Social Media in Employment Law

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28th Annual Employment Law Update
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SOCIAL MEDIA AND EMPLOYMENT LAW

- Social media now affects virtually every workplace

- Social media presents legal risks before, during and after employment

- Employers ignore social media at their peril

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Pre-Employment Concerns

- You can learn a lot from social media:
  - Verify application information
  - Ability to interact with others
  - Judgment
- What could go wrong?

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HIRING PROCESS – CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

- **Risks of social media screening**
  - Exposure to discrimination claims
    - Decision maker cannot "unsee" information about race, age, religious beliefs, disabilities, etc.
    - Exposure to protected characteristics not readily obvious, such as marital status, family restrictions, transgender transition, etc.
    - Exposure to protected "off-duty" activities.
  - Implicating the Fair Credit Reporting Act
    - If employer uses a third-party to view social media profiles.
  - Accuracy and authenticity
    - Cannot verify that the social media is posted by the applicant (i.e., same name but different person).
    - Risk of fraudulent accounts.

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HIRING PROCESS – CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

- **Minimizing risks associated with social media screening**
  - Implement a policy.
  - Use a screening system.
  - Hire a third-party to do the screening?
  - Look at social media content later in the interview process.
  - Keep records.

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EMPLOYEE SOCIAL MEDIA USE

Can an employer monitor an employee's social media activity?

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EMPLOYEE SOCIAL MEDIA ACTIVITY

- **Social media snooping**
  - Is it OK to snoop into someone else's *private* social media posts? (No!)
- **OK to use publicly available information**
- **Three influential cases**
  - *Konop* (9th Cir.) – The federal Wiretap Act does not apply to access of secured websites because it only covers interceptions of information that is being contemporaneously transmitted.
  - *Pietrylo* (DNJ) – Restaurant managers violated federal Stored Communications Act and New Jersey equivalent by coercing employees into giving access to private MySpace group page without authorization.
  - *Ehling* (DNJ) – Employer did not violate Stored Communications Act or National Labor Relations Act (NLRA) where employee wrote private Facebook post critical of employer and Facebook friend saw the post and freely reported it to the employee's manager as an authorized user.
- **"Authorized User Exception"**
  - Consent is KEY.

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EMPLOYEE IN COLORADO JUST POSTED THIS ON FACEBOOK

Can you rely on it in taking adverse employment actions?

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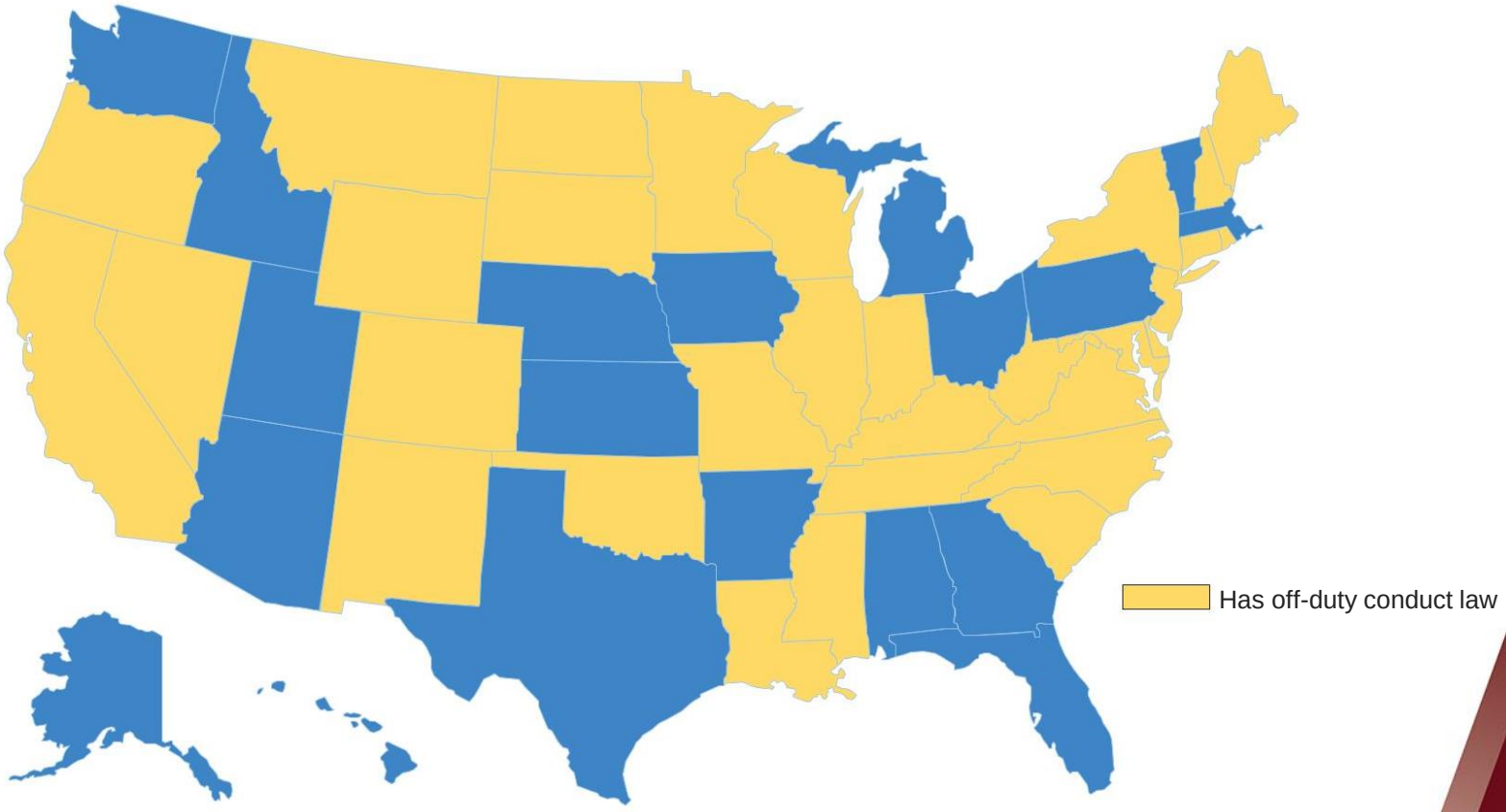
OFF-DUTY CONDUCT LAWS

- Twenty-nine (29) states and Washington D.C. have some form of law protecting off-duty conduct.



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OFF-DUTY CONDUCT LAWS

- In Texas, generally yes because use of marijuana is not permitted.
  - Failing to take remedial action could lead to a claim for negligent hiring or retention against the employer down the road.

- Other states also foreclose an employer from taking adverse actions based on lawful conduct that occurs after hours and offsite.
  - E.g., California, Illinois, Wisconsin.

- Answer may vary depending on state.
- Answer will always vary depending on facts!

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EMPLOYEE SOCIAL MEDIA USE

Is inconsistent application of a social media policy evidence of discrimination?

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REDFORD v. KTBS, LLC (W.D. La. 2015)

- Television station implemented social media policy with provision prohibiting employees from responding to viewer complaints
- Male on-air reporter wrote a negative post on his Facebook page about a viewer who had commented on one of his stories and was fired

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REDFORD v. KTBS, LLC (W.D. La. 2015)

- Reporter sued for race and gender discrimination because station had not fired black female white female employees who had done the same thing
- KTBS moved for summary judgment
- Court concluded that station's inconsistent application of its policy created a triable issue of fact for the jury and denied motion for summary judgment
- The case illustrates the importance of consistently applying social media policies to avoid liability under employment statutes, such as Title VII or the ADA

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EMPLOYEE SOCIAL MEDIA USE

Can you take action against an employee who posts that he and his coworkers are “fed up” with their supervisor and the Company’s policies?

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THE NLRB AND SOCIAL MEDIA

- NLRB's Focus on
  - Social Media Policies
  - Discipline

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NLRA SECTION 7

- "Employees shall have the right:
  - to self organization,
  - to form, join, or assist labor organizations,
  - to bargain collectively through representatives of their own choosing, and
  - to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and
  - shall also have the right to refrain from any or all such activity…."

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PIER SIXTY LLC

- Employees sought to unionize company, and made complaints about supervisor to management
- Supervisor later used a “loud voice” and “raised, harsh tone” during catering event
- Employee posted on Facebook:
  - “Bob is such a NASTY M---------- don’t know how to talk to people!!!!! F--- his mother and his entire f------ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”
- Did NLRB determine employee’s comments were protected?

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PIER SIXTY LLC

- Yes
- Employee's post was protected discussion of employee mistreatment
- Employee did not lose protection because "vulgar language is rife in [Pier Sixty's] workplace, among managers and employees alike."
- Facebook posts "were not a slur against [Bob's] family but, rather, an epithet directed to [Bob] himself."

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TRIPLE PLAY SPORTS BAR AND GRILLE (2d Cir. 2015)

- Former employee posted:
  - employer “can’t even do the tax paperwork correctly!!! Now I OWE money . . . Wtf!!!”
- Several other former employees also responded that they owe money, purportedly because of employer’s mistakes
- Current employee “liked” original comment and was fired for disloyal conduct
- NLRB found that pressing “like” on Facebook was protected activity under the NLRA

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TRIPLE PLAY TAKEAWAYS

- An employee's negative comment online may not constitute disloyalty, especially if there is no mention of the employer's products or services.
- While an obscene comment made in the physical presence of customers may cause an employee to lose her NLRA protections, a similar comment made on social media may remain protected, even if customers view the social media comment.
- Employers should continue exercising caution to avoid drafting overly broad social media policies.

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FEDERAL TRADE COMMISSION ("FTC") REGULATION

- In 2009, the FTC updated its Guides Concerning the Use of Endorsements and Testimonials in Advertising

- FTC released updated Dot Com disclosures in 2013

- Employers may find themselves facing an FTC enforcement action based on their employee's online activities

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FEDERAL TRADE COMMISSION REGULATIONS

- Employees must disclose clear connection
- Disclosure must be clear and conspicuous
- Disclosure must be of typical results

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COLE HAAN, INC.

- Cole Haan, Inc. held a contest in which contestants created a Pinterest board entitled “Wandering Sole” and posted five shoe images of the contestants’ “favorite places to wander” with the handle “#WanderingSole”

- The most creative contestant would win $1000

- Seems harmless right?

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Cole Haan, Inc.

- FTC didn't think so

- FTC sent letter stating that it was concerned contestants were not instructed to label pins so that others knew they were participating in a contest

- FTC decided not to recommend an enforcement action

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DEUTSCH LA, INC.

- Deutsch LA was marketing on behalf of Sony's PlayStation Vita, a gaming console

- Deutsch employees were called to log on to their personal Twitter accounts and to tweet #gamechanger with positive comments

"One thing can be said about PlayStation Vita . . . it's a #game changer"

"PS Vita [ruling] the world. Learn about it! us.playstation.com/psvita/ #GAME CHANGER"

"Got the chance to get my hands on a PS Vita and I'm amazed how great the graphics are. It's definitely a #game changer!"

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DEUTSCH LA, INC.

- FTC alleged the tweets were deceptive because they appeared to be endorsements from actual users of the PlayStation rather than employees of Sony's ad agency
- Deutsch and Sony settled with FTC
- Sony's settlement involved providing cash or credit refunds or merchandise vouchers

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WHO OWNS YOUR SOCIAL MEDIA ACCOUNTS?

- Many companies distinguish between personal and business social media use
- Business accounts may be under Company's or employee's name
- If Trey Jackson conducts official company business using @TreyJacksonCompany Twitter account, who owns the account?

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CDM Media v. Simms (N.D. Ill. 2015)

- Marketing company and employee had noncompete with confidentiality clause.
- Company launched “CIO Speaker Bureau” for CIOs interested in speaking at Company events.
- 679 members comprising Company’s customers and potential customers
- Employee listed as contact person for LinkedIn account
- After resignation, employee refused to change contact information or provide membership list and other communications.
- Breach of contract?
- Theft of trade secrets?

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CDM Media v. Simms (N.D. Ill. 2015)

- Court denied defendant employee's motion to dismiss breach of contract and trade secret claims.
- Court held that if member communications were private messages to the employer, they are likely covered by confidentiality agreement
- Court also refused to dismiss claim that membership list was trade secret under Illinois state law.

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CONTENT CAN BE OWNED BY COMPANY OR BLOGGER

Factors

- Who created or managed
- Industry
- Information known about followers
- Subject matter sent from account
- Policies or agreements bearing on account ownership

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let's not

- Be proactive
- Written agreements to define:
  - Who owns employer-related social media accounts
  - Who owns the information generated by and contained in social media accounts
  - When and how such accounts may be used

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SOCIAL MEDIA SOLICITATIONS

- Can posting on social media constitute solicitation of customers or employers in violation of an individual's non-solicitation agreement with a former employer?

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CORPORATE TECHS., INC. V. HARNETT (1st Cir. 2013)

- Employment Agreement prevented employee "'solicit[ing], divert[ing] or entic[ing] away existing [CTI] customers or business' for a period of twelve months following the cessation of his employment."
- Employee left after a year and sent out a blast email that announced his new place of employment to a targeted list of recipients, 40% of whom were (or had been) Corporate Tech customers
- Employee had numerous interactions with customers after initial contact
- Court found Employer was likely to succeed in showing that Employee violated the Agreement because Employee's conduct could be construed as "enticing" customers away from Corporate Tech
  - Court noted that customers only contacted Employee following their receipt of a blast email announcing his hiring by another employer

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BTS, USA, INC. V. EXEC. PERSPECTIVES, LLC (Conn. Super 2014)

- Employee signed Employee Agreement with employer in which he agreed to not solicit or take away any clients of employer for two-year period
- Employee left and went to work for a competitor
- Employee posted an announcement of his new position on LinkedIn
- Court determined post was not in violation of anti-solicitation provision

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QUESTIONS??

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28th Annual Dallas Employment Law Update

Wednesday, April 21, 2016

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THE AGENCY AWAKENS: EEOC ENFORCEMENT TRENDS IN 2016 AND BEYOND

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THE AGENCY AWAKENS

I. Update on the Commission's Strategic Enforcement Plan
II. Trends in charge filings and EEOC litigation
III. Major cases decided in 2015
    A. Mach Mining
    B. Abercrombie
    C. Young
IV. Big issues to watch in 2016
    A. Equal Pay Act claims
    B. Focus on vulnerable workers
    C. Sexual orientation and gender issues
    D. New guidance on retaliation
    E. Risks of using "big data"

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EEOC 101

- Bipartisan body of five members appointed by the President and confirmed by the Senate
- Enforces anti-discrimination laws in employment and promotes for equal employment opportunity
  - Title VII of the Civil Rights Act of 1964
  - The Age Discrimination in Employment Act of 1967 (ADEA)
  - The Equal Pay Act of 1963 (EPA)
  - Section 501 of the Rehabilitation Act of 1973
  - American with Disabilities Act of 1990 (ADA)
  - Genetic Information Nondiscrimination Act of 2008 (GINA)

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SETTING PRIORITIES FOR THE COMMISSION

- Issues that will have broad impact
- Issues involving developing areas of the law
- Issues affecting workers who may lack an awareness of their legal protections, or who may be reluctant or unable to exercise their rights
- Issues involving discriminatory practices that impede or impair full enforcement of employment anti-discrimination laws
- Issues that may be best addressed by government enforcement

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STRATEGIC ENFORCEMENT PLAN 2013 - 2016

- Eliminating barriers in recruitment and hiring
- Protecting immigrant, migrant and other vulnerable workers
- Addressing emerging and developing issues
- Enforcing equal pay laws
- Preserving access to the legal system
- Preventing harassment through systemic enforcement and targeted outreach

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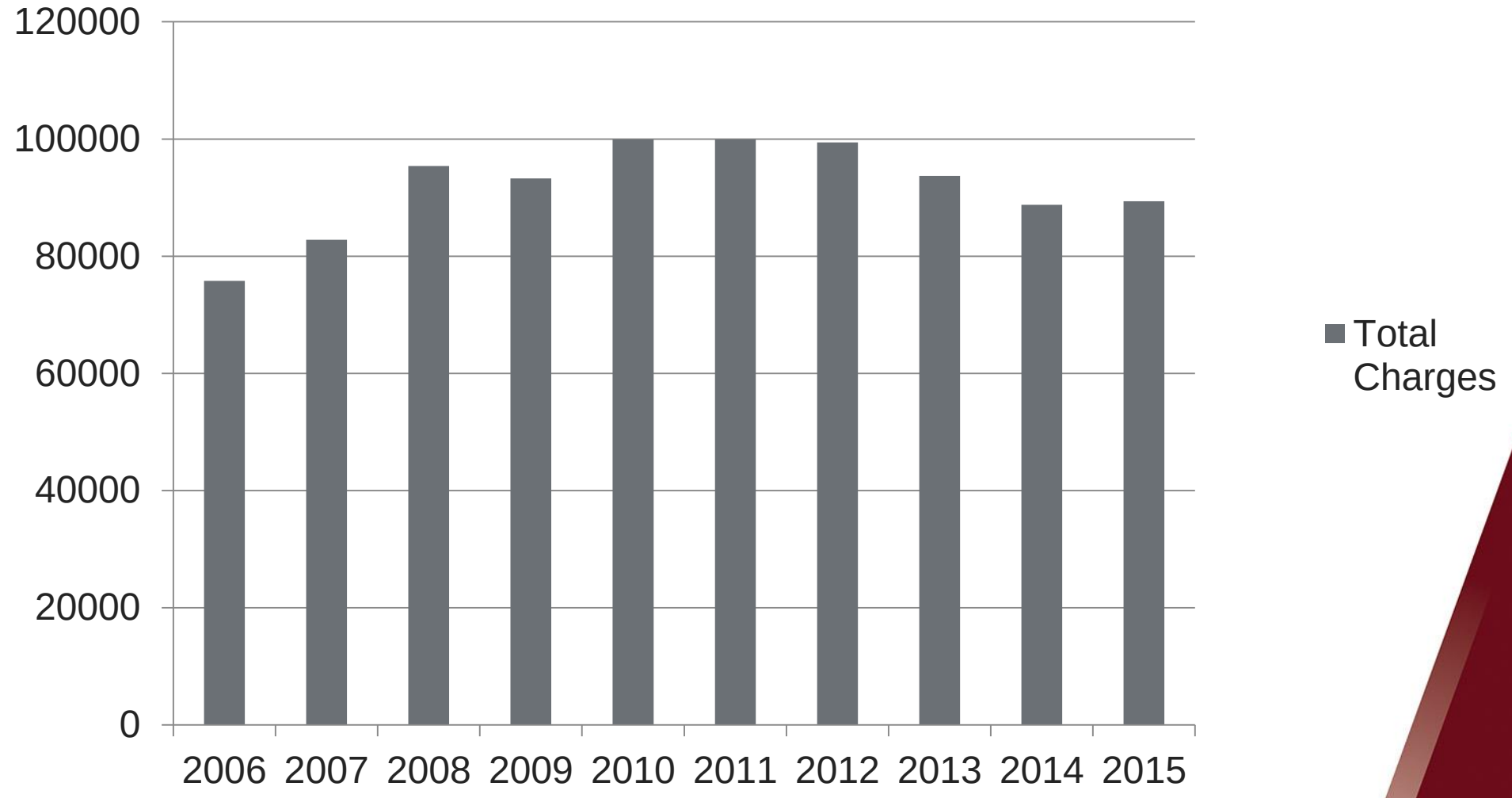
EEOC CHARGE FILINGS



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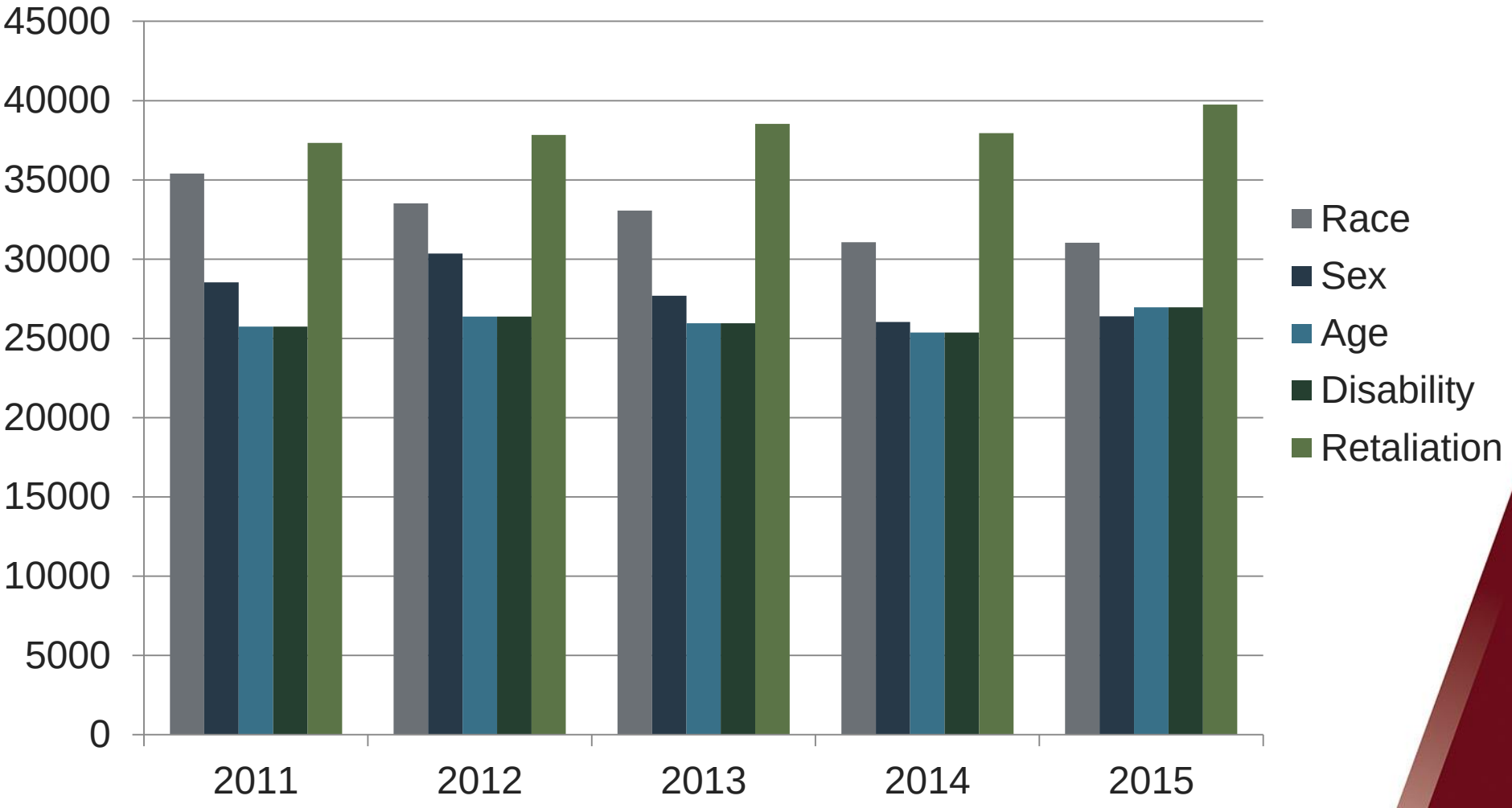
EEOC CHARGES FOR PAST FIVE YEARS BY TYPE



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HIGHLIGHTS FROM CHARGE STATISTICS FOR 2015

- Retaliation claims reach their highest level ever
- Texas has more than 10,000 charges filed in 2015
- EEOC's backlog remains a major problem
  - 76,408 cases; 90 new investigators have not yet made a dent
- EEOC's litigation focus moves toward larger, systemic cases

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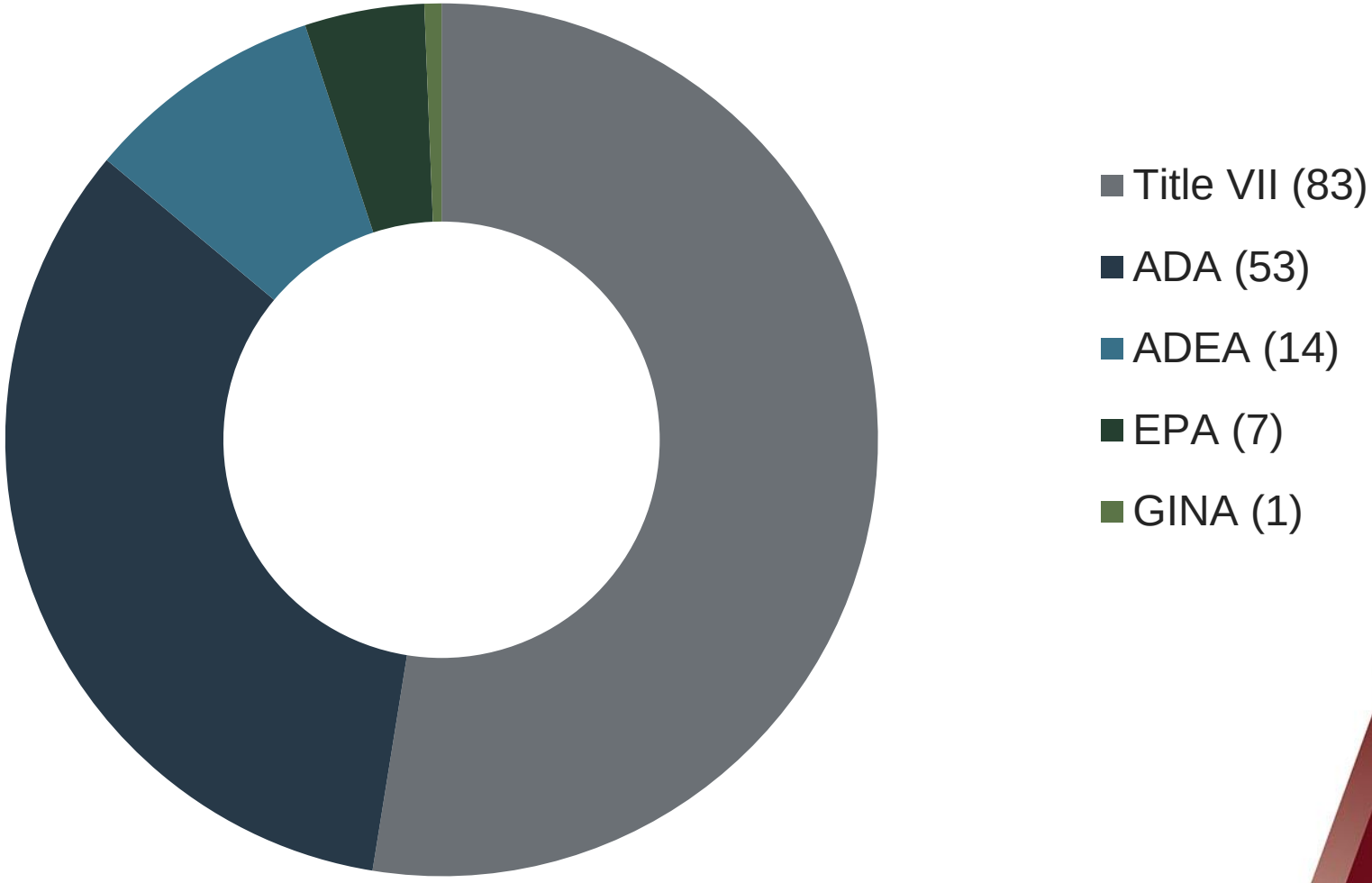
EEOC LITIGATION FILED IN 2015



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SYSTEMIC CASES REMAIN THE FOCUS

- Systemic cases are now more than 25% of the EEOC's docket
- EEOC's reported success rate in systemic cases is about 47%
- Agency completes 268 systemic investigations
- Reasonable cause findings made in more than one third of systemic investigations
- Amount obtained resolving systemic charges tripled in 2015 to more than $33.5 million

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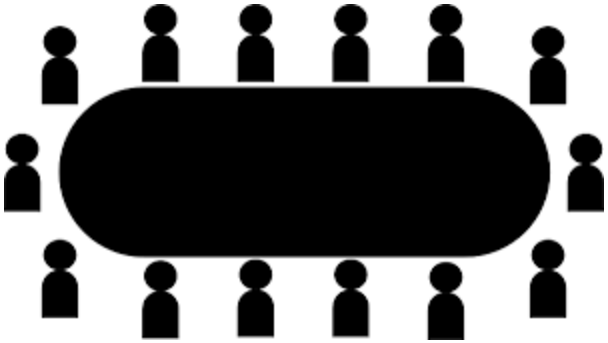
DUTY TO CONCILIATE BEFORE FILING LAWSUIT

- Commission must endeavor to eliminate alleged unlawful employment practices by informal methods of conference, conciliation, and persuasion
- It may only file suit if it "has been unable to secure . . . a conciliation agreement acceptable to the Commission"
- What effort must the Commission make toward conciliation and is that process subject to judicial review?



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MACH MINING V. EEOC

- Female complainant filed charge with EEOC after unsuccessfully applying for a mining position
- EEOC found reasonable cause that company discriminated against a class of women who had applied for mining-related jobs
- Commission unilaterally determines that conciliation with employer has failed and files suit in district court
- Supreme Court: "barebones review" with no deep dive into conciliation process, EEOC need only engage in some form of discussion with employer

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COURTS NARROW DUTY TO INVESTIGATE AND CONCILIATE BEFORE FILING LAWSUIT

- ***EEOC v. The Geo Group, Inc***. (9th Cir. Mar. 14, 2016)
  - EEOC is not required to identify all victims prior to suit or to conciliate on an individual basis
- ***EEOC v. Sterling Jewelers Inc*.** (2d Cir. Sept. 9, 2015)
  - Court holds "[t]he sole question for judicial review is whether the EEOC conducted an investigation"
- ***EEOC v. AutoZone*** (N.D. Ill. Nov. 2, 2015)
  - Title VII does not mandate any particular investigative technique or standard

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EEOC V. ABERCROMBIE & FITCH STORES, INC.

- Applicant interviews wearing black hijab (headscarf) and is not hired
- EEOC charges that Abercrombie violated Title VII when it failed to offer a reasonable accommodation
- Supreme Court sides with EEOC
  - "Thus . . . [a]n employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions."

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NOBACH V. WOODLAND VILLAGE NURSING HOME

- Nursing home activities aide refused to pray the rosary with a patient because it was against the employees' religious beliefs
- Employee is terminated five days later and she brings claims of religious discrimination
- The religious practice need only be a "motivating factor" of the employer's decision to be actionable
- Fifth Circuit rejects claim because there was no evidence that employer knew or suspected her refusal was for religious reasons

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EEOC SEEKS TO EXPAND LGBT RIGHTS

- Title VII does not include sexual orientation as a protected class
- EEOC committed to enforcing protections for LGBT individuals under laws “as they may apply”
- Sex v. Sexual Orientation v. Gender Identity
- Sex stereotyping cases based on failure to comply with particular gender norms

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EXTENDING TITLE VII TO TRANSGENDER EMPLOYEES

EEOC v. Lakeland Eye Clinic

- Employee who initially presented as male is terminated after she begins presenting as female

Broussard v. First Tower Loan

- Employee terminated after he refuses employer's instruction to dress as a woman

Lusardi v. McHugh

- Referring to employee with former male name, calling her "sir" and forcing her to use segregated restroom

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TRANSGENDER ISSUES IN THE WORKPLACE

- Transition planning and implementation
- Single sex restrooms and locker rooms
- Dress codes
- Personnel records and systems
- Customer and co-worker relationships

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BALDWIN V. FOXX (JULY 15, 2015)

- Discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII
  - Treatment would not have occurred but for the individual's sex;
  - Treatment was based on the sex of the person(s) the individual associates with; and
  - Treatment was premised on the fundamental sex stereotype that individuals should be attracted only to those of the opposite sex.
- EEOC files two new cases in March of 2016 to expand theory

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YOUNG V. UPS

- Young requested light duty after becoming pregnant and was denied
- UPS claims its decision was pregnancy-neutral and PDA did not require more
- Supreme Court: Does policy put a "significant burden" on female workers, and the policy is "not sufficiently strong" to justify that burden?

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EEOC ISSUES NEW GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES

- On June 25, 2015, based on *Young*, EEOC reissued its pregnancy discrimination guidance
- Women may be able to prove unlawful pregnancy discrimination if the employer accommodated some workers but refused to accommodate pregnant women
- Employer policies that are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification
- Employers need to be sensitive to potential reasonable accommodation obligations under the ADA based on the expanded definition of protected disabilities in the ADA based on the ADAAA

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EQUAL PAY ACT RETURNS TO THE FOREFRONT

- Lily Ledbetter Fair Pay Act to expand statute of limitations for claims
- National Equal Pay Task Force issues report on persisting pay gap in United States
- Executive Order in 2014 bans federal contractors from retaliating against workers who discuss their salary
- What does "any factor other than sex" mean in practice?

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NEW RULES REQUIRING EEO-1 PAY REPORTING

- Companies with more than 100 employees will submit pay data on EEO-1 forms
- Aggregate W-2 data for 12 pay bands for the EEO-1 job categories
- Begins with the September 2017 report
- Commission hopes employers will use it to make adjustments to their pay practices if needed

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USWNT EQUAL PAY CLAIM

- Charge filed on March 20, 2016 by five members of the US Women's National Team
- Women take home between 40-70% of their male counterparts
  - Men earn $5,000 for a loss, $6,250 for tie and $9,375 for win
  - Women earn $0 for loss or tie and only $1,350 for win
- Women's soccer more profitable than men's game

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ENSURING EQUAL PAY FOR EQUAL WORK

- Evaluate compensation systems annually and take action to correct problems
- Designate individuals to monitor pay practices
- Provide training to supervisors
- Ensure that job related criteria are used to determine base pay, raises, overtime, and bonuses and in making decisions about performance evaluations, job assignments, and promotions
- Set starting salaries that eliminate discriminatory pay gaps on the basis of prior salary or salary negotiations

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PROTECTING VULNERABLE WORKERS

- ***EEOC v. Signal International*** (Dec. 2015 settlement)
  - $5 million settlement for Indian workers forced to live in unsanitary conditions in guarded camps
- ***EEOC v. Moreno Farms*** (Sept. 2015 verdict)
  - Graphic sexual harassment of female farm workers results in $17 million jury verdict
- ***EEOC v. Vail Run Community Resort Association*** (2016 settlement)
  - Housekeeping manager systematically harasses Mexican female employees
  - $1 million settlement; Spanish-speaking monitor put in place to oversee training and employee complaints

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EEOC PROPOSES NEW GUIDANCE ON RETALIATION

- New enforcement guidance in January of 2016
- Blurs distinction between “participation” clause and “opposition” clause
- Expansive view of what can constitute adverse action
- Causation can be established through a “convincing mosaic” of circumstantial evidence

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EEOC PROCEDURES FOR RELEASING POSITION STATEMENTS

- EEOC has implemented nationwide procedures that provide for the release of Respondent position statements and non-confidential attachments to a Charging Party or her representative upon request
- If the Respondent relies on confidential information in its position statement, it should provide such information in separately labeled attachments.
- Respondent should provide an explanation justifying the confidential nature of the information contained in the attachments.
- EEOC staff may redact confidential information as necessary prior to releasing the information to a Charging Party or her representative.

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HOW MUCH DATA IS BEING CREATED?

- In one internet minute:
  - Facebook: 300,000 status updates
  - Twitter: 350,000 tweets
  - LinkedIn: 17,361 member profiles viewed
  - Instagram: 46,611 photos posted
  - YouTube: 300 hours of video uploaded
  - Vine: 1 million video loops viewed
- 87 percent of the U.S. population can be identified by knowing a person's gender, zip code and birthdate

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HOW IS BIG DATA BEING USED?

- Linguistic analysis of job postings and ads
- Computer-automated sourcing and candidate matching
- Vendor-provided applicant-screening questions that are “statistically proven” based on “world class behavioral data analytics” to identify the best candidates
- “Who to hire, who to promote, how much to pay, how to develop, what next job to take - all these decisions are now ‘data enabled’”

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POTENTIAL PROBLEMS WITH USING BIG DATA

- FTC Report - *Big Data: A Tool for Inclusion or Exclusion?*
- Neutral selection criteria may have disparate impact
- Use of predictive criterion may produce fewer candidates in protected group
- Analytics are controlled by too few employees, who may exhibit bias in selection or data inputs

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THE FAIR LABOR STANDARDS ACT: FREQUENT EMPLOYER MISTAKES AND HOW TO AVOID THEM

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FLSA BASICS

- Minimum wage ($7.25/hour)
- Overtime (1.5x regular rate) for hours over 40
- Child labor
- No retaliation

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ENFORCEMENT MECHANISMS

- **Department of Labor**
  - DOL initiatives: misclassification of employees as independent contractors; oil and gas services industry; restaurant industry; childcare industry
  - DOL audit may be followed by IRS or state audit
  - Back wages and possible civil and criminal penalties

- **Private Plaintiff**
  - Collective action (a.k.a. FLSA's version of class action lawsuit)
  - Back wages, liquidated damages, and attorneys' fees and costs
  - Damages can extend 3-years back
  - Potential for added retaliation claims
  - Potential personal liability for owners, officers, executives, directors, and supervisors

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WHY CARE?

Fair Labor Standards Act Enforcement Statistics

FY 2015	Cases with Violations	Back Wages	Percent of FLSA Back Wages	Employees Receiving Back Wages(duplicated[1])	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	10,642	$37,828,554	22%	86,229	39%
Overtime	10,496	$137,701,703	78%	173,330	78%
FY 2014	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	11,042	$36,732,407	21%	106,184	46%
Overtime	11,238	$136,239,001	79%	174,365	76%
FY 2013	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,403	$38,470,100	23%	103,671	46%
Overtime	12,108	$130,703,222	77%	174,197	77%
FY 2012	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,532	$35,270,524	19%	107,005	40%
Overtime	12,462	$148,560,700	81%	218,137	82%
FY 2011	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	12,450	$29,327,527	17%	89,305	37%
Overtime	11,990	$140,328,012	83%	204,243	86%
FY 2010	**Cases with Violations**	**Back Wages**	**Percent of FLSA Back Wages**	**Employees Receiving Back Wages(duplicated[1])**	**Percent of Employees Receiving FLSA Back Wages**
Minimum Wage	10,529	$21,043,700	16%	52,530	28%
Overtime	8,788	$107,545,263	84%	166,295	90%

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WHY CARE . . . ADDITIONAL CONSIDERATIONS

- Lawsuits continue to be filed
- Class and collective action proceedings – increasingly easy to certify
  - 115 conditional certification motions granted vs. 38 denied
  - 8 decertification motions granted vs. 14 decertification motions denied
- High dollar settlements
  - $445 million in 2013; $400 million in 2014
  - Halliburton $18.3 million settlement with DOL for 1,016 employees misclassified as exempt

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MISCLASSIFICATION OF EXEMPT EMPLOYEES

Exemptions

- Professional Exemption
- Executive Exemption
- Administrative
- Computer-Related Employees
- Outside Sales
- Highly Compensated Employee

Elements

- Salary Level – Must earn at least $455/week (subject to change)
- Salary Basis – Must be paid on a salary (or fee) basis
- Job Duties – Must perform the primary & other functions listed in the applicable “duties test”

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WHAT DOES "SALARY BASIS" MEAN?

Being paid on a "salary basis" means:

- Employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount of compensation (constituting all or part of the employee's compensation)
- The predetermined amount cannot be reduced because of variations in the quality or quantity of the work performed by the employee
- Employee must receive the full salary for any week in which he performs any work, regardless of the number of days or hours worked (with limited exceptions)
- Deductions from the predetermined amount may only be made in certain, limited circumstances

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PERMISSIBLE DEDUCTIONS

- One or more full day absences for personal reasons, other than sickness or disability.
- One or more full day absences because of sickness or disability (including work-related accidents) if such deductions are made under a bona fide plan, practice or policy of providing compensation for loss of salary occasioned by such sickness or disability.
- To offset any amounts received as jury fees, witness fees or military pay.
- Penalties imposed in good faith for violations of safety rules of major significance.
- Unpaid disciplinary suspensions of one or more full days imposed in good faith for violations of written workplace conduct rules.
- Portions of the first and last weeks of employment not actually work.
- Weeks in which the employee takes unpaid FMLA leave

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IMPERMISSIBLE DEDUCTIONS

- Impermissible Deductions
  - Deduction for absence occasioned by ER or operating requirements of business (e.g., inclement weather, slowdown)
  - Deduction for absence because of jury duty, attendance as a witness, or temporary military leave
  - Deduction for partial day absence

- Exemption will be lost if ER has an “actual practice” of making improper deductions

- HAVE SAFE HARBOR POLICY!

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SALARY LEVEL REQUIREMENTS

- Executive, Administrative, and Professional Exemptions: paid on a salary basis at a rate of at least $455/week ($23,660/year)
  - *But,* administrative and professional employees may be paid on a fee basis
- Computer Employee Exemption: paid on a salary or fee basis at a rate of at least $455/week or on an hourly basis at a rate of at least $27.63/hour
- Highly Compensated Employee Exemption: total annual comp of at least $100,000 that includes at least $455/week on a salary or fee basis

- Salary requirements do not apply to outside sales employees, teachers, lawyers, or doctors

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PRESIDENT OBAMA'S 3/13/2014 DOL DIRECTIVE TO REVISE OVERTIME RULES

Objectives:

- Modernize and streamline existing FLSA regulations to address changing nature of American workplace
- Simplify overtime rules to make them easier to understand and apply

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PROPOSED REGULATIONS – WHAT CHANGES?

- Revisions applicable to “white collar” exemptions
  - Executive, administrative, professional, and highly compensated exemptions

- Proposed changes to salary level requirements:
  - Currently: $455/wk or $23,660 annualized
    - Below poverty line for family of 4
  - Proposal projected at **$970/wk or $50,440/yr** (40th percentile) + automatic updates

- Highly Compensated Exemption: high salary level = easier duties test
  - Increase from $100K to **$122,148/year** (90th percentile)

- Final regulations anticipated in Spring 2016

- DOL estimates 4.6 million exempt workers who are paid under 40th percentile affected

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PROPOSED REGULATIONS – WHAT STAYS THE SAME?

- Duties tests (*at least we think …*)
- Exemptions that do not rely on salary basis test
- Rules regarding deductions
- Recordkeeping requirements
- *Pretty much everything else!*

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WHAT TO DO NOW – AUDIT

- Identify exempt employees in “at risk” salary range ($23,660-$55,000)
  - Organize by type of job, exemption classification, salary range

- Evaluate job duties “on the bubble”
  - Should be hand-in-hand with salary analysis
  - Start with largest employee classes
    - Consider reclassification of questionable positions that include employees both over and under new threshold

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WHAT TO DO NOW – WAYS TO MITIGATE

- Consider having employees start clocking hours so you can appropriately analyze compensation options

- Moving to non-exempt & controlling hours
  - Delegate responsibilities to other employees
  - Limit work from home/flexible work hours

- Restructuring positions and reassigning duties
  - Revise job descriptions

- Increasing salary & remain exempt

- Restructuring bonuses & other sources of extra comp – moving into salary

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2. INDEPENDENT CONTRACTOR MISCLASSIFICATION

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INDEPENDENT CONTRACTOR VS. EMPLOYEE

"Economic Realities" Test = whether the worker is economically dependent on the employer or truly in business for him or herself

1. Extent to which the work performed is an integral part of the employer's business;
2. Worker's opportunity for profit or loss depending on his or her managerial skills;
3. Relative investments of the employer and the worker;
4. Whether the work performed requires special skills and initiative;
5. Permanency of the relationship; and
6. Nature and degree of control by the employer.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***Extent to which the work performed is an integral part of ER's business***
  - IC's work unlikely to be integral to ER's business.
  - Work can be integral even if it is just one component of the business or is performed by many workers.
  - Work can be integral even if it is performed away from ER's premises.

- ***Worker's opportunity for profit or loss***
  - This factor should not focus on the worker's ability to work more hours or the amount of work available from the employer.
  - IC should exercise managerial skills (*e.g.*, make decisions on staffing, advertising, and purchasing; negotiate contracts; decide which jobs to perform; etc.) in a way that affects the worker's opportunity for both profits and loss beyond the current job.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***The relative investments of ER and worker***
  - Relevant inquiry is how worker's investment compares to ER's investment in its *overall business*.
  - Investing in tools and equipment is not necessarily a business investment that indicates worker is an IC.

- ***Whether the work performed requires special skills and initiative***
  - Focus is on the worker's *business* skills, judgment, and initiative, and not his technical skills.
  - Fact that a worker has specialized skills does not mean that he is in business for himself.

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DOL'S 7/15/2015 ADMINISTRATOR'S INTERPRETATION

- ***The permanency of the relationship.***
  - Permanency or indefiniteness in worker's relationship suggests that worker is an EE.
  - IC typically works one project and does not necessarily work continuously or repeatedly for an ER.
  - But, a lack of permanence or indefiniteness does not automatically suggest an IC relationship; rather, key is whether the lack of permanence is due to worker's own business initiative.

- ***The nature and degree of control by ER.***
  - IC must control meaningful aspects of work performed.
  - ER's lack of control over workers who work from home or offsite as well as workers' control over their hours are not indicative of IC status.
  - ER's reason for exercising control – *e.g.,* nature of business, regulatory requirements, customer demands – does not matter.
  - Control factor should not be overemphasized by ERs.

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OFF THE CLOCK WORK

"Off the Clock" work includes work required by the employer but also work that the employer doesn't require the employee to do, but that the employer knows the employee is doing and it benefits the employer.

Legal Test: Whether employer had actual knowledge of overtime or had opportunity through reasonable diligence to acquire knowledge.

You make me clock out but I then have to come back and work. Where is my money?

I cannot get my work done during my shift, so I work at home after I have clocked out. Where is my overtime?

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OFF THE CLOCK WORK – GOOD POLICIES/PRACTICES

- Require advance management approval for OT (except in emergencies)
- Require accurate time reporting
- Require employees to verify time
- Prohibit off the clock work
- Place burden on employee to notify employer of work after hours from home or outside workplace
- Open communication between employees and management

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POST AND PRELIMINARY WORK

- "Principal activities" are compensable.
  - Is the activity "an integral and indispensable part of the principal activities" for which the employee is employed?
- "Integral and indispensable"
  - Necessary to the principal work performed
  - Done for employer's benefit
- Continuous workday rule – time between first and last principal activity is compensable.

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BREAKS AND MEAL PERIODS

- FLSA does not require meal periods or breaks.
- Breaks less than 20 minutes = compensable
  - Unauthorized extensions not compensable if ER has clearly communicated to EE (i) length of authorized break time, (ii) any extension violates ER's rules, and (iii) any extension will be punished.
- Bona fide meal periods of at least 30 minutes = not compensable

WATCH OUT FOR ….

- Employees working through lunch / not completely relieved of duty
- Employees taking lunch break <30 minutes
- Employees "riding" the clock during lunch

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WAITING TIME & ON-CALL TIME

- **Waiting Time:** Whether waiting time is time worked under the FLSA depends upon the particular circumstances.
  - engaged to wait (work time)
  - waiting to be engaged (not work time).

- **On-Call Time:**
  - An employee who is required to remain on call on the employer's premises is working while "on call."
  - An employee who is required to remain on call at home, or who is allowed to leave a message where he/she can be reached, is not working (in most cases) while on call.
    - BUT additional constraints on the employee's freedom and the frequency of interruptions could require this time to be compensated.
  - Of course, all time spend responding to calls is hours worked.

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LECTURES, MEETINGS, AND TRAINING

- Time spent in attendance not work time if:
  - held outside of work hours;
  - attendance is voluntary;
  - meeting is not directly related to EE's job; and
  - EE does no productive work during the meeting time

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TRAVEL TIME

- **Home To Work Travel** = not work time
- **Home to Work on a Special One Day Assignment in Another City** = work time, except that ER may deduct that time EE would normally spend commuting to the regular work site.
- **Travel That is All in the Day's Work** = work time
- **Travel Away from Home Community (overnight)** = work time when it cuts across EE's workday.
  - Also applies to travel during nonworking days.
  - Time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile is not considered work time.
- **Work During Travel** = work time

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WEATHER RELATED CONCERNS

- Hourly employees
  - Only paid for hours worked
  - Travel time during the day still compensable even if weather delays
- Exempt employees
  - Must still be paid if employer shuts down
  - If open and exempt employee chooses not to come in, can deduct
  - Can NOT deduct exempt employees for part-days
  - If employee works from home, must pay

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REGULAR RATE CONCERNS

- Overtime paid on “regular rate” not hourly rate

- Included in regular rate:
  - Commissions
  - Non-discretionary bonuses
  - Shift differentials
  - Incentive compensation

- Excluded from regular rate:
  - Expense reimbursement
  - OT premium payments
  - Discretionary bonuses
  - Gifts
  - Vacation, holiday, sick pay, PTO

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STAY OUT OF TROUBLE…AUDIT

- Classification issues
  - Exempt vs. non-exempt
  - Independent contractor vs. employee
- Policies and procedures
- Compensation issues
  - Overtime policies
  - Regular rate calculations
  - Salary basis requirements
- Time-keeping practices

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THE FAIR LABOR STANDARDS ACT: FREQUENT EMPLOYER MISTAKES AND HOW TO AVOID THEM

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Annual Employment Law Update
April 21, 2016

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AFFORDABLE CARE ACT: WHAT CAN YOU EXPECT IN THE NEXT COUPLE OF YEARS?

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28th Annual Employment Law Update
April 21, 2016

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AGENDA

- Employer Shared Responsibility Rule and Reporting
- Excise Tax on High Cost Coverage
- Other ACA Items
- Questions?

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EMPLOYER SHARED RESPONSIBILITY RULE

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EMPLOYER SHARED RESPONSIBILITY RULE

- The Affordable Care Act's (ACA) employer shared responsibility rules apply to "applicable large employers" and include:

1. Full-time employee (FTE) determination and measurement – Employers must determine their FTEs (those with 30+ hours of service per week on average) and can use two safe harbor methods to help
   - Monthly measurement method
   - Look-back measurement method

2. ACA reporting – IRS Forms 1094 and 1095 are used to report information about employers and employees, offers of coverage, enrollment, and other required information

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EMPLOYER SHARED RESPONSIBILITY RULE

3. Penalties
   - IRC Section 4980H(a) “Doomsday penalty” – If an employer fails to offer minimum essential coverage to a minimum threshold of FTEs (70% in 2015; 95% in 2016+) during the calendar year and one FTE enrolls in subsidized coverage in the public insurance marketplace, the doomsday penalty is triggered
     – 2015: = $2,080 x (all FTEs – 80)
     – 2016: = $2,160 x (all FTEs – 30)

   - IRC Section 4980H(b) “Per affected FTE penalty” – If an employer does not trigger the doomsday penalty but fails to offer coverage to an FTE or offers coverage that does not meet the ACA’s minimum value or affordability requirements, and that FTE enrolls in subsidized coverage in the public insurance marketplace, a $3,120 (2015) per affected FTE penalty is incurred ($3,240 for 2016)

   - Both penalties are pro-rated monthly

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EMPLOYER SHARED RESPONSIBILITY RULE – ALES AND ALEMS

Applicable Large Employer (ALE)

- An employer who employed at least 50 FTEs (including full-time equivalent employees) during the previous calendar year.
- New employers that did not exist during the previous calendar year are ALEs if reasonably expected to employ at least 50 FTEs during the current calendar year.
- For 2015, ALEs with 50 to 99 FTEs (including equivalents) were subject to reporting but not to employer shared responsibility penalties.
- Closely related legal entities (generally those in a common control group under IRS rules) are combined into an "Aggregated ALE Group" to determine if there are at least 50 FTEs. This means many smaller entities are considered large employers due to common ownership.
- Governmental entities may use a good faith method to determine whether they are closely related (e.g. common participation in a pension plan).

Applicable Large Employer Member (ALEM)

- An ALEM is an ALE by itself or a member of an Aggregated ALE Group that:
    1. Exists as a legal entity with its own FEIN/Tax ID and/or is incorporated, licensed, registered, chartered, etc. to do business; and
    2. Has one or more employees with hours of service during the calendar year.
- Penalties and reporting requirement apply to each separate ALEM.

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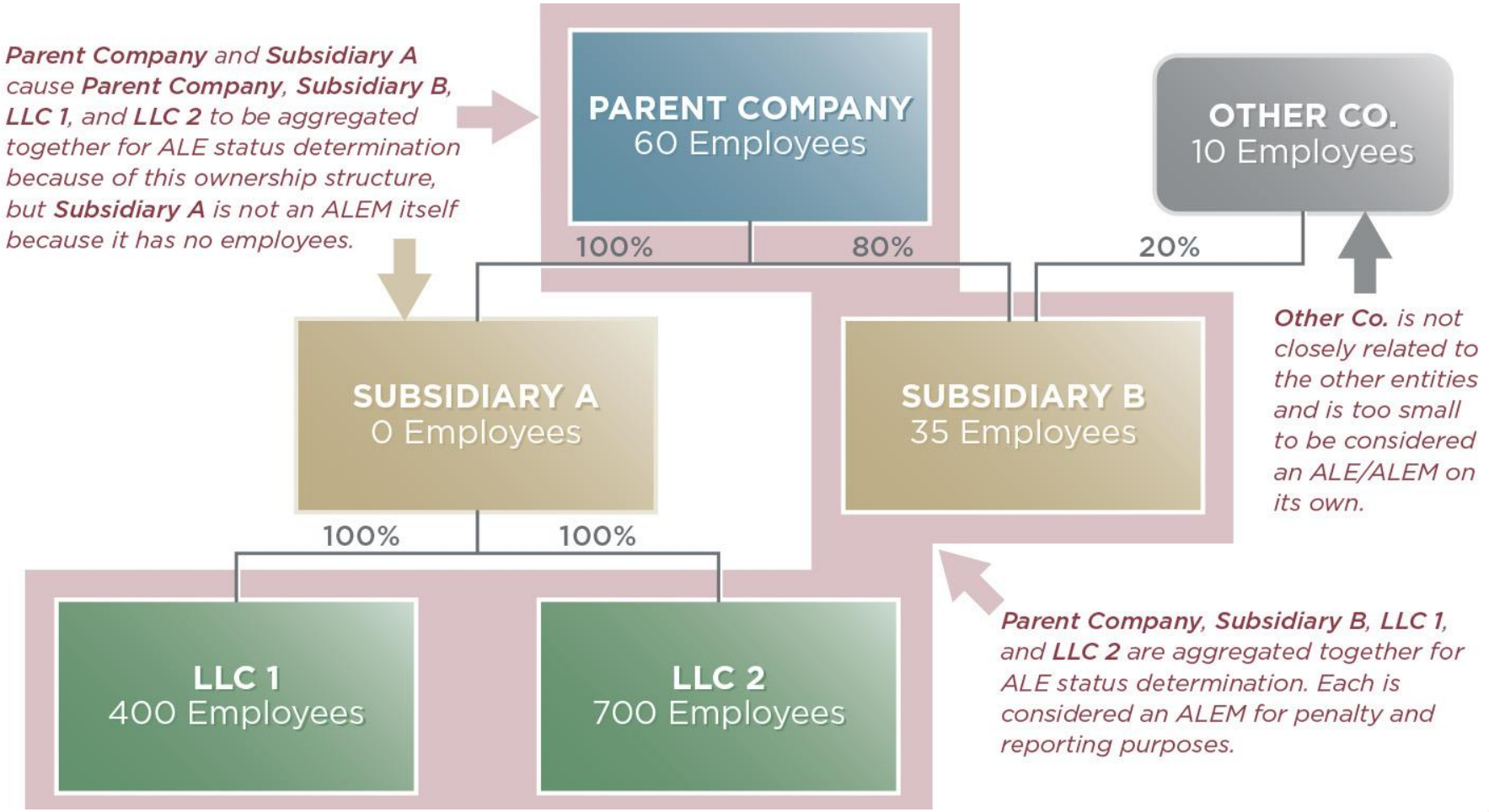
ALE/ALEM STATUS DETERMINATION EXAMPLE 1



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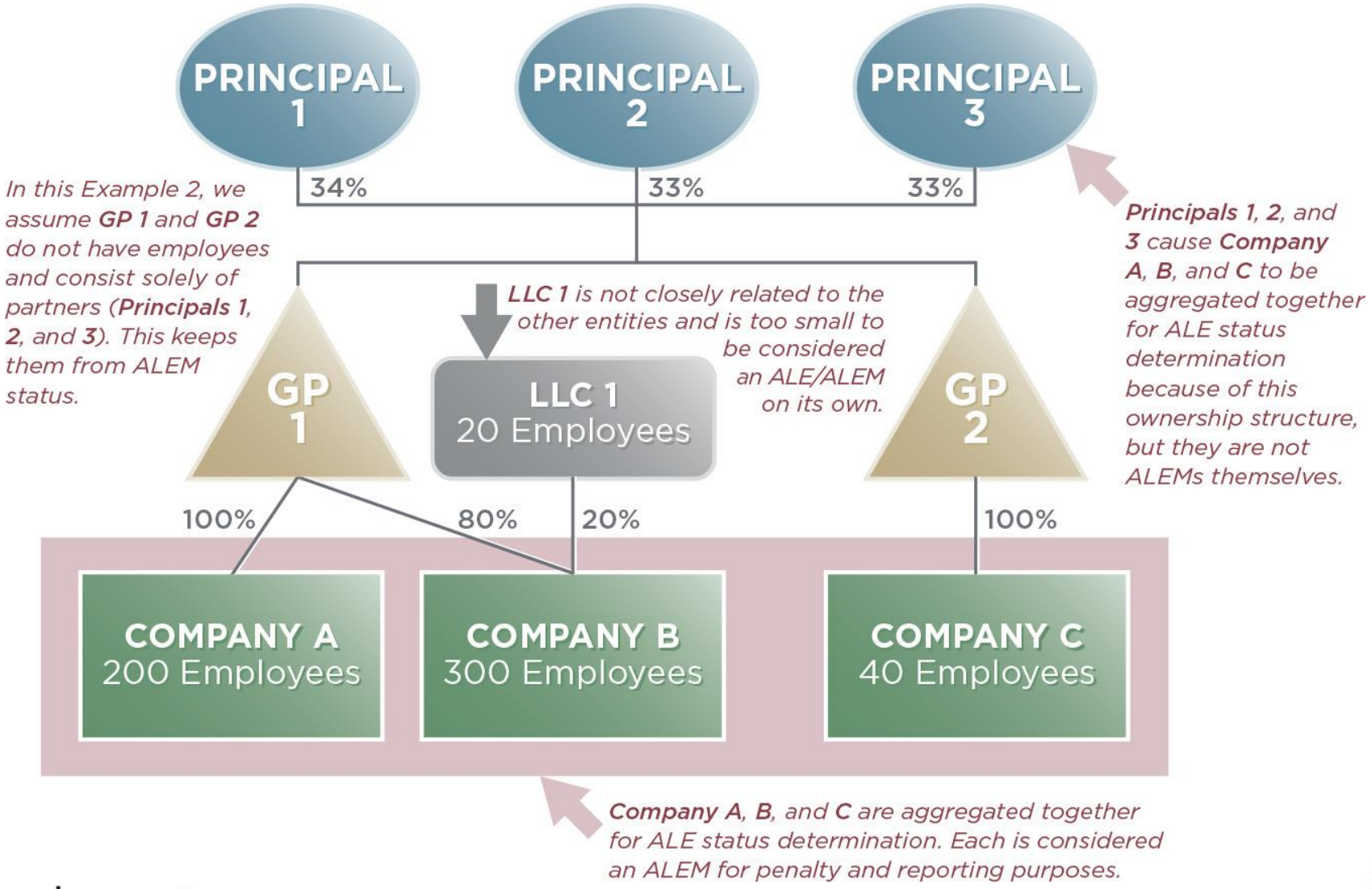
ALE/ALEM STATUS DETERMINATION EXAMPLE 2



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EMPLOYER SHARED RESPONSIBILITY RULE – ACA REPORTING

IRS Form	Who Reports?	Who Receives?	Description
1094-C	ALEM	• IRS	• Transmittal form accompanying Form(s) 1095-C for that ALEM • Identifies ALEM, provides information about the total number of employees and FTEs, and identifies other members of Aggregated ALE Group (if any) • Used by IRS to help determine if penalties apply
1095-C	ALEM	• IRS • Individual	• Provides information about individual and ALEM • Provides information about whether coverage was offered, its cost, enrollment or other circumstances enabling the ALEM to avoid potential penalty • Provides information about enrollment of the individual and any dependents in self-insured medical coverage • Used by IRS to help determine if penalties apply and by individuals for individual mandate purposes
1094-B	Insurance Carrier*	• IRS	• Transmittal form accompanying Form(s) 1095-B filed by insurance carrier * A small employer with a self-insured medical plan will also use Form 1095-B to report coverage and use Form 1094-B as the transmittal
1095-B	Insurance Carrier*	• IRS • Individual	• Identifies individuals enrolled under insurance carrier's insured medical plan • Used by individuals for individual mandate purposes * A small employer with a self-insured medical plan will also use Form 1095-B to report coverage

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ACA REPORTING – DELAYS, CHANGES, AND PROPOSED CHANGES

Item	Description

1. Form due dates	• For the 2015 reporting year, the IRS extended the form due dates:
	  ○ Forms to individuals – The due date was extended from February 1, 2016 to March 31, 2016
	  ○ Forms to the IRS – The due date was extended from March 31, 2016 to June 30, 2016 (if filing electronically); or from February 29, 2016 to May 31, 2016 (if not filing electronically; fewer than 250 forms)
	
	• For the 2016 reporting year, the due dates reset:
	  ○ Forms to individuals – January 31, 2017
	  ○ Forms to the IRS – March 31, 2017 (if filing electronically); or February 28, 2017 (if not filing electronically; fewer than 250 forms)

2. Form 1095-C, Part II Plan Start Month	• This information is optional for the 2015 reporting year and mandatory beginning with the 2016 reporting year

3. Form 1095-C, Part II Qualifying Offers to Spouses, Line #14	• The IRS indicates it intends to include two additional Code 1 Series codes to reflect certain qualifying offers affecting spouses for the 2016 reporting year, likely:
	  ○ Spousal eligibility is contingent on the spouse not having access to other employer coverage; or
	  ○ A spouse with access to other employer coverage is eligible but the employee is subject to a spousal surcharge

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EMPLOYER SHARED RESPONSIBILITY RULE – OTHER CHANGES

Item	Description
1. Federal public insurance marketplace notice	• Beginning Spring 2016, the federal marketplace will start mailing notices to employers whose employees have enrolled in the marketplace and receive subsidies • Initially, notices will only be mailed to employers if the employee provided the marketplace with a complete employer address • Employers will have 90 days to appeal an employee's subsidy eligibility (to help avoid potential penalties)

2. "Hours of service" and disability	• "Hours of service" for FTE determination purposes includes an employee's time spent on paid short or long-term disability
	  • whether the disability coverage is insured or self-insured
	  • unless the disability coverage was 100% paid by the employee on an after-tax basis with no direct or indirect contribution from the employer

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EMPLOYER SHARED RESPONSIBILITY RULE – OTHER CHANGES

Item	Description
3. Employer affordability calculation percentage	• 9.5% employer affordability calculation percentage used for the W-2 and rate of pay employer affordability safe harbor methods will be indexed • 9.56% for 2015 • 9.66% for 2016

4. Employer affordability calculation, opt-out credits, and flex credits	• The following will be added to the required employee contribution when determining affordability:
	  • Value of an opt-out credit for declining medical coverage
	  • Value of employer flex credits that may be used by an employee toward the purchase of medical if the flex credits may be used toward the purchase of non-health benefits and/or received as cash
	• Opt-out and flex credit arrangements in effect by December 16, 2015 are grandfathered until first plan year beginning on/after January 1, 2017
	• Because reporting a lower required employee contribution could affect subsidy eligibility, employers are encouraged to add flex credits usable toward non-health benefits or cash outs to the employee's required contribution for Form 1095-C purposes in 2015 and 2016; employers assessed penalties because of this can appeal that they merely reflected the cost as the IRS requested

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EMPLOYER SHARED RESPONSIBILITY RULE – OPT-OUT CREDITS AND FLEX CREDITS EXAMPLES

Example 1 (Opt-out Credit)

- Employee-only coverage in the lowest cost medical plan option is $80 per month. If an employee waives medical coverage, the employee receives a $50 per month opt-out credit. For affordability calculation purposes, the employee contribution for employee-only coverage in the lowest cost medical plan option is $130/month ($80 + $50).

Example 2 (Flex Credit)

- Employee-only coverage in the lowest cost medical plan option is $200 per month. The employer makes $1,200 in flex credits available through its cafeteria plan toward the purchase of medical, dental, and vision coverage. For affordability calculation purposes, the employee contribution for employee-only coverage is reflected as $100/month ($200 x $12) – $1,200).

Example 3 (Flex Credit)

- Employee-only coverage in the lowest cost medical plan option is $200 per month. The employer makes $1,200 in flex credits available through its cafeteria plan toward the purchase of medical, dental, vision, HSA, DCFSA, disability, and life insurance coverage. For affordability calculation purposes, the employee contribution for employee-only coverage should be reflected as $200/month because the flex credits can be used toward non-health benefits.
- Note: An employer could reflect the cost of coverage as $100/month until 2017 (or earlier if regulations are issued with an earlier effective date), but the IRS is encouraging employers to reflect the cost as $200/month in the meantime (see previous slide)

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EXCISE TAX ON HIGH COST COVERAGE

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EXCISE TAX ON HIGH COST COVERAGE

Requirement	Description

What is it? The “Cadillac Tax” 	• A 40% tax on the cost of employer-provided group health coverage that exceeds certain statutory thresholds:
	  • $10,200 for self-only coverage
	  • $27,500 for coverage other than self-only
	• These amounts are indexed and certain adjustments are also available for age and gender, qualified retirees, and plans primarily covering those engaged in certain high risk professions
	• Multiemployer plans may calculate excise tax liability solely using the threshold for coverage other than self-only (this is the only “break” for unions)
	• The threshold is based upon the “cost” of coverage, which is the unsubsidized premium (i.e. employee + employer portion)
	• A plan’s claims experience does not directly affect the excise tax for that year but may indirectly affect the excise tax in a subsequent year by affecting the future premium
	• The excise tax is intended to:
	  • Act as a revenue raiser for the ACA;
	  • Claw back the unlimited tax deduction available for employer-provided coverage; and
	  • Reduce demand for high cost coverage by making it more expensive

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EXCISE TAX ON HIGH COST COVERAGE

Requirement	Description

What is included?	• This is in flux and currently includes:
	  • Medical and prescription drug coverage
	  • Health FSA, HRA, and pre-tax HSA contributions
	  • Onsite clinics if they provide significant medical benefits (i.e. operate more like a traditional clinic or doctor's office and not merely an aid station)
	  • EAP coverage if it provides significant medical benefits (but many will not)
	• Out or potentially "on the outs":
	  • Most forms of HIPAA excepted benefits (e.g. likely catches most EAPs) including limited scope dental and vision coverage whether insured or self-insured
	  • Limited scope health FSAs/HRAs (e.g. can only reimburse for dental and/or vision expenses)
	• Retiree coverage isn't excluded merely for being retiree coverage

Who pays?	• Insurance carriers for insured coverage • The IRS is considering whether the plan administrator or third-party administrator (TPA) should be responsible for self-insured coverage • Insurance carriers and TPAs will want to pass cost through to employers (the reimbursement is a taxable event to the insurer and/or TPA)

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EXCISE TAX ON HIGH COST COVERAGE

Requirement	Description

How is it calculated?	• The cost of coverage is generally determined under the rules for determining the applicable COBRA premium
	  • IRS is likely to issue guidance describing appropriate methods including the actuarial basis and past cost methods
	  • This could affect how COBRA premiums are set in general
	• Employees who elect the same benefit packages will be grouped together into self-only and other than self-only groups
	• If the cost of coverage for the group exceeds the applicable excise tax threshold, the excess is subject to tax
	• The IRS is exploring permitting employers to subdivide the other than self-only group into sub-groups based on employment criteria (e.g. hourly versus salaried, collective bargaining status, geography, business unit, etc.)

When is it paid?	• Intended to be a calendar year reporting obligation without regard to plan year • For example, reporting for the 2020 calendar year may be due by the end of the 1st quarter in 2021 • Reporting and payment will occur on a lag basis; IRS is exploring including this excise tax on IRS Form 720 (see slide #27) • The IRS is exploring taking into account the information timing needs for FSA/HRAs with run-out periods and experience-rated contracts

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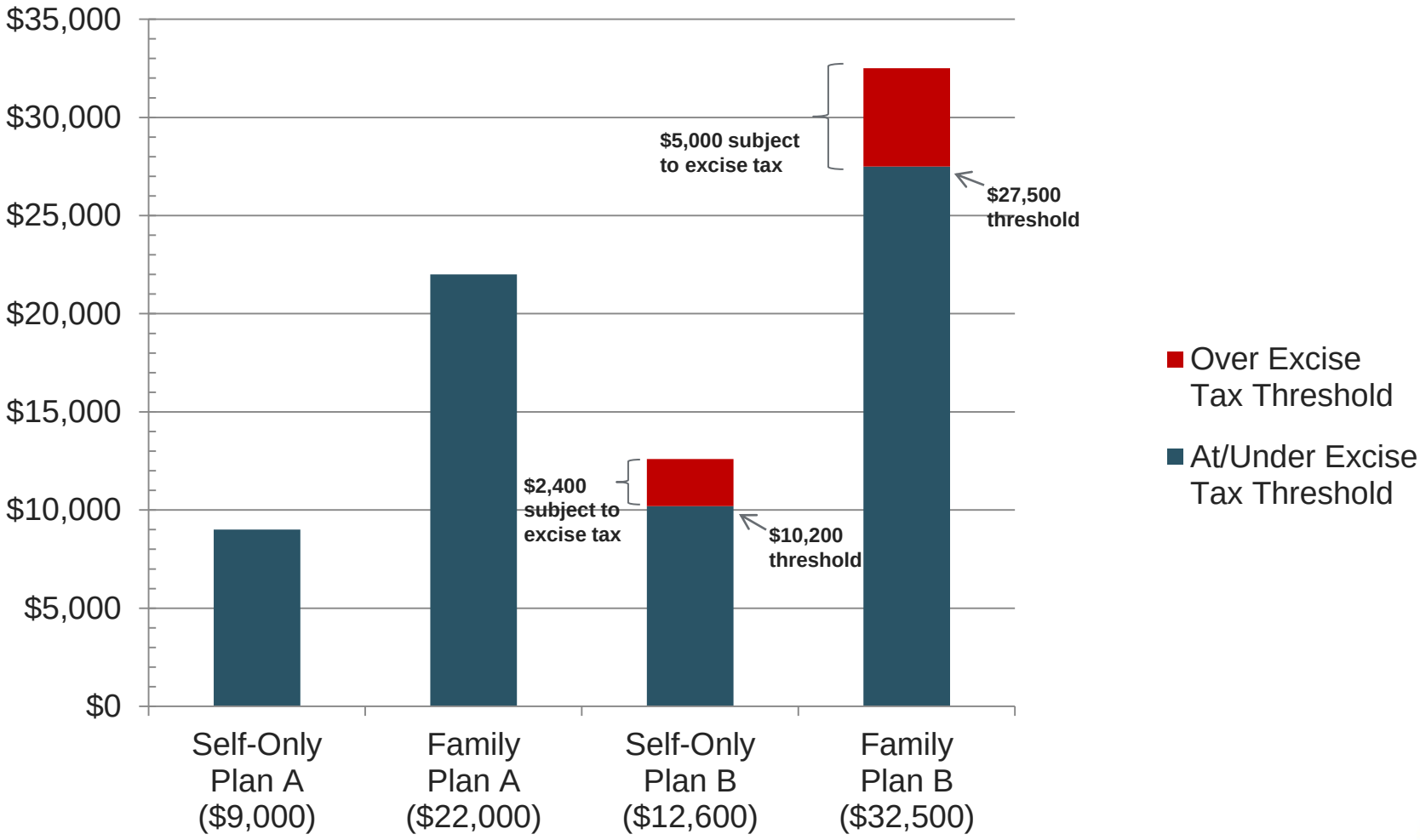
EXCISE TAX ON HIGH COST COVERAGE TAX – EXAMPLE 1



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EXCISE TAX ON HIGH COST COVERAGE – DELAYS, CHANGES, PROPOSED CHANGES

Item	Description
1. Excise tax delayed and made tax deductible for employers	• Initial excise tax year delayed from 2018 to 2020 • Excise tax made tax deductible for employers

2. Proposed geographical variation for determining excise tax threshold	• The 2017 Obama Administration's budget proposal includes a proposed change to modify the excise tax thresholds to account for geographical variation in the cost of health coverage
	• Under proposal, the excise tax thresholds would be equal to the greater of:
	  • The statutory limits (currently $10,200/$27,500 in 2018 dollars); or
	  • The average cost for self-only and other than self-only Gold plan coverage in the public insurance marketplace published for each state
	• The threshold will be based on the employee state of residency
	• Multi-state employers will use a weighted average (presumably proportional to the size of the enrolled population in each state)

3. The debate about the inclusion of spending accounts rages on	• The IRS fielded a large number of comments upset at the inclusion of FSAs and HSAs, particularly the inclusion of the employee's own pre-tax contributions • Employers will likely drop and/or limit these benefits as necessary to minimize excise tax liability if the rules are not changed • Individuals can contribute to HSAs on their own and take a deduction when filing personal income tax return; miss out on payroll tax savings

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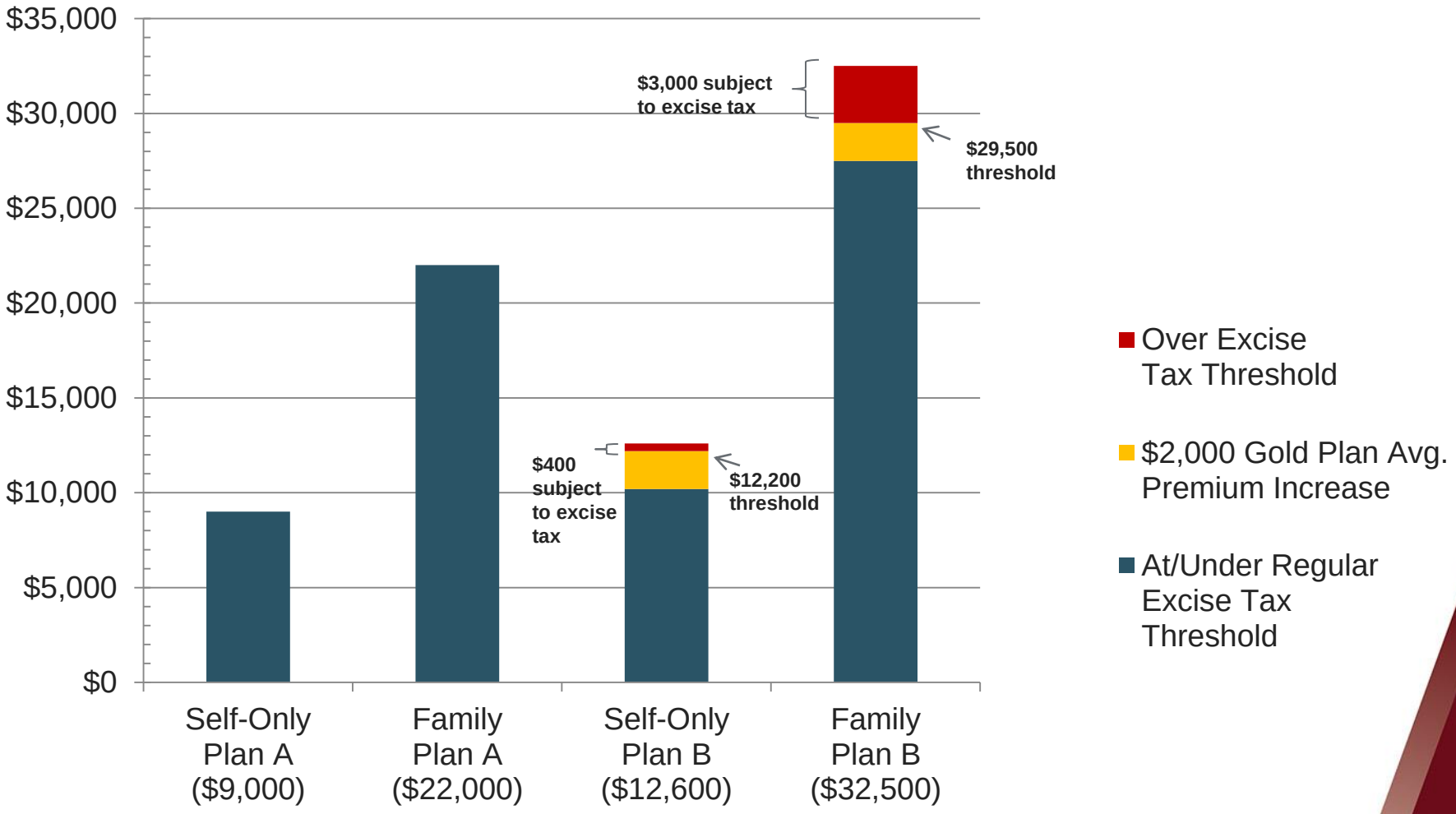
EXCISE TAX ON HIGH COST COVERAGE – EXAMPLE 2 (PROPOSED GOLD PLAN GEOGRAPHICAL VARIATION)



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OTHER ACA ITEMS

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PATIENT CENTERED OUTCOMES RESEARCH INSTITUTE (PCORI) FEE & TRANSITIONAL REINSURANCE FEE

Covered lives fees for certain group health coverage

PCORI Fee

- Reported and paid by insurer for insured coverage and by plan sponsor for self-insured coverage
- Reported on IRS Form 720 by July 31st (2nd Quarter) for the previous year
- Plan years ending October 2014 through September 2015: $2.08/ covered life
- Plan years ending October 2015 through September 2016: $2.17/ covered life

Transitional Reinsurance Fee

- Reported and paid by insurer for insured coverage and by plan sponsor or TPA on behalf of self-insured coverage
- This is the final year for the Transitional Reinsurance Fee, which must be reported by November 15, 2016, and is approximately $27 per covered life (can be paid in two installments)

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PROPOSED HEALTH CARE NONDISCRIMINATION RULE

- The Department of Health and Human Services (HHS) issued a proposed rule under the ACA in late 2015 prohibiting discrimination on the basis of sex (including gender identity) in health care
  - HHS interprets the rule to impact an insurance carrier's and/or third-party administrator's entire book of business if the entity receives federal funding (e.g. Medicare, Medicaid, from the public insurance marketplace)
  - For example, if an entity participates in the public insurance marketplace, an employer's self-funded medical plan administered by that entity as the TPA is also subject to the nondiscrimination rule
- Sex-specific health care cannot be denied or limited just because the person seeking the services identifies as belonging to another gender
  - For example, a plan cannot deny treatment for ovarian cancer for an individual born as a woman but identifying as a transgendered man

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PROPOSED HEALTH CARE NONDISCRIMINATION RULE

- Explicit coverage exclusions for all health care services related to gender transition are discriminatory
  - Presumably, exclusions such as limiting coverage to generic hormone replacement therapy drugs where available and effective or other reasonable medical management techniques will be permitted
- HHS is considering including an exemption for religious organizations
- The rule will likely take effect for the 2017 plan year

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OTHER ODDS AND ENDS

- Health reimbursement arrangements (HRAs)
  - General purpose HRAs offered by employers that cover active employees must generally be integrated with group health coverage in order to comply with certain ACA plan design mandates
  - The IRS released guidance effective for the 2017 plan year indicating that HRAs may only be integrated with a group health plan if the individuals "covered" under both the group health plan and HRA match
    - For example, if an employee enrolls in self-only coverage but may use her HRA to reimburse for her spouse's medical expenses, the HRA is not integrated with the group health plan
    - Informally, IRS indicated that likely this resolved if HRA integrated with spouse's employer's coverage
  - HRAs that do not cover active employees (e.g. retiree HRAs) and HRAs that limit reimbursements to dental and/or vision expenses remain exempt from this issue

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OTHER ODDS AND ENDS

- Public insurance marketplace
  - 2017 expected open enrollment period November 1, 2016 – January 31, 2017
  - Beginning in 2017, states can choose to permit employers with 100 or more employees to participate in the public insurance marketplace (currently limited to individuals and smaller employers) and purchase large group health plan coverage
    - For now, it seems unlikely that many (any?) states are planning to enable this for 2017
- Summary of benefits and coverage (SBC)
  - A new proposed SBC template has been released for use in connection with the 2017 plan year
    - Questions on first page streamlined
    - Less boilerplate language in the middle
    - A third example for plan costs (simple fracture) at the end

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OTHER ODDS AND ENDS

- Health insurer fee
  - Health insurers are allocated a portion of the overall health insurer fee target amount based on their U.S. health plan book of business
  - Fee is typically passed through to clients as an expense
  - This fee will not be assessed and collected for the 2017 year and should slow the rate of premium increase or produce a small savings for many insured clients

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AFFORDABLE CARE ACT: WHAT CAN YOU EXPECT IN THE NEXT COUPLE OF YEARS?

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28th Annual Employment Law Update
April 21, 2016

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ARE WE OUTTA THE WOODS YET? – A GUIDE TO NAVIGATING COMPLEX ISSUES UNDER THE FMLA AND ADA

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April 21, 2016

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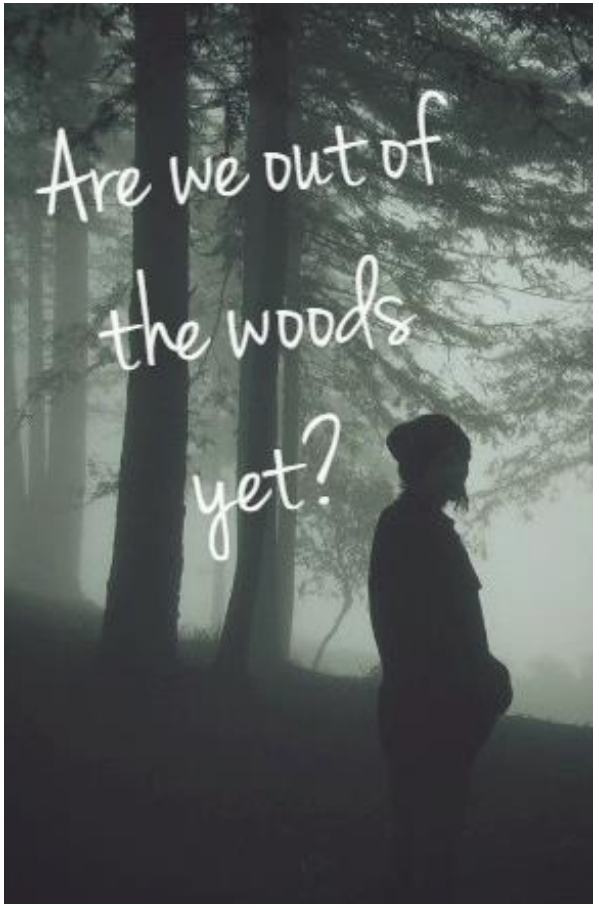
AGENDA

- Modified Work Schedules as a Reasonable Accommodation and Intermittent Leave
- Leave as a Reasonable Accommodation
- Addressing and Accommodating Mental Impairments
- Preventing FMLA/ADA Fraud and Abuse



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When Your Full-Time Position Is Converted Into A Part-Time/Telecommuting, Work-When-I-Feel-Like-It Gig

Modified Work Schedules as a Reasonable Accommodation and Intermittent Leave

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POP QUIZ

Emily Employee works as a sales manager for Acme Supply Company. Emily typically works Monday through Friday, 8 am to 6 pm. After nine months on the job, Emily takes a medical leave of absence while she undergoes back surgery. Three months later, Emily notified her employer that she is ready to return to work on a part-time basis with the goal of working up to full-time within the next six months. Due to intermittent back pain which she cannot always anticipate, Emily requests that her employer allow her to come and go during this time period depending upon how she feels with no set hours.

Is Emily's Employer required to grant Emily's request?

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MODIFIED WORK SCHEDULES

- Under the ADA, a “reasonable accommodation” may include job restructuring and part-time or modified work schedules provided no undue hardship exists.
- Examples include:
  - Adjusting arrival or departure times.
  - Providing periodic breaks.
  - Altering when/how certain functions are performed.
  - Allowing an employee to use accrued paid leave.
  - Providing additional unpaid leave.
- However, changing a full-time position to a part-time position is not a reasonable accommodation if the change would require the elimination of an essential job function, would require the employer to create another part-time position, or would require other employees to work harder or longer.

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MODIFIED WORK SCHEDULES

- What should Emily's Employer do?
- Engage in the interactive process to determine if the requested work schedule is reasonable or whether alternate reasonable accommodations exist:
  - Analyze the essential functions of the employee's job;
  - Determine whether he/she is able to perform the essential functions pursuant to the requested modified schedule;
  - Document the findings and any basis for asserting undue hardship;
  - If modifying an employee's schedule poses an undue hardship, an employer must consider reassignment to a vacant position that would enable the employee to work during the hours requested.

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TIME AND ATTENDANCE REQUIREMENTS

- The ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship).
- However, employers need not:
  - Completely exempt an employee from time and attendance requirements;
  - Grant open-ended schedules (*e.g.*, the ability to arrive or leave whenever the employee's disability necessitates); or
  - Accept irregular, unreliable attendance.

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TIME AND ATTENDANCE REQUIREMENTS

- Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.
- The chronic, frequent, and unpredictable nature of such absences may put a strain on the employer's operations for a variety of reasons, such as the following:
  - An inability to ensure a sufficient number of employees to accomplish the work required;
  - A failure to meet work goals or to serve customers/clients adequately;
  - A need to shift work to other employees, thus preventing them from doing their own work or imposing significant additional burdens on them; and
  - Incurring significant additional costs when other employees work overtime or when temporary workers must be hired.

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UNREASONABLE ACCOMMODATIONS

- Not required to **eliminate a primary job responsibility**.
- Not required to **lower production standards** that are applied to all employees, though it may have to provide reasonable accommodation to enable an employee with a disability to meet them.
- Not required to provide personal-use items.
- Not required to **excuse a violation of a uniformly applied conduct rule** that is job-related and consistent with business necessity.

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POP QUIZ

During the interactive process, Emily and her Employer came up with a mutually agreeable modified work schedule wherein she would take breaks when she experienced bouts of pain. After 3 months of this modified work schedule, Emily became eligible for FMLA leave and requests to leave work on an “as needed” basis.

Must Emily’s employer comply with this request?

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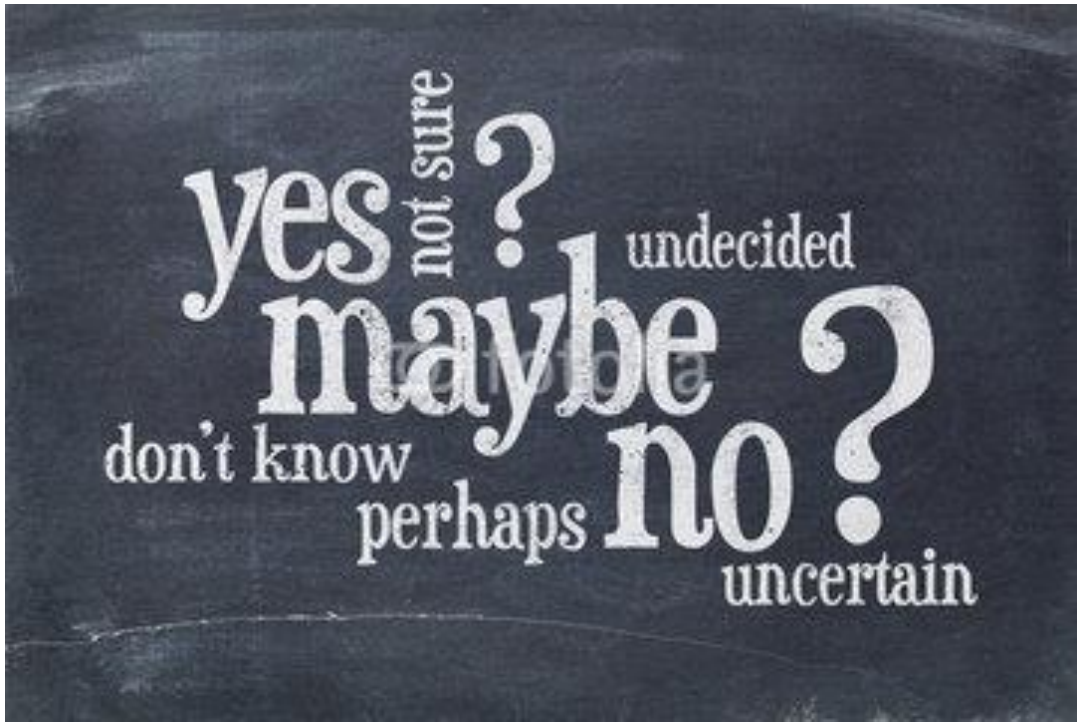
INTERMITTENT LEAVE UNDER THE FMLA



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MANAGING INTERMITTENT LEAVE REQUESTS

- Request certification and re-certification.
- Require employees to follow Company call-in policies.
- Track the employee's intermittent leave.
- Ask employees taking planned intermittent leave to schedule leave so that it does not unduly disrupt business operations when possible.
- If leave is foreseeable, consider transferring the employee temporarily to an alternative job with equivalent pay and benefits that better accommodates recurring periods of leave.

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ADA V. FMLA

- An employer should determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take.
- Under the ADA, an employee who needs a modified or part-time schedule because of his/her disability is entitled to such a schedule if there is no other effective accommodation and it will not cause undue hardship.
- Under the FMLA, an eligible employee is entitled to take leave intermittently or on a part-time basis, when medically necessary, until s/he has used up the equivalent of 12 workweeks in a 12- month period.
- Leave must be provided under whichever statute provides the greater rights.

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POP QUIZ

During the interactive process, Emily suggests that telecommuting would allow her to perform the essential functions of her position while still enabling her to start late/take breaks when she experiences bouts of pain. Emily requests to telecommute up to 4 days each week on an unpredictable schedule and asserts that she can supervise the sales managers and interact with customers remotely via email, telephone, and videoconferencing. The Company has a telecommuting policy, but it requires that employees come to the office as needed, even on days set for telecommuting, and provides that jobs which require "face-to-face contact" may not be appropriate for telecommuting.

Is Emily's Employer required to allow her to telecommute?

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TELECOMMUTING AS A REASONABLE ACCOMMODATION

- Telecommuting may constitute a reasonable accommodation under the ADA, but the relevant inquiry is whether the essential functions can be performed at home.
- Factors to consider include:
  - The employer's ability to supervise the employee adequately.
  - Whether any duties require use of certain equipment or tools that cannot be replicated at home.
  - Whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace.
  - Whether there is a need for face-to-face interaction and coordination of work with other employees.
  - Whether in-person interaction with outside colleagues, clients, or customers is necessary.

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TELECOMMUTING AS A REASONABLE ACCOMMODATION

- Remember in the end it is the employer's choice: An employer may select another effective accommodation which would enable an employee to perform the essential functions of his/her job even if it is not the employee's preferred choice.

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ANDERSON V. HARRISON COUNTY, MISS.,
NO. 14-60896, 2016 WL 547800 (5TH CIR. FEB. 12, 2016) (PER CURIAM)

- Plaintiff Patricia Anderson was a correctional officer for the Harrison County Adult Detention Center working an 8-hour shift Monday through Friday as a canteen officer.
- Facility wide restructuring of the correctional officer position reassigned a majority of the correction officers to 12-hour shifts with rotating, rather than fixed duties.
- Anderson submitted documentation from her psychotherapist stating that she was suffering from severe anxiety and depression and, as a result, could only work a 6-8 hour shift.
- Anderson's request was denied—there was no position available as a result of the restructuring and a schedule modification would result in an undue hardship.

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ANDERSON V. HARRISON COUNTY, MISS.,
NO. 14-60896, 2016 WL 547800 (5TH CIR. FEB. 12, 2016) (PER CURIAM)

- Win for the Employer?
- Yes!
- The warden testified that even when all of the corrections officers worked 12-hour shifts, the facility often was short staffed, requiring some of the higher ranking officers to perform the correction officer duties.
- As a result, Anderson's scheduling accommodation could not have been accomplished without requiring other corrections officers to work longer hours and extended shifts.
- Anderson failed to submit any evidence that either rebutted or undermined the warden's testimony that her requested accommodation would have caused the County an undue hardship.

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When Enough Is Enough

Leave as a Reasonable Accommodation

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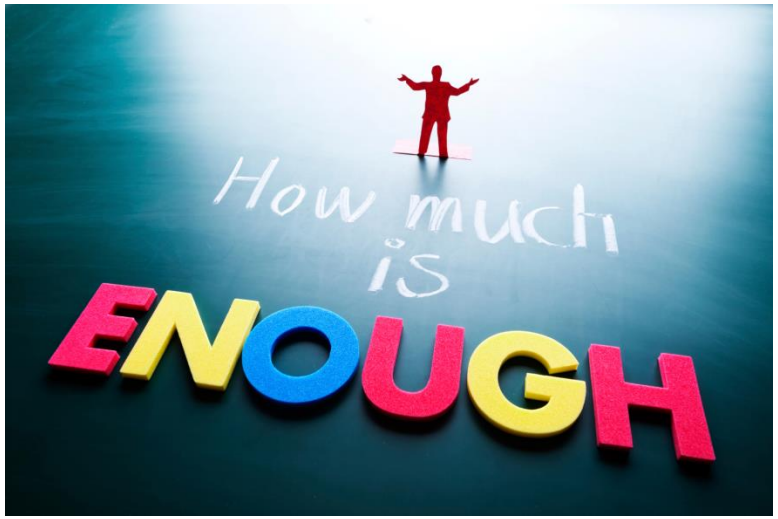
POP QUIZ

Ellen the employee took an FMLA leave of absence for her epilepsy. Ellen also received 6 months of short-term disability benefits. Ellen's employer allowed her to take leave for the entire short-term disability period, but is anxious to let Ellen go so it can find a permanent replacement for Ellen's position.

Can Ellen's employer terminate her after this 9 months' leave of absence?



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WHEN IS ENOUGH ENOUGH?

- There is no bright line/specified amount of time.
- Employers must analyze leave requests on a case-by-base basis.
- No obligation to provide indefinite leave, but an approximate return to work date is okay.
- Leave must provide employee with a reasonable prospect to return to work in the foreseeable future.
- Engage in the interactive process!

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UNDUE HARDSHIP – IMPACT ON OPERATIONS

Relevant Factors May Include:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error.
- Lower quality and less accountability for quality.
- Lost sales.
- Less responsive customer service and increased customer dissatisfaction.
- Deferred projects.
- Increased burden on management staff required to find replacement workers, or readjust work flow or readjust priorities in light of absent employees.
- Increased stress on overburdened co-workers.

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POP QUIZ

Ethan Employee has been on a FMLA leave of absence for 10 weeks when his employer informs him that he has 2 weeks remaining of FMLA leave and requests an approximate return to work date. Ethan knows he's not able to return to work at the end of his FMLA leave, but tells his employer he should be able to return to work after an additional month of leave.

Does Ethan's Employer have to grant his additional leave request?

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LEAVE AS A REASONABLE ACCOMMODATION

- No obligation to provide additional leave if medical evidence indicates that the employee cannot currently perform the job with or without a reasonable accommodation and will likely be unable to do so by some specified or estimated date in the future—despite an employee's hope he/she will be able to return.
- But, still engage in and document the interactive process!
- An employer should allow an employee to present evidence that he may be able to return to work in the foreseeable future.

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BEST PRACTICES FOR LEAVE REQUESTS UNDER THE ADA

- Request documentation from a healthcare provider explaining the nature of the medical condition and an estimate of the leave required.
- Identify the essential functions of the employee's position.
- Conduct an individualized assessment to determine if the leave request is reasonable or whether another reasonable accommodation would allow the employee to perform the essential functions of his/her job.
- Engage in and document the interactive process as well as how the leave is impacting business and operations.
- Communicate during FMLA leave . . . after FMLA leave ends . . . and at all times before and in between!

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When Generalized Fear Takes Over

Addressing and Accommodating Mental Impairments

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POP QUIZ

Suicidal Sammy works as a shoe salesman at the Shoe Factory. Sammy was a top salesman who got along well with all of his co-workers and supervisors. One day, Sammy mentioned to a coworker that he was going through personal issues and was planning to go home after his shift, put his affairs in order, and commit suicide.

Shoe Factory calls 911 and Sammy does not commit suicide.

In light of Sammy's mental instability, Shoe Factory wants to place him on a medical leave of absence pending a psychiatric evaluation.

Smart or Not Smart?

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ADDRESSING AND ACCOMMODATING MENTAL IMPAIRMENTS

- While a medical leave of absence is a reasonable accommodation under the ADA, an employer cannot force an employee to take a leave of absence or submit to a medical exam unless the employer has a "reasonable belief, based on objective evidence that an employee's ability to perform essential functions will be impaired by a medical condition, or an employee will pose a direct threat due to a medical condition."
- What Should Shoe Factory do here?
- What if Sammy worked as a nurse at a hospital or as a police officer?

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WALTON V. SPHERION STAFFING, NO. 13-6896, 2015 WL 171805 (E.D. PA. JAN. 13, 2015)

- Plaintiff Taj Walton experienced suicidal and homicidal ideations at work.
- In a plea for help, Walton wrote the following note to his supervisor:

  "Lizelle, Please Help Call [*telephone number provided*] Mom [*telephone number provided*] Dad The police I'm scared and angry. I don't know why but I wanna kill someone/anyone. Please have security accompany you if you want to talk to me. Make sure, please. I'm unstable. I'm sorry Taj."
- The Company called police who drove Walton to a nearby hospital without incident.
- Walton was subsequently diagnosed with depression and was advised to seek further medical treatment.
- Walton quickly sought to advise his supervisor of his diagnosis and intention to seek additional treatment; but was repeatedly unable to reach her.
- Three weeks later, Walton's supervisor terminated him.
- Did Spherion violate Walton's rights under the ADA?

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WALTON V. SPHERION STAFFING, NO. 13-6896, 2015 WL 171805 (E.D. PA. JAN. 13, 2015)

- Spherion alleged it had no choice but to terminate a potentially dangerous employee for misconduct and that proclivities towards violence are not protected under the ADA.
- Court refused to dismiss Walton's ADA claim as Walton neither committed nor threatened violent acts—he simply sought assistance:

> "I am mindful of the fact that as a medical condition mental illness is frequently misunderstood. Predictable, and in some instances understandable, **fear of the mentally-ill can skew an objective evaluation of risk.** There is no indication here that Walton had a history of any violent conduct whatsoever, and as set forth above, his individual instinct in the moment of crisis was to seek help, and to be protective of others."

- What should Spherion have done?

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STERN V. ST. ANTHONY'S HEALTH CENTER, 788 F.3D 276 (7TH CIR. 2015)

- Plaintiff Dr. Michael Stern was the Chief Psychologist for an acute care facility who experienced poor memory and cognitive issues.
- Dr. Stern's employer placed him on a paid leave of absence pending a fitness-for-duty evaluation.
- Fitness-for-duty exam revealed short term and delayed memory functioning in the second and fifth percentiles and concluded not fit for duty.
- St. Anthony terminated Dr. Stern without first discussing the findings with him.
- Did Dr. Stern's termination violate the ADA?

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STERN V. ST. ANTHONY'S HEALTH CENTER, 788 F.3D 276 (7TH CIR. 2015)

- **Termination Upheld**
- Proposed accommodations were contingent upon eliminating essential functions of Dr. Stern's jobs and were based upon a conclusory and untested opinion/hope that Dr. Stern could perform these remaining duties effectively.
- But, employers should still engage in the interactive process!

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POP QUIZ

Erica Employee requests time off of work because she is “stressed” in her current position as an accountant for her employer. She complains that her supervisor frequently yells and speaks to her in a derogatory manner causing her to suffer from stress. She also wants to be assigned a supervisor who does not “stress her out.”

Is Erica’s employer requested to provide her with a stress-related leave of absence and provide her with a nicer supervisor?

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STRESS-RELATED FMLA LEAVE AND ACCOMMODATIONS

- Stress alone is not a serious health condition or disability
- Providing a “stress-free environment” is not a reasonable accommodation.
- An employee’s ability to handle reasonably necessary stress and work reasonably well with others are essential functions of any position.

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ADDRESSING AND ACCOMMODATING MENTAL IMPAIRMENTS

- Avoid making decisions based upon generalized fear of mental illness—conduct an individualized assessment.
- Require a medical exam before an employee may return to work but only where permissible.
- Don’t assume an employee with performance problems has a mental disability.
- Hold all employees to the same performance standards regardless of a disability, but provide accommodations where needed.
- Don’t withhold discipline even if misconduct might be due to the employee’s mental illness.

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Friday and Monday Leave Act

Preventing FMLA/ADA Fraud and Abuse

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POP QUIZ

Kim calls in on the Friday before Memorial Day Weekend and says she cannot come in to work because she is having an insulin reaction. Kim is diabetic and has a current FMLA medical certification stating that she may need intermittent leave for the condition. On the Tuesday following Memorial Day, an employee reports to his supervisor that he saw pictures posted by Kim on Facebook showing her tubing on the Guadalupe River. The employee was upset because he had to fill in for Kim during her absence.

What should Kim's employer do?

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PREVENTING FMLA/ADA FRAUD AND ABUSE

- Avoid jumping to conclusions.
- Investigate patterns of absences and talk to the employee.
- Under FMLA, request recertification, which includes providing the employee's healthcare provider with a record of the employee's absence pattern and ask the healthcare provider if the serious health condition and need for leave is consistent with that pattern.

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POP QUIZ

Ben has a chronic illness and on occasion it renders him unable to work. Ben has exhausted all of his FMLA leave, but the Company has allowed him to modify his work schedule as a reasonable accommodation when Ben has a flare up. On Friday, Ben calls in sick due to a flare up related to his chronic illness.

The Company discovers that Ben is looking for a new job and has been interviewing with potential employers. In fact, Ben had an interview on the Friday he called in sick.

The Company wants to fire Ben. How should the Company proceed?

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CURTIS V. COSTCO WHOLESALE CORP., 807 F.3D 215 (7TH CIR. 2015)

- Plaintiff Keith Curtis was an optical manager employed by Costco with a history of customer complaints and poor performance.
- In September 2011, Curtis requested and was provided a medical leave of absence under the FMLA due to stress and anxiety.
- After returning to work following the leave, Curtis's work performance did not improve and ultimately Curtis was placed on a 90 day PIP in April 2012.
- In May 2012, Curtis's subordinate informed Costco that she was concerned Curtis was going to "scam" the Company as Curtis allegedly told her he intended to take a medical leave of absence to secure his position and pay in the event of a demotion.
- Shortly thereafter, Curtis was demoted and two days later, Curtis took FMLA leave.
- Curtis filed suit for violation of the FMLA.

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CURTIS V. COSTCO WHOLESALE CORP., 807 F.3D 215 (7TH CIR. 2015)

- FMLA not triggered—Curtis's comment made in passing to a subordinate employee that he was contemplating taking a medical leave did not provide Costco management with sufficient information as required by the FMLA.
- Regardless, "activity that might normally receive FMLA protection is stripped of that protection when it is fraudulent."
- Costco demoted Curtis based upon information received from Curtis's subordinate that he intended to "scam" the Company by taking a fraudulent medical leave.

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I SPY . . .

- Can an employer spy on the employee taking FMLA leave or leave under the ADA?
- Yes, when employer has an honest suspicion that the employee is taking fraudulent leave.
- May also introduce evidence from surveillance to defend against interference claims.

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PREVENTING FRAUD AND ABUSE

- Certification and recertification are the best methods for preventing fraud and abuse.
- For reasonable accommodation requests, request documentation from a health care provider for non-obvious conditions.
- Request a second and possibly third opinion.
- Investigate allegations of fraud and abuse before taking an adverse employment action.
- Require all employees (even those on intermittent FMLA leave) to follow normal-call in procedures for reporting an absence, absent extenuating circumstances.
- Require accrued leave to run concurrently with FMLA leave.

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Case Law Updates

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INSUFFICIENT FMLA NOTICE CASES

- *Anderson v. McIntosh Construction*, *LLC*, 597 Fed. App'x 313 (6th Cir. 2015).

- *Brown v. Atrium Windows & Doors, Inc*., No. 3:13-CV-4819, 2015 WL 1736983 (N.D. Tex. Apr. 16, 2015).

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KINGSAIRE, INC. V. MELENDEZ, 477 S.W.3D 309 (TEX. 2015)

- Plaintiff Jorge Melendez lacerated his wrist while participating in demolition work for his employer which required surgery.
- Melendez filed a workers' compensation claim and took a leave of absence to recover.
- Two weeks after the incident, the Company provided Melendez with an FMLA notice advising Melendez that he would be placed on FMLA leave during his workers compensation leave.
- When Melendez's 12 weeks of FMLA leave expired, he had not been released to return to work and 4 days later, the Company terminated Melendez pursuant to Company policy.
- Melendez filed suit alleging that his termination was in retaliation for filing a workers' compensation claim.

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KINGSAIRE, INC. V. MELENDEZ, 477 S.W.3D 309 (TEX. 2015)

- Held: No retaliation because termination was pursuant to a "uniform enforcement of a reasonable absence-control policy."
- But, what about the ADA?

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ARE WE OUTTA THE WOODS YET? – A GUIDE TO NAVIGATING COMPLEX ISSUES UNDER THE FMLA AND ADA

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SCREENING CURRENT AND POTENTIAL EMPLOYEES: HOW THIS MAKES YOU A TARGET FOR A LAWSUIT

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Issue No. 1: Procedure

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“IT’S FUN TO COMPLY WITH THE…”

FCRA

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LIABILITY FOR FCRA VIOLATIONS

- Statutory actual damages range from $100 to $1,000 per consumer for willful noncompliance.
- There is no cap on punitive damages.
- Costs and reasonable attorney's fees are awarded for successful actions to enforce the FCRA.

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FAIR CREDIT REPORTING ACT

- Step 1 – Employers must obtain consent from an applicant or employee to run a background check before running a background check.
  - Notice and authorization (15 U.S.C. § 1681b(b)(2).)

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FCRA COMPLIANCE / SAMPLE FORM

Notice/Authorization and Release For A Consumer Report

I, the undersigned consumer, do hereby authorize

_____

by and through Employment Screening Services Inc. (ESS), to procure a consumer report on me. This report may include, but is not limited to, my personal credit history based on reports from any credit bureau; criminal history/records; my driving history, including any traffic citations; a social security number verification; information discerned through employment and education verifications; present and former addresses; and any other public record.

I further authorize any person, business entity or governmental agency who may have information relevant to the above to disclose the same to

_____

by and through ESS, including, but not limited to any and all courts, public agencies, law enforcement agencies and credit bureaus, regardless of whether such person, business entity or governmental agency compiled the information itself or received it from other sources.

I hereby release _____,
ESS, their successors and assigns, and any and all persons, business entities and governmental agencies, whether public or private, from any and all liability, claims and/or demands, by me, my heirs or personal representatives, successors, assigns, or others making such claim or demand on my behalf, for providing a consumer report hereby authorized.

I understand that this Notice/Authorization and Release form shall remain in effect for the duration of my employment and/or lease with said Company. Additionally, I give permission to investigate any incidents of workplace and/or general misconduct or criminal activity for which I might be alleged to have been involved during my employment and/or lease. Further, I certify that the information contained on this Notice/Authorization and Release form is true and correct and that my application and/or lease will be terminated based on any false, omitted or fraudulent information.

Signature: _____

Date: _____

Printed Name: _____
First Middle Last Maiden

Other Names Used (previously married names, nickname, aliases, other):

_____

List any friends/relatives working with Gray Fire Rescue:

CONVICTIONS

Have you ever been convicted of a felony within the last (10) years?	☐ YES ☐ NO

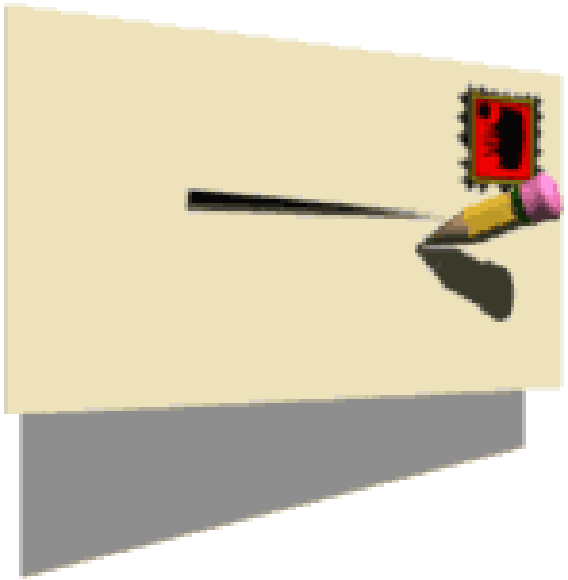
If yes, describe:

DISCLAIMER AND SIGNATURE

☐ YES ☐ NO	I understand and agree that I may be required, as a result of the job classification, to take one or more physical examination(s) and alcohol and drug test(s) as a condition of hiring or continued employment. I agree to consent to take such test(s) at such time designated by the Municipality and to release the Municipality, its directors, officers, agents or employees from any claim arising in connection with the use of such test(s).
☐ YES ☐ NO	I certify that all information submitted by me on this application is true and complete and I understand that if any false information, misrepresentations or failure to fully complete this application shall be cause to reject the application or may be cause for subsequent dismissal if you are hired.
☐ YES ☐ NO	In consideration of my employment, I agree to conform to the Town of Gray's personnel rules and regulations and I agree that my employment and compensation can be terminated without cause and with or without notice, at any time, at either my or the Municipality's option. I also understand and agree that the terms and conditions of my employment may be changed, with or without cause and with or without notice, at any time by the Town.
☐ YES ☐ NO	I understand that in order to assess my qualifications for the position, a full background investigation/check is necessary and that I will sign a statement detailing this investigation as part of the application completion process.
Date	Signature

FAIR CREDIT REPORTING ACT

- Step 2 – **Before** making the decision not to go forward with an offer of employment or promotion, a pre-adverse action notice is required. (15 U.S.C. § 1681b(b)(3).)



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PRE-ADVERSE ACTION LETTER

Dear Employee:

As we recently apprised you, as part of its employment process, University System of New Hampshire obtains or asks others on its behalf to obtain, consumer reports regarding applicants. These reports assist us in evaluating individuals for employment with University System of New Hampshire.

We are enclosing a copy of the consumer report we obtained in conjunction with your consideration for employment; we are also enclosing a copy of an information sheet summarizing your rights under the Fair Credit Reporting Act. We have or will be completing our review of your application within the next few days, and may take action based on the enclosed report.

If you have any questions on the enclosed report, please contact the company listed below.

Consumer Report from:

HireRight, Inc.
5151 California
Irvine, CA 92617
Phone: 866-521-6995, 949-428-5804
Fax: 877-797-3442, 949-224-6020
E-mail: customerservice@hireright.com

Thank you again for considering employment with University System of New Hampshire.

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Para informacion en espanol, visite www.ftc.gov/credit o escribe a la FTC Consumer Response Center, Room 130-A 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) promotes the accuracy, fairness, and privacy of information in the files of consumer reporting agencies. There are many types of consumer reporting agencies, including credit bureaus and specialty agencies (such as agencies that sell information about check writing histories, medical records, and rental history records). Here is a summary of your major rights under the FCRA. **For more information, including information about additional rights, go to www.ftc.gov/credit or write to: Consumer Response Center, Room 130-A, Federal Trade Commission, 600 Pennsylvania Ave. N.W., Washington, D.C. 20580.**

- **You must be told if information in your file has been used against you.** Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information.
- **You have the right to know what is in your file.** You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:

TAKE NOTE:

- The Consumer Financial Protection Bureau has replaced the Federal Trade Commission with regard to the rule making and enforcement responsibilities for the Fair Credit Reporting Act ("FCRA"). Consequently, it has updated the FCRA Summary of Rights (as well as "the Notice to Users of Consumer Reports of their Obligations Under the FCRA" and "the Notice to Furnishers of Information of Their Obligations Under the FCRA") to reflect that change. Effective January 1, 2013, employers should replace their current FCRA Summary of Rights with the new version.

- HOT ISSUE: The employment decision is alleged to have been made before the pre-adverse action notice is sent.

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FAIR CREDIT REPORTING ACT

- Step 3 – After the applicant/employee has been given a reasonable time period to dispute the contents of the background check information, the decision can be made.
  - Post-adverse action notice (15 U.S.C. § 1681m.)

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POST-ADVERSE ACTION LETTER

Dear_____:

On behalf of _____ thank you for the opportunity to consider your request for employment; however, we regret that we are unable to offer you a position at this time.

According to the Fair Credit Reporting Act, you are entitled to know when adverse action was taken in whole or in part based on information received from a consumer reporting agency.

Information having an adverse impact on your application was received from

Employment Screening Services, Inc.
627 E. Sprague, Suite 100
Spokane WA 99202
(800) 473-7778

Under the Fair Credit Reporting Act you have a right to receive an additional free copy of your consumer report if one is requested within 60 days of this notice. You have a right to dispute the accuracy or completeness of any information in your consumer file.

PLEASE NOTE: Employment Screening Services, Inc.'s only role was to provide consumer report information. ESS cannot give the reason why your application was not approved.

Sincerely,

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FAIR CREDIT REPORTING ACT – CLASS ACTIONS

- **Home Depot**
  - Suit alleged Home Depot's background check forms violated FCRA because they included a provision releasing Home Depot from all liabilities.
  - California district judge approved a $3 million settlement.
- **Dollar General**
  - Class action alleged Dollar General sent outdated notices to job applicants that a background check was performed.
  - Settlement reached for $4 million.
- **Publix Super Markets**
  - Suit alleged Publix conducted background checks on employees and job applicants without providing a "stand alone" disclosure informing them that a background check was performed.
  - Parties agreed to settle for $6.8 million.

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FAIR CREDIT REPORTING ACT – CLASS ACTIONS

- **Class actions were filed in 2015 against Chipotle, Dollar Tree, Big Lots, Avis, Amazon, Pizza Hut, and Universal Studios, among others.**

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HIRING PROCESS – CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

- **Risks of social media screening**
  - Exposure to discrimination claims
    - Decision-maker cannot “unsee” information about race, age, religious beliefs, disabilities, etc.
    - Exposure to protected characteristics not readily obvious, such as marital status, family restrictions, transgender transition, etc.
    - Exposure to protected “off-duty” activities.
  - Implicating the Fair Credit Reporting Act
    - If employer uses a third-party to view social media profiles.
  - Accuracy and authenticity
    - Cannot verify that the social media is posted by the applicant (i.e., same name but different person).
    - Risk of fraudulent accounts.

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HIRING PROCESS – CYBER-SLEUTHING AND SOCIAL MEDIA SCREENING

- Minimizing risks associated with social media screening
  - Implement a policy.
  - Use a screening system.
  - Hire a third-party to do the screening?
  - Look at social media content later in the interview process.
  - Keep records.

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Issue No. 2: Substance

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- EEOC's 2012 Enforcement Guidance
  - Treat all candidates and employees consistently.

  - Ask: Is the consideration of the conviction

  1) job related for the position in question and
  2) consistent with business necessity?

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TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- EEOC's 2012 Enforcement Guidance
  - Arrests must be treated differently than convictions.
  - Consideration of an arrest requires additional inquiry by the employer.

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MITIGATING RISK

- Develop screening processes that specify the types of checks performed based on the type of job at issue and state the time periods considered and the types of conduct that can result in an applicant or employee not receiving a position.
- The EEOC expects individualized assessments, giving an applicant/employee the opportunity to argue why the exclusion should not be applied to the individual.

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BACKGROUND CHECK PROCEDURE

- The employment application asks the applicant to provide criminal conviction information, but it states that a conviction would not automatically bar applicant from being offered a job and that the circumstances surrounding the conviction and how long ago the conviction occurred would be considered.
- The background check is run after the employee is offered and accepts the position.
- The procedure provides for different levels of background checks based on the job sought.
- Concerning criminal history, the check is limited to convictions in the prior 7 years (except $75,000 in salary or insurance business).
- The process provides for a multi-step evaluation to consider an applicant's criminal history in relation to qualifications to work for the company.

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EEOC V. FREEMAN

961 F. SUPP. 2D 783 (D. MD. 2013)

- The EEOC alleged that Freeman's consideration of criminal history in hiring had a disparate impact on African American, Hispanic and male applicants and Freeman's consideration of credit history had a disparate impact on African American applicants.

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BAN THE BOX MOVES INTO TEXAS

- Austin “bans the box” on March 24, 2016
- Austin employers cannot:
  - Solicit information about criminal history on **job application**
  - Consider criminal history before offer of employment “conditioned **solely** on the employer’s evaluation of the individual’s criminal history.”
- No private party cause of action but $500 penalty for violations

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Issue No. 3: Risk of Not Conducting Background Checks

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RISKS OF NOT CONDUCTING BACKGROUND CHECKS

- Respondeat Superior
  - An employer is liable for the acts of its employees if those acts are committed in the course and scope of the employee's employment for the employer.

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RISKS OF NOT CONDUCTING BACKGROUND CHECKS

- Vice-Principal Requirement

- Vice-Principals include:
    1. corporate officers;
    2. those who have authority to employ, direct, and discharge servants of the master;
    3. those engaged in the performance of non-delegable or absolute duties of the master; and
    4. those to whom the master has confided the management of the whole or a department or a division of the business.

Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 922 (Tex. 1998) (citing *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 391 (Tex. 1997)).

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RISKS OF NOT CONDUCTING BACKGROUND CHECKS

- Negligent Hiring
  - A claim that an employer is negligent in hiring an incompetent individual whom the employer knows (or through the exercise of reasonable care should have known) was incompetent or unfit, creating an unreasonable risk of harm to others, and which negligence proximately causes an injury to another.

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RISKS OF NOT CONDUCTING BACKGROUND CHECKS

- Negligent Retention
  - A claim that an employer is negligent because the employer continued to employ an individual who the employer knows (or by the exercise of reasonable care should have known) was incompetent or unfit, creating an unreasonable risk of harm to others, and such individual proximately causes injury to others.

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TEXAS LABOR CODE CHAPTER 103: BACKGROUND CHECKS REQUIRED

- In home services
- Residential delivery

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CONSIDERATIONS:

Executives:

- Auditors
- Lenders
- Shareholders

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ENCOURAGEMENT FOR TEXAS EMPLOYERS TO HIRE INDIVIDUALS WITH CRIMINAL BACKGROUNDS?

- TEX. CIV. PRAC. & REM. CODE § 142.002 provides that an employer may not be sued solely for negligently hiring or failing to adequately supervise an employee based on evidence that the employee has been convicted of an offense.
- However, there is a **long** list of exceptions, and it specifies that it provides no protection against lawsuits concerning the misuse of funds or property in certain circumstances.

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SCREENING CURRENT AND POTENTIAL EMPLOYEES: HOW THIS MAKES YOU A TARGET FOR A LAWSUIT

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28th Annual Employment Law Update
April 21, 2016

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4/21/2016

THINK THE SAME OLE HANDBOOK WILL DO? POLICY UPDATES YOU NEED TO KNOW

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KEEPING YOUR HANDBOOK UP-TO-DATE

- Equal Employment Opportunity Policies
  - LGBT Issues
- Reasonable Accommodation Policies
  - Religious Beliefs
  - Pregnancy, Childbirth, and Related Issues
- Leave Policies
  - State-Specific Laws
- Policies Targeted By The NLRB
- Workplace Safety-Related Policies
  - Weapons/Violence
  - Safe Driving
  - Smoke-Free Workplace

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EQUAL EMPLOYMENT OPPORTUNITY POLICIES

- LGBT Issues
  - Title VII protections
    - Title VII does not explicitly include sexual orientation or gender identity in its list of protected categories
    - However, EEOC interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity
  - EEOC enforcement priority for FY 2013-2016
    - "Coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply"
  - Multiple cases filed by EEOC addressing LGBT discrimination-related issues in recent years

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EQUAL EMPLOYMENT OPPORTUNITY POLICIES

- LGBT Issues
  - Many states prohibit discrimination based on sexual orientation and gender identity
    - In states that have not enacted such laws, many municipalities provide these protections
  - OSHA published “A Guide to Restroom Access for Transgender Workers”
    - Restroom access is a safety matter
    - All employees, including transgender employees, should have access to restrooms that correspond to their gender identity

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EQUAL EMPLOYMENT OPPORTUNITY POLICIES

- LGBT Issues
  - Policy Considerations
    - Consider including sexual orientation and gender identity in prohibited discrimination despite no explicit federal law
    - Prohibit not just overt discrimination, but also less obvious types of discrimination, even in the absence of ill intent
    - Do not restrict bathroom use; allow employees to use facilities that correspond with gender identity
    - Include catch-all phrase within EEO policy providing protection to “any other classes protected by federal, state, or local law”

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REASONABLE ACCOMMODATION POLICIES

- Religious Accommodation
  - *EEOC v. Abercrombie & Fitch Stores, Inc.* (June 1, 2015)
    - Employer acting with motive of avoiding accommodation may violate Title VII even with no more than an unsubstantiated suspicion that accommodation would be needed
      - Actual knowledge of need for a religious accommodation is not required to find liability under Title VII

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REASONABLE ACCOMMODATION POLICIES

- Religious Accommodation
  - EEOC Guidance on Religious Garb and Grooming in the Workplace
    - When an employer's dress and grooming policy conflicts with an employee's religious beliefs or practices, employer must make an exception to the policy unless it would be an undue hardship on the operation of the employer's business.
    - Typically, employer will advise applicant or employee of dress code or grooming policy and subsequently the applicant or employee will indicate that an exception is needed for religious reasons.

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REASONABLE ACCOMMODATION POLICIES

- Religious Accommodation
  - Policy Considerations
    - Carefully consider image-based policies that exclude applicants from jobs based on how they look and dress
    - Proactively consider possible exceptions to even “neutral” dress codes and other policies for protected groups
    - Engage in the interactive process and be prepared to reasonably accommodate
  - Interviews/Hiring Decisions
    - Stick to job requirements; do not ask about religious beliefs
      - Ask questions of all applicants that can elicit necessary information without reference to protected categories
    - Do not make assumptions

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REASONABLE ACCOMMODATION POLICIES

- Reasonable Accommodation for Pregnancy-Related Impairments
  - *Young v. United Parcel Serv., Inc.* (Mar. 25, 2015)
    - Plaintiffs can reach a jury on pregnancy discrimination claims by providing evidence that:
      - employer's facially neutral policies impose a "significant burden" on pregnant employees; and
      - employer's legitimate, nondiscriminatory reasons are not "sufficiently strong" to justify the burden
  - EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues
  - State Pregnancy Protection Laws

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REASONABLE ACCOMMODATION POLICIES

- Reasonable Accommodation for Pregnancy-Related Impairments
  - Policy Considerations
    - Re-evaluate “neutral” policies to determine whether they might impact pregnant women differently than others
    - Include that accommodations may be available for temporary impairments, including impairments related to pregnancy
    - Ensure that pregnant employees with medical limitations are accommodated to the same extent as non-pregnant employees with comparable medical limitations
    - Take into account state and local laws providing special protections for pregnant workers

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LEAVE POLICIES

- FMLA regulations
  - New regulatory definition of “spouse” (effective March 27, 2015)
  - Revisions entitle eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or covered family member

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LEAVE POLICIES

- State and local leave laws
  - For example:
    - Paid sick leave
    - Domestic violence leave
    - Military leave
    - Volunteer firefighter leave

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LEAVE POLICIES

- Paid Sick Leave
  - Five states (plus Washington, DC), 22 cities, and one county have paid sick time laws
    - California
    - Connecticut
    - Massachusetts
    - Oregon
    - Vermont
    - Washington, DC
  - Each law has different requirements regarding eligibility, accrual, carryover, and types of leave covered

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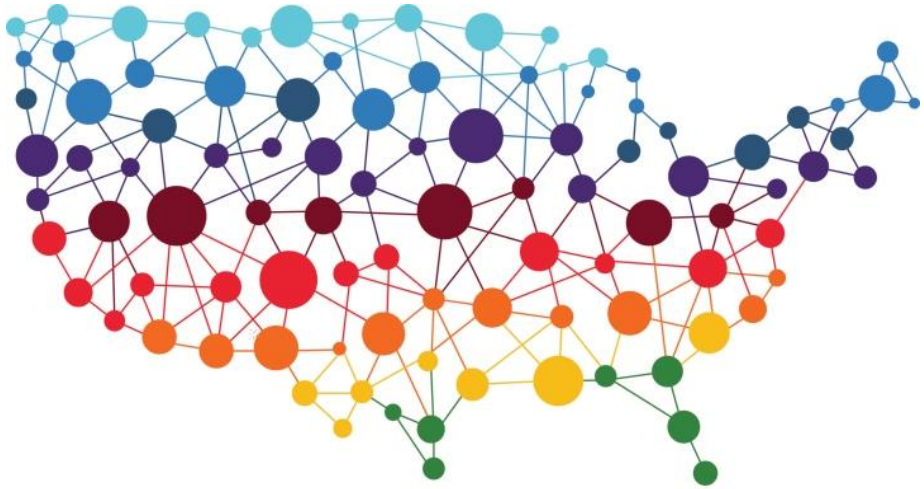
LEAVE POLICIES

- How to address?
  - Options for multi-state employers
    - Single handbook with all state- and local-specific policies in relevant sections
    - Addenda for each state requiring different/additional policies



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POLICIES TARGETED BY THE NLRB

- Confidentiality
- Employee Conduct Toward the Company and Supervisors
- Employee Conduct Toward Fellow Employees
- Employee Interaction with Third Parties
- Social Media
- Conflict of Interest
- Electronic Communication Systems

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POLICIES TARGETED BY THE NLRB

- "[T]he law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the [NLRA]."
- Any rules that could reasonably be construed to restrict protected activity will be unlawful, even if not enforced.
- When in doubt, current Board will broadly construe an ambiguous rule against the employer.

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CONFIDENTIALITY

Unlawful Language	Lawful Language
• Do not discuss "customer or employee information" outside of work, including "phone numbers [and] addresses" • "You must not disclose proprietary or confidential information about [the Employer, or] other associates (if the proprietary or confidential information relating to [the Employer's] associates was obtained in violation of law or lawful Company policy)." • "Never publish or disclose [the Employer's] or another's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer]."	• No unauthorized disclosure of "business 'secrets' or other confidential information." • "Misuse or unauthorized disclosure of confidential information not otherwise available to persons or firms outside [Employer] is cause for disciplinary action, including termination."

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EMPLOYEE CONDUCT TOWARD THE COMPANY AND SUPERVISORS

Unlawful Language	Lawful Language
• "[B]e respectful of the company, other employees, customers, partners, and competitors." • Do "not make fun of, denigrate, or defame your co-workers, customers, franchisees, suppliers, the Company, or our competitors." • No "[d]efamatory, libelous, slanderous, or discriminatory comments about [the Company], its customers and/or competitors, its employees or management." • "Refrain from any action that would harm persons or property or cause damage to the Company's business or reputation." • Do not make "[s]tatements that damage the company or the company's reputation or that disrupt or damage the company's business relationships."	• No "rudeness or unprofessional behavior toward a customer, or anyone in contact with" the company. • "Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of [company] business." • "Each employee is expected to work in a cooperative manner with management / supervision, coworkers, customers and vendors."

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EMPLOYEE CONDUCT TOWARD FELLOW EMPLOYEES

Unlawful Language	Lawful Language
• "[D]on't pick fights" online. • Do not make "insulting, embarrassing, hurtful or abusive comments about other company employees online," and "avoid the use of offensive, derogatory, or prejudicial comments." • "[S]how proper consideration for others' privacy and for topics that may be considered objectionable or inflammatory, such as politics and religion." • Do not send "unwanted, offensive, or inappropriate" emails.	• Any logos or graphics worn by employees "must not reflect any form of violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message." • Prohibiting "threatening, intimidating, coercing, or otherwise interfering with the job performance of fellow employees or visitors." • No "harassment of employees, patients, or facility visitors."

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EMPLOYEE INTERACTION WITH THIRD PARTIES

Unlawful Language	Lawful Language
• "[A]ssociates are not authorized to answer questions from the news media . . . . When approached for information, you should refer the person to [the Employer's] Media Relations Department." • "[A]ll inquiries from the media must be referred to the Director of Operations in the corporate office, no exceptions." • "If you are contacted by any government agency you should contact the Law Department immediately for assistance."	• "The company strives to anticipate and manage crisis situations in order to reduce disruption to our employees and to maintain our reputation as a high quality company. To best serve these objectives, the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons." • "Events may occur at our stores that will draw immediate attention from the news media. *It is imperative that one person speaks for the Company to deliver an appropriate message and to avoid giving misinformation in any media inquiry*. . . . Every employee is expected to adhere to the following media policy: . . . 2. Answer all media/reporter questions like this: 'I am not authorized to comment for [the Employer] (or I don't have the information you want). Let me have our public affairs office contact you."

CONFLICT OF INTEREST

Unlawful Language	Lawful Language
• Employees may not engage in “any action” that is “not in the best interest of [the Employer].”	• Do not “give, offer, or promise, directly or indirectly, anything of value to any representative of an Outside Business,” where “Outside Business” is defined as “any person, firm, corporation, or government agency that sells or provides a service to, purchases from, or competes with [the Employer].” Examples of violations include “holding an ownership or financial interest in an Outside Business” and “accepting gifts, money, or services from an Outside Business.” • As an employee, “I will not engage in any activity that might create a conflict of interest for me or the company,” where the conflict of interest policy devoted two pages to examples such as “avoid outside employment with a[n Employer] customer, supplier, or competitor, or having a significant financial interest with one of these entities.”

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SOCIAL MEDIA

- Same work rule analysis applies
- Unlawful policies (according to GC's office):
  - Prohibiting "disparagement" of company, clients or competitors;
  - Requiring employees to disclaim ability to speak on Company's behalf;
  - Restricting use of Company logos or trademarks.

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SOCIAL MEDIA

Unlawful Language	Lawful Language
• "Refrain from commenting on the company's business, financial performance, strategies, clients, policies, employees or competitors in any social media, without the advance approval of your supervisor, Human Resources and Communications Departments. Anything you say or post may be construed as representing the Company's opinion or point of view (when it does not), or it may reflect negatively on the Company. If you wish to make a complaint or report a complaint or troubling behavior, please follow the company procedure in the applicable Company policy (e.g., Speak Out)." • "Respect copyrights and similar law. Do not use any copyrighted or otherwise protected information or property without the owner's written consent."	• "Do not comment on trade secrets and proprietary Company information (business, financial and marketing strategies) without the advance approval of your supervisor, Human Resources and Communication Departments." • "Do not make negative comments about our customers in any social media." • "Use of social media on Company equipment during working time is permitted, if your use is for legitimate, preapproved Company business. Please discuss the nature of your anticipated business use and the content of your message with your supervisor and Human Resources. Obtain their approval prior to such use."

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ELECTRONIC COMMUNICATION SYSTEMS

- *Purple Communications, Inc. and Communications Workers of America, AFL-CIO* (December 11, 2014)
  - Employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems
    - Applies only to employees already granted access to employer's email system in the course of their work

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ELECTRONIC COMMUNICATION SYSTEMS

- *Purple Communications, Inc. and Communications Workers of America, AFL-CIO* (December 11, 2014)
  - Employer may justify a total ban on non-work use of email by demonstrating that special circumstances make the ban necessary to maintain productivity or discipline
  - Absent justification for total ban, employer may apply consistently enforced controls over its email system to the extent controls are necessary to maintain productivity and discipline
  - **Note:** Does not address any other type of electronic communication systems.

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VIOLENCE AND WEAPONS IN THE WORKPLACE

- Occupational Safety and Health Act
  - Employers have a general duty to prevent workplace violence and can be cited for noncompliance
- Suits for negligent hiring, supervision, or retention, or vicarious liability for gun-related violence by employee

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VIOLENCE AND WEAPONS IN THE WORKPLACE

- Some states have guns-at-work laws, which may:
  - Protect employees' rights to keep firearms in locked vehicles when parked in employer's parking lot
  - Limit employer's ability to search vehicles on its property
  - Prohibit discrimination against gun owners
  - Permit employers to prohibit weapons at work if they post a required notice
  - Subject an employer to fines for failure to comply with the law

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VIOLENCE AND WEAPONS IN THE WORKPLACE

- Texas Open Carry
  - Effective January 1, 2016
  - Generally, you can carry any handgun openly or concealed as long as you are licensed by Texas or a state with reciprocity, subject to specific requirements and exceptions
  - Private property owners, including employers, can still ban firearms on their property, but must continue to comply with the “Guns at Work” law in Texas

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VIOLENCE AND WEAPONS IN THE WORKPLACE

- Texas Open Carry
  - Section 30.06 – Concealed Carry
    - License holder commits an offense if he/she carries a concealed handgun on property of another without effective consent *and* received notice that entry on the property by a license holder with a concealed handgun was forbidden
  - Section 30.07 – Open Carry
    - License holder commits an offense if he/she openly carries a handgun on property of another without effective consent *and* received notice that entry on the property by a license holder openly carrying a handgun was forbidden

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VIOLENCE AND WEAPONS IN THE WORKPLACE

- Texas Open Carry
  - Notice Requirements
    - A person receives notice if the owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication
      - "Written communication" can be a "card or other document" or a sign posted at the property containing specific language in Section 30.06 and 30.07 and meeting certain requirements

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VIOLENCE AND WEAPONS IN THE WORKPLACE

What should you do about your current Weapons Policy?

- References to “concealed” handguns should be revised so the policy covers handguns “openly carried” as well
- Do not have to use the special language in Section 30.06 and/or Section 30.07 to prohibit guns in the workplace
  - But if you include the language, violations may be punishable as both a violation of Company policy *and* a criminal trespass violation
- If you post the Section 30.06 and/or Section 30.07 signs, you do not have to include the special language in your policies as well, but may do so
- Include a carve-out for state laws allowing employees to lawfully transport/store handguns, firearms and ammunition in their locked, personal vehicle in Company parking lot, if applicable

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SAFE DRIVING POLICIES

- Many states and cities ban text messaging while driving or have hands-free requirements
- OSHA recommends written policies and procedures emphasizing the commitment to work-related safe driving practices
  - Comprehensive and enforceable set of traffic safety policies
  - Alcohol and drug use policy
  - Seat belt use policy
  - Regulatory compliance (including laws on cell phone use while driving)
  - Crash reporting and investigation process
  - Disciplinary action

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SMOKE-FREE POLICIES

- With the rise of e-cigarette use, some states have expanded the definition of smoking (in the context of workplace smoking laws) to include the use of e-cigarettes
- Consider including e-cigarettes in your smoke-free workplace policy
- Keep in mind that smokers are a protected class in many states, and some states prohibit discrimination against employees for off-duty conduct
  - However, such employees may still be required to comply with workplace policies regarding smoking
- Nicotine addiction could trigger protections under ADA

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THINK THE SAME OLE HANDBOOK WILL DO? POLICY UPDATES YOU NEED TO KNOW

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