted activity; and (2) the employer's legitimate business justifications for maintaining the rule. If the justifications for the rule outweigh the potential impact on employees' rights, the rule will be held lawful. Conversely, if the potential impact on employees' rights outweighs the justifications for the rule, it will be held unlawful. When the Board applied this new formulation to the Boeing rule, it found Boeing's justifications for the rule, including the protection of information implicating national security, proprietary trade secrets, and employees' personal information, outweighed any potential impact on employees' protected concerted activity. As a result, the rule did not violate federal law.

While not directly bearing on off the clock activities, the Boeing holding will necessarily be applied to work rules which apply to off the clock activities. In fact, in June of this year, the Office of the General Counsel issued new guidance to on Handbook Rules. A copy of these materials is attached as Exhibit A to this document. Under this new guidance, Rules Against Joining Outside Organizations or Voting on Matters Concerning Employer and Confidentiality Rules Specifically Regarding Wages, Benefits, or Working Conditions are specifically prohibited. This is not surprising as these types of rules have historically be prohibited. However, of note are the "Category 2" Rules which bear individual scrutiny. These rules include:

- Broad conflict-of-interest rules that do not specifically target fraud and self-enrichment and do not restrict membership in, or voting for, a union;
- Confidentiality rules broadly encompassing "employer business" or "employee information"
- Rules regarding disparagement or criticism of the employer
- Rules regulating use of the employer's name
- Rules generally restricting speaking to the media or third parties

- **Rules banning off-duty conduct that might harm the employer**
- Rules against making false or inaccurate statements

If an employer wishes to implement these rules, it should be careful to explain its legitimate reasons for the rule and should balance its scope against the affect on potentially protected activities.

Discipline and Discharge – Necessary Documentation

Submitted by Elvige Cassard

Discipline and Discharge—Necessary Documentation

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A. Putting a Discipline Policy in Place Proactively

Having a clearly defined, consistently applied discipline policy is an important step in creating a more productive workplace, as employees will have a better understanding of the behaviors that will not be accepted by an employer. Pre-existing policies are often important in defending employment claims. Moreover, proactively implementing disciplinary policies and procedures can help employers avoid potential misunderstandings around discipline and discharge, which may otherwise be used as the basis of employment lawsuits. A good discipline policy is characterized by the following:

- **Tailored to specific business needs and circumstances**. Policies are modified to ensure the company is not bound to policies it would not have otherwise instituted or policies that are unsuitable to the business or simply wrong (for example, drug testing rules inconsistent with state law or medical leave policies that do not reflect new legal developments).
- **Clear**. Plain language is used and legal jargon is avoided in employee handbooks and policies governing employee discipline. Employees cannot follow rules they do not understand.
- **Simple**. Numerous details create too many issues for argument during a disciplinary meeting. Simple policy language allows employers to exercise discretion.
- **Reasonable**. Fairness is a primary consideration for juries and judges evaluating legal claims brought by disgruntled employees.

[1] Special thanks to Mercedes Townsend for her assistance in preparing these materials.

- **Realistic and relevant**. Unrealistic or irrelevant expectations are demoralizing for employees to follow and frustrating for employers to enforce. Discipline policies should be functional and realistic.
- **Accessible**. Employers must provide employees with copies of written policies. Employers should be able to demonstrate employee receipt and acknowledgement of policies (or the handbooks in which they appear) with a signature by the employee. Policies should be reviewed, revised if necessary, and redistributed regularly (every 2 or 3 years is often appropriate).
- **Professional**. Avoid excessively casual or overly friendly language in policies. An unprofessional tone may result in policies being taken less seriously by employees. It may also cause an employer defending these policies in litigation to lose credibility with a judge or jury.
- **Supported by a business purpose**. The employer should be able to connect every policy and procedure to a legitimate business justification.
- **Consistent with other policies of the employer**. Review employment policies as a whole to ensure they are consistent with one another.
- **Current**. Update policies to reflect changes in federal and state employment law.

B. What to Do When There is No Policy Addressing an Offense

Despite your best efforts, even the best crafted policy cannot predict *every* employee action that may warrant discipline. In those situations when an offense is not explicitly addressed in the discipline policy, an employer needs to use its best judgment, as its action will be viewed as setting a precedent for addressing the offense in the future. Analyze the circumstances of the offense, considering the impact of the objectionable behavior on business, on co-workers, on general company standards and on company culture. The seriousness, the level of disruption, and other concerns that would arise if others behaved similarly should be evaluated. Also consider if it aligns with or is similar to other policies

in the employee handbook. Some actions may be so obviously wrong that the absence of a written policy is of little significance (*e.g.*, significant theft or overt violence).

For some offenses that are not addressed in writing, an employer may consider updating its policies specifically to include this new offense. When considering implementing such an update, keep the following in mind:

- Will the policy excessively impact one employee or group of employees?
- Is the policy really necessary?
- In what situation would this policy be used?
- Are supervisors willing to enforce the policy?
- What documentation would be necessary to administer and enforce the policy?
- What would the consequence be if/when someone breaks the new policy?

C. Evaluating Employee Performance While Mitigating Liability

Employees should be given feedback throughout the year, and not just at the time of their performance evaluation. Employees should never learn of their significant deficiencies for the first time in their performance evaluation.

While regular, written employment evaluations may be viewed by some of the supervisors who complete them as tedious or, even worse, a waste of time, performance documentation can prove crucial in minimizing liability and litigation risk. Performance reviews also provide other benefits for both the employee and employer.

Mutual Benefits of Properly Performed Employee Evaluations

Properly conducted performance documentation benefits the evaluated employees because it:

- Provides employees with fair notice of performance expectations and concerns;
- Provides employees with direction for ways to improve; and

- Can be motivational and help employees grow and develop.

Performance evaluations also benefit companies and managers, as they:

- Allow managers to document performance versus expectations;
- Allow managers a basis to compare performance of similar employees;
- Provide written justification for promotion, demotion, layoff (RIFs), termination, compensation, and other actions; and
- Reduce the "surprise factor" (surprised employees are more likely to sue).

The Importance of Documenting Performance from a Liability Perspective

When an employee believes he or she has been illegally disciplined or terminated, one of the first sources referenced is the personnel file. If the file indicates satisfactory job performance and no disciplinary actions, a termination is more likely to be viewed with suspicion and potentially challenged as wrongful or discriminatory. If a performance evaluation reveals, among other things, a supervisor's failure to communicate performance standards clearly, failure to give timely feedback when performance does not meet standards, failure to allow employees the opportunity to correct inadequate performance, inconsistency in measuring performance among different employees, or a failure to document performance objectively, it undermines the employer's ability to argue that a non-discriminatory reason exists for the adverse action taken. On the other hand, if discipline or termination is adequately supported, and if the employee was on clear notice of the issues, then the risk of a legal challenge is minimized, and the employer is placed in the best possible position to defend a challenge if one is still brought.

Tips for Performance Evaluations

Given the importance of evaluations not only to employee performance, but in establishing a defense should a challenge to an adverse employment action be brought, it

is critical that evaluating managers give honest, constructive criticism in a timely manner. Yet, this is one of the biggest challenges often faced in defending employment discrimination or retaliation claims, because nobody wants to be the bad guy. It's hard for many people to criticize others face to face. Nonetheless, constructive criticism is an essential factor in good management of others. Supervisors should be trained and evaluated themselves on their ongoing management and on their handling of their subordinates' evaluations. Moreover, effective management ideally should be demonstrated daily at all business levels.

Some points to keep in mind during performance evaluations include:

- **Do not beat around the bush**. Though giving criticism can sometimes be difficult or uncomfortable, dancing around the issues may distort your message, so that the one you thought was delivered was not the message received.
- **Focus on behavior, not personality.** The goal is to correct the performance so that the employee is carrying out job-related duties in an acceptable manner. The discussion should address what the employee has accomplished or failed to accomplish, and not personal characteristics (*i.e.*, that the employee is failing to meet attendance requirements, not that the employee is too lazy to get out of bed in the morning). Health-related issues should be avoided, unless it is reasonably clear that they are relevant. In that case, application of ADA and, if applicable, FMLA protocols should immediately be implemented.
- **Discuss only the employee's own performance.** Resist efforts by the employee to compare his performance or treatment to that of others. But, make sure the evaluation criteria are consistent across the group of similarly situated employees.
- **Actively listen for concerns about discrimination.** If you hear complaints that some employees are being treated unfairly, document the specifics of the

concerns so any alleged discrimination on the basis of a protected class can be investigated and properly acted upon promptly, and follow through.

- **Document the discussion in writing, even if in handwritten form.**
- **Review prior evaluations and disciplinary memos to make sure that issues which were previously identified are being effectively addressed.** Keep in mind that emails and texts containing criticisms (as well as praise) may be just as potentially helpful (or harmful) as an "official" written evaluation.
- **Do not exaggerate or generalize.** Always try to provide specific examples, especially where subjective problem areas are involved.
- **Be sure to agree upon a plan for improving performance.**
- **Don't hold a grudge.** If an employee's performance has improved since the last evaluation, say so.
- **Evaluations should be reviewed for quality control by either higher management or the human resource department**.
- **Allow the employee to appeal the evaluation to the next level of supervision**. Experience shows that many employees will not appeal. If they don't, this can be used as evidence of tacit agreement should there be later litigation. If the employee does appeal, the employee may have a positive outcome. The next level manager may reinforce the points the supervisor was trying to make, or may be in a position to correct an error prior to litigation. Either way, providing an opportunity for appeal is viewed as objective, balanced, and fair-minded in the eyes of a jury.

D. What Goes in the Discipline or Discharge Letter?

Before issuing a disciplinary or discharge letter, employers should ensure that an appropriate investigation into the facts upon which the discipline is based has been conducted. Documentation reflecting a fair, prompt and reasonably thorough investigation often defeats employment claims, even if it turns out the employer's conclusion could have been wrong. When necessary, an employer should talk to any witnesses to the alleged

conduct, obtain signed, written statements where appropriate, and examine any relevant documents. The employer should also speak with the employee and analyze the possible reasons for performance problems. *Was the situation beyond the employee's control? Did he or she have adequate training and guidance? Was previous good performance unrewarded? Was past poor performance tolerated?* This is where thorough and honest performance evaluations can prove to be very helpful to the employer.

Discipline Letter/Notice

A written record of all discipline given to employees—formal, informal, written, or verbal—should be kept in the individual employee's personnel file. A disciplinary letter/notice should include the following:

- the type of discipline being given, including a list of prior discipline given for the same or similar offenses;
- a detailed description of the improper conduct, including the date(s) on which it occurred;
- a cite to the employer's policy that is being violated by the conduct;
- a description of the required improvements;
- a deadline by which the employee is expected to improve; and
- the potential consequences if the employee does not improve within the given timeframe.

A discipline letter/notice should focus solely on the conduct itself, and should not include any language that suggests the cause of the conduct. For example, an employer should not state in the discipline letter/notice that an employee's issue with securing childcare is causing the employee to miss shifts. This language of a suggested or presumed cause can be used to infer bias or discriminatory motives.

The letter/notice should also be given in person and in private (although having an appropriate witness is sometimes advisable; but never should the transaction take place in public or in the presence of the employee's other co-workers). The employee should be asked to sign a copy of the disciplinary notice to acknowledge that he or she received it. The document should make clear that signature is not an admission by the employee of any alleged misconduct. If the employee refuses to sign it, the refusal should be noted.

Discharge Letter

A discharge letter should include the following:

- confirmation of the employee's termination and the effective termination date;
- usually, a summary of prior warnings/discipline and the date(s) of such events;
- a summary of any benefits the employee is entitled to;
- information on when and how the employee can obtain their last paycheck;
- a reminder for the employee to return company property and/or to comply with a confidentiality or non-compete agreement, if applicable; and
- a description of any appeal or review procedures available to the employee.

Whether an employer should state the reason for termination in the letter is often a tricky question. A specific, accurate, well-drafted reason for termination can be valuable in fighting an unlawful discharge claim or challenging a claim for unemployment benefits, usually best stated concisely. If an employee is unaware of the reason for their termination, including a specific reason in the termination letter may prevent them from speculating about potential unlawful reasons for their discharge. However, including a specific reason for termination in the discharge letter might later prove problematic for the employer. If the employee brings a claim for unlawful discharge, the employer will be required to prove that the employee was terminated for the exact reason stated in the letter. Defamation

considerations also can be involved: direct accusations of criminal conduct usually are unnecessary ("theft," "battery," *etc*.)

E. At What Point Should Discharge be Considered?

There are a wide variety of reasons why employers would discharge an employee. As long as those reasons abide by state and federal law, then the question of whether or not to terminate an employee is dependent on the facts and circumstances of each case and the business judgment of the employer. Some questions to consider when deciding to terminate an employee include:

- What is the stated reason for termination?
- Are all managers who participated in the termination decision in agreement with termination decision?
- Is HR in agreement with the termination decision?
- Is termination consistent with how other employees have been treated at the company under similar circumstances?
- Do performance evaluations, promotions, pay increases, bonuses and other acts by the employer support termination?
- Is the termination consistent with company policies (*e.g.*, at-will employment policy, "just cause" termination policy, progressive discipline policy)? If not, is there a valid reason why?
- Is there credible testimonial and documentary evidence to support the termination?
- Does the termination violate any state or federal statutes prohibiting termination under the circumstances? Is there reason to think the employee or his/her attorney could perceive such a violation?
- If the termination will be for misconduct, has an adequate investigation been done?

F. Minimizing Liability When Discharging an Employee

Aside from the previously listed questions, another step in what can be referred to as the "termination risk analysis" is considering whether the employee fits into a protected class as defined by state or federal law. For example, keep the following illustrative examples of problem areas in mind:

Title VII Protections (race, color, sex, religion, national origin)

- Is the employee being treated in the same manner as other employees in similar positions/situations?
- Have other employees been given more chances before being terminated for the same or similar reasons as this employee?
- If so, are there legitimate, non-discriminatory reasons for treating this employee differently than other employees?

Americans with Disabilities Act Protection

- Is the employee physically or mentally disabled?
- If so, were attempts made to reasonably accommodate the employee's disability?
- Were reasonable accommodation measures well documented (including use of the interactive process)?

Age Discrimination in Employment Act Protection

- Is the employee age 40 or older?
- Will or has the employee been replaced with a younger employee?

Pregnancy Discrimination Act Protection

- Is the employee pregnant?
- Were attempts made to reasonably accommodate the employee's pregnancy?
- Were reasonable accommodation measures well documented?

Worker's Compensation

- Has the employee filed a workers' compensation claim? Terminating an employee who has filed a claim, intends to file a claim, or has testified in a worker's compensation hearing could be considered workers' compensation discrimination.

Retaliation

- Has the employee reported any illegal or discriminatory behavior to a supervisor, or filed a formal complaint to HR?
- Has the employee reported or threatened to report any illegal activity of the company to a state or federal agency? Even if the company is not in fact acting illegally, the termination could be seen as retaliation for "whistle-blowing."
- Has the employee participated in any official investigation of the employer (*i.e.*, wage or safety violation) or testified against the employer in an unemployment insurance or other hearing?

G. Common Mistakes to Avoid During Discharge

Mistakes made during the termination process may open an employer up to liability. Here are some common mistakes to avoid.

- **Relying on poorly kept performance evaluations or other employment documentation**. As reiterated throughout this paper, proper and thorough documentation is key. The only way to for an employer to ensure that the evaluations they are citing to in a termination decision are reliable is to actively and consistently impress upon supervisors the importance of honest and forthright documentation.
- **Conducting and relying upon a subpar investigation**. Make sure you understand the entire story and that there is sufficient, consistent documentation to support the reason for discharge.
- **Failing to consider the timing of the termination**. The closer in time between an employee's complaint of discrimination or other protected

activity and that employee's subsequent termination, the easier it will be for the employee to prove a retaliation claim.

- **Failing to keep termination on a need to know basis.** Do not initiate and/or spread rumors about the termination. Ultimately, the rest of the office will find out the employee is terminated. But there is no need for widespread discussion which carries a risk of misinformation and/or the employee finding out before the termination meeting.
- **Providing a Detailed Letter of Reference**. The employee can use your words in a reference letter against you. In general, employers should only provide a neutral reference with job title and dates of employment. Notably, a negative job reference could be deemed retaliatory.
- **Failure to Follow Company Policies.** It is easy for an employee to argue discrimination where the employer does not follow its own policies in effecting a termination.

H. Waivers and Releases—Their Use After Termination

To minimize the risk of potential litigation, employers often offer departing employees money or benefits (beyond which the employee is already entitled) as part of a severance agreement, wherein the benefits are exchanged for a waiver of liability for all claims connected with the employment relationship. Such a waiver/release is only effective if, in exchange, the employee receives something to which the employee was not otherwise entitled.

Seeking a release of claims as part of a severance agreement may prove risky for the employer, however, as the employee may construe the proposed release as the suggestion that he or she may have a claim against the employer. Nonetheless, these waivers may "buy peace" for the employer, as a valid waiver of employment claims helps restrict the

terminated employee from asserting an employment-related claim. Employee releases typically are narrowly construed, and therefore claims should be explicitly released.

Waiver of many types of employment claims is governed by a common law "knowing and voluntary" test. This is generally a multiple-factor analysis that looks at the totality of the circumstances. Courts will take into account factors that are not in the employer's control, such as the educational and business background of the employee, and whether the employee actually invested sufficient time to read the release document and consult with an attorney. There are other factors, though, that are within the employer's control, and these documents should be taken into account when drafting the release agreement. These would include the use of clear and understandable language, clearly setting forth the consideration offered in exchange for the release, and stating the company's advice to consult with legal counsel. Releases of ADEA[2] claims require specific elements set forth in the statute.

Without addressing here new laws suppressing confidentiality in sexual harassment settlements, confidentiality is usually desirable. Note, however, recent developments under various federal agencies, under the Deceptive Trade Secrets Act, and issues arising under a variety of whistleblower and anti-retaliation laws have created additional standards under which confidentiality provisions must be accompanied by communication to the employee of circumstances under which disclosure of information is allowed (such as, *e.g.*, certain complaints or information to agencies).

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[2] Age Discrimination in Employment Act.

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