



Monday, May 18
10:00-11:30am

102 Employment Law for In-house Counsel

William Davis Harn
Senior Attorney
Southern California Edison Company

Dion Kohler
Partner
Jackson Lewis

Amy Loggins
Corporate Counsel
Crawford & Co.

Faculty Biographies

William Davis Harn

William Davis Harn is a senior attorney for Southern California Edison Company (SCE) in Rosemead, CA. Mr. Harn has specialized in representing SCE and other employers on employment and labor matters, actively litigating cases through jury trial and appeal in both state and federal courts. He has handled several labor arbitrations, appeared in regulatory proceedings before the California Public Utilities Commission, and daily provides practical legal advice and solutions to client organizations on a broad panoply of employment, labor, and benefits matters.

Mr. Harn is a former chair of ACC's Employment and Labor Law Committee and current Vice-chair for ACC's Council of Committees. He is a vice president for services for ACC's Southern California Chapter's board of directors. Mr. Harn has been a past speaker on several subjects including discovery in employment law matters, workplace privacy, leave and disability management, wage and hour law, legal intern programs, and the elimination of bias within the legal profession. Mr. Harn has been actively involved in SCE's program with Streetlaw, a non-profit organization dedicated to furthering a diversity pipeline to the legal profession by promoting the legal profession as a career choice to local high school students. Mr. Harn was also the creator and coordinator of the SCE law department summer legal intern program from its inception and still provides oversight to the current summer program team. Mr. Harn provides several hours of service annually to the Los Angeles County Superior Court as a volunteer mediator and temporary judge.

Mr. Harn received his J.D. with great distinction from the University of the Pacific McGeorge School of Law.

Dion Kohler

Dion Kohler is a partner in the Atlanta office of Jackson Lewis. Mr. Kohler's practice is broad in scope and includes labor matters involving union-related issues as well as the defense of employment related litigation and administrative charges. The cases Mr. Kohler handles include a variety of state and federal court claims involving discrimination, harassment, retaliation, contracts, and employment related torts. He is an experienced trial lawyer and regularly handles cases before federal and state agencies, judges and juries. Mr. Kohler is also recognized for his experience and counsel in matters related to occupational safety and health, affirmative action, employment contracts, and wage and hour matters including prevailing wage laws. He also is regularly called upon to assist employers in complying with the Family and Medical Leave Act, the American with Disabilities Act, and other federal and state employment laws. To assist employers in avoiding expensive employment related lawsuits and claims, Mr. Kohler regularly presents training programs for managers and executives. He also assists employers in

developing workplace policies and practices which maximize positive employee relations and act as effective risk management strategies for the workplace. On a daily basis, Mr. Kohler advises clients on handling discharges, workplace investigations and other sensitive employment related problems. He takes as much pride in the claims he assists clients in avoiding as those he successfully defends.

Mr. Kohler is involved in a variety of charitable organizations which support and provide for neglected and abandoned animals. He is also active participant in several charities which provide support for the people of Haiti.

Mr. Kohler received his Bachelor's from Emory University and his law degree with Distinction from Emory University School of Law.

Amy Loggins

Amy Loggins is corporate counsel for Crawford & Company in Atlanta. She is responsible for handling all labor & employment issues for Crawford. Her area of practice includes defending and advising the company on issues pertaining to human resources policies and procedures, restrictive covenants, conflicts of interest, contracts, whistleblower issues, internal investigations, Title VII, ADA, ADEA, FLSA, FMLA, EPA, and other state and federal statutes. Ms. Loggins manages all employment litigation for Crawford & Company and its subsidiaries. She develops and presents training modules for supervisory and management level employees on human resources and labor & employment topics. She also serves on the Crawford & Company scholarship committee.

Before joining Crawford, Ms. Loggins successfully practiced as a trial attorney for the equal employment opportunity commission in the Atlanta District Office. She also previously practiced law as an associate with Seacrest, Karesh, Tate & Bicknese in Atlanta.

Additionally, Ms. Loggins is active in the community. She is the president of the Junior League of DeKalb County and is a member of the 2008 Class of Leadership DeKalb. Her volunteer board involvement includes the State Bar of Georgia Young Lawyers Division; Younger Lawyer Alumni Committee for the University of Georgia School of Law; DeKalb Rape Crisis Center; International Women's House; and Junior League of DeKalb County. She also chaired the state public affairs committee representing all Junior Leagues in the State of Georgia.

Ms. Loggins received her B.S. and J.D. from the University of Georgia.



What we will cover:

- Wage & Hour
- Performance Management
- Discrimination
- EEOC processes
- FMLA
- Reductions in force & WARN Act
- Traditional Labor law
- Independent contractors
- Affirmative Action Plans
- EEO-1 reports
- Employee Privacy

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Fair Labor Standards Act (FLSA)

- Enacted in 1938 to (1) pay employees a living wage and (2) to encourage employers to employ more people
- Defines federal wage and hour requirements, including minimum wage
- Defines overtime pay requirements (generally all hours in excess of 40 per week at time and a half) & exemptions from overtime pay
- Can be “trumped” by state wage and hour laws, i.e. some states have minimum wages higher than that required by federal law
- Currently, there are more “class actions” under this law than any other employment statute

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FLSA (cont.)

Exempt vs. Non-Exempt employees

- Exempt employees are those paid on a salary basis and defined as “Executive,” “Professional,” or “Administrative” employees who “exercise discretion and independent judgment with respect to matters of significance.” (CEO, Supervisor, Lawyer, Nurse, Teacher, Claims Adjuster)
- **All other employees are non-exempt employees who are due overtime pay.** (i.e. Clerical Employees)
- If employers treat exempt employees as though they are non-exempt, their exempt status will be waived. Result is employers will have to go back and figure out overtime for those employees usually without the benefit of timecards.

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FLSA (cont'd)

- Remember that “salaried” employees are NOT the same as “exempt” employees
- Non-exempt employees must maintain a separate time card
- Use Caution when making deductions to an employee’s pay
 - Improper deductions can convert an exempt employee to a non-exempt employee, resulting in overtime pay being due to the employee

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Salary Deductions

- Not allowed
 - Quality or quantity of work
 - Unavailability of work
 - Disciplinary reasons
 - Jury/Witness/Military duty

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Salary Deductions

- Generally Allowed (partner with HR)
 - Vacations, personal leave, religious observances
 - Sickness or disability
 - Workers' compensation leave
 - Initial/final weeks of work
 - FMLA

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State Overtime for Non-Exempt Employees

- California:
 - Any hours more than 8 in a day
 - Double time for hours more than 12 in a day
 - Any hours over 40 in a week
- Colorado
 - Any hours more than 12 in a day or more than 12 consecutive hours
- Nevada
 - For employees who make less than \$9.23/hour overtime for hours more than 8 in a day



Wage & Hour Watch List!

- Hours worked
 - What is/isn't; special issues
 - OT rules
- Regular Rate
 - Non-discretionary bonuses
- Meal & Rest Breaks
- Penalties



Monitoring and Measuring Hours Worked

- The Business Case
 - Info Mgmt for Productivity, Efficiency, Cost Analysis, Coverage, Compensation, and Employee Activity
 - Reduce incentives to organize
- The Regulatory Case
 - FLSA, OSHA, State Law
 - Avoiding penalties for non-compliance, e.g. meal break penalties
- The Case for Reducing Liability
 - Burden on Employer to Defend Recorded Hours and Minimize Damages; *Anderson v. Mt. Clemens Pottery*, 328 U.S. 680 (1946)
- The Ethical Case
 - Paying EE's what they have earned is right thing to do

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FLSA (cont'd) – WORK TIME

- All hours an employee “is suffered or permitted to work” for an employer. (This does not include any leave taken during the work week)
- Generally includes all time during which an employee is required to be at the office or “on duty”.
 - “On call” issues, Travel time issues
- Any time spent on training programs (i.e. online training classes) required by the Company to be completed is compensable time

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FLSA (cont'd) – WORK TIME

- Once the manager allows or knows that an employee is working, the employee must be compensated for his/her time. In other words, if the manager knows the employee is working on the weekend or after hours, that employee must be properly compensated
- Employees must report ALL time worked
- If an employee is not paid for “off the clock” work, a violation has occurred
- An employee’s failure to report the time worked is not an excuse for the employer and will not bar recovery by the employee of overtime pay
- Managers must review and approve all timecards of all employees

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Working Time

- **Activities at the start or end of the shift**
 - Turning computer on or off
 - Logging onto or off of network
 - Required early arrival at work site
 - Security screening
 - Gathering or storing work equipment
 - Meetings
 - Checking voice mails
 - Checking e-mails
 - Reading the newspaper
 - Surfing the internet

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Working Time

- **Activities away from the workplace**
 - BlackBerry
 - Telephone calls
 - Paperwork
 - Logging onto the network remotely
 - Possibly a first or last principal activity for purposes of the continuous workday concept

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Special Issues

- Donning/Doffing/Preparatory Activity
 - *IBP v. Alvarez*, 126 S.Ct. 514 (2005) (changing clothes, washing up, or setting up compensable if compelled by business necessities)
 - Special vs. standard gear? *Garcia v. Tyson Foods* (D Kan. 2007)
 - Reporting in uniform? Normally not compensable.
- Travel
- Training, Lectures, and Meetings
- Stand-by vs. Waiting to Commence
- “On Call” Time
 - Restricted vs. Unrestricted
 - See *Madera POA v. City of Madera*, 36 Cal. 3d 403 (1984)

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FLSA (cont'd)

Travel Time

- Ordinary home-to-work commuting time is not included in “working time”
- However, if an employee is required to report to a meeting to pick up supplies or receive instructions, compensable time starts at the meeting place
- Travel time during the work day for the employer's benefit or convenience or as part of the employee's job duties is compensable.
- If an employee travels during normal work hours, but on non-work days (i.e. Saturday or Sunday), the time is compensable. However, travel outside normal work hours is not compensable.



‘On-Call’ and ‘Standby’ Issues

- Must be Free to Pursue Personal Activity, Otherwise Relatively Unrestricted
- What if: Employee Must be Able to Report Within 2 hours and “Fit for Duty,” if Called?
- What if: Pager and Duty may be to spend 2 to 3 minutes phoning in for further instructions or to provided information to on-site staff/ supervisor?
- Blackberries? Computers at home?



On-Call cont'd.

- Some criteria considered:
 - Geographical restrictions on EE movement
 - Required response time
 - Nature of the employment
 - Degree of impact on EE's personal activities.
 - Are restrictions primarily directed toward fulfillment of employer's requirements?
 - Is EE so restricted as to be unable to attend to private pursuits?



Meal and rest periods

- Compensable breaks: 5-20 minutes
- Bona fide meals: 30 minutes or more
- What about breaks of 20-30 minutes?
- Automatic deductions



'Comp' Time (Not!)

- FLSA – Does not allow for private sector employees!
- State Laws
 - May allow, but if FLSA applies state law is void
 - Make up time in California – allowed only if in same work week, requested in advance and hours worked on make up are not > 40

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CA PENALTIES FOR VIOLATIONS

- Failure to provide meal or rest period – one hour of straight time pay in addition to any wages due.
- Failure to pay all wages when due – full days wages for each day late up to 30 calendar days.
- Civil Penalties - \$50 per violation, \$100 per subsequent
- Attorney Fees
- Compounding

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Discipline & Termination Practices

- Support with reasonable investigation giving the charged party notice and the opportunity to respond.
 - Representation/Weingarten issues
- Fair & honest reason supported by substantial evidence
 - At Will issues

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Workplace Investigation Guidelines

- Two on One Rule
 - *Weingarten* Rights
- Advise EE of nature of Inquiry- Avoid accusing
- Admonish re truthfulness, confidentiality
- Open ended questions; let EE explain his/her version of relevant facts
- Interview others for corroboration, credibility
- Searches should be based on reasonable suspicion, legitimate business need and limited in scope
 - Electronic searches - cautions

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Corrective/Disciplinary Action Documentation

- Indicate level of written warning
- Identify previous attempts to correct the problem
- Detail the problem with specific examples
- Identify the expected performance or behavior standard to meet
- Establish an “up to” deadline for demonstrated improvement
- Outline consequences if performance does not improve

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Keeping it Privileged

- Maintain Distance in
- Don't make decisions, only
Recommendations
- Don't over label
- Don't under label

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Keeping it Privileged

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Performance Evaluations

- **Measurable:** The end result can be identified in terms of quantity, quality or timeline (or applicable standard of writing). If it is not measurable, how do we know its value?
- **Observable:** The witnessing and/or gathering of descriptions of the work performance and comparing it with accepted "benchmarks" (standards). Actions, words, gestures, procedures with which the person being evaluated can identify with. Should be used so they can take appropriate action to maintain or improve the work behavior
- **Behavioral:** Actions which are observed, described and can be changed or corrected with instructions or self discipline

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Evaluation Pitfalls to Avoid

“Halo Effect”. This is the tendency to overrate a favored employee. This can happen because of:

- **Effect of Past Record.** Good work in a previous rating period tends to carry over to the current period
- **Compatibility.** People who please are sometimes rated more highly than they deserve
- **The Blind Spot.** In this case, the Manager is blind to certain defects because he or she possesses them

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Evaluation Pitfalls to Avoid

“Horns Effect”. This is the tendency to rate an employee lower than circumstances warrant. Some causes of this are:

- **Perfectionism.** The Front Line Manager may have an unrealistic expectation
- **Dislike.** The employee is contrary or is not always agreeable with manager or employees
- **Guilt by association.** A person who is friends with someone who is perceived as a troublemaker may also be perceived as a troublemaker

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Evaluation Pitfalls to Avoid

- **Stereotypes.** This pitfall involves basing evaluations on fixed perceptions of performance rather than actual performance and is typically “looking for facts to fit theory” reason. Objective criteria must be applied to performance
- **Bias/Prejudice.** Things we tend to react to that have nothing to do with performance such as: race, religion, education, family background, age and/or sex
- **Over-emphasis on favorable or unfavorable performance.** On one or two tasks, this leads to an unbalanced evaluation of the overall contribution
- **Bad Impression.** Relying on impressions rather than facts
- **Uncontrollable circumstances.** Holding employees responsible for the impact of factors beyond their control

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Equal Employment Opportunity Commission (EEOC)

- Administers:
 - Americans with Disabilities Act of 1990
 - Rehabilitation Act of 1973
 - Age Discrimination in Employment Act of 1967
 - Title VII of the Civil Rights Act of 1964
 - Equal Pay Act of 1963
- Employees are required to file a charge with the EEOC before they can proceed to court.
- Average life of a charge of discrimination is approx. 182 days.
- EEOC has subpoena power if employer is not responsive.

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EEOC Process

1. Employee files charge.
2. Parties are offered internal EEOC mediation.
3. Employer notified and requested to provide information to the investigator.
 - Position statement – employer's response to the charge
 - Request for Information (RFI) – request for supplemental documents and evidence (i.e. personnel files, comparator data, etc.)
4. Investigator proceeds to investigate the charge.
5. Investigator may request an "on-site" investigation and/or witness interviews.
6. Determination will be made by the agency:
 - "Cause" to believe discrimination occurred.
 - Unable to determine whether discrimination occurred.
- If "cause" is found, investigator will attempt to conciliate the charge.
- If "cause" is not found, charge will be dismissed.
- Once the agency has completed its process, a Dismissal and Notice of Rights letter will be issued. Complainant has 90 days to file litigation.



Americans with Disabilities Act

- Protects individuals with impairment that substantially limits a major life activity.
- Requires that employers reasonably accommodate to allow them to perform the essential functions of the job.
- Basically, if some one requests something because of an illness or impairment, treat it as a request for an accommodation.
- Employers have an affirmative duty to engage in the interactive process with the employee to determine eligibility under the ADA and, if the employee is qualified, to discuss with the employee options for an accommodation.
- An accommodation is something that allows an employee to perform the essential functions of his/her job.



“Substantially limits”

- Congress did not define, but gave guidelines for the EEOC to redefine in its regulations.
- Congress stated that the courts had gone too far and made the standard for this phrase too narrow. (Overturns Toyota case.)
- Wants the definition to mean “materially restricts.”



The determination of “substantially limits” will be made without mitigating measures (overturns Sutton case):

- Medication, medical supplies, equipment, or appliances
- Low-vision devices (not ordinary eyeglasses or contact lenses)
- Prosthetics – limbs and devices, hearing aids, and implantable hearing devices
- Mobility devices – wheelchairs, walkers, etc.
- Oxygen therapy equipment and supplies
- Assistive technology
- Reasonable accommodations or auxiliary aids or services – interpreters or readers
- Learned behavioral or adaptive neurological modifications



ADAAA covers an impairment that *would* limit a major life activity *if* it were active – even if it is currently in remission.

EXAMPLES

- Multiple Sclerosis
- Lupus
- Cancer
- Epilepsy
- Seizure disorder



“MAJOR LIFE ACTIVITIES”

Expanded definition of “major life activities”

NEW definition includes:

- | | |
|-------------------------|---------------|
| Caring for oneself | Seeing |
| Performing manual tasks | Hearing |
| Eating | Walking |
| Sleeping | Standing |
| Lifting | Speaking |
| Bending | Breathing |
| Learning | Reading |
| Reading | Concentrating |
| Thinking | Working |
| Communicating | |



“MAJOR LIFE ACTIVITIES”

Expanded definition of “physical or mental impairment” to include the operations of a major bodily function, including but not limited to, functions of the :

Immune system	
Normal cell growth	
Digestive	Bowel
Bowel	Bladder
Bladder	Brain
Neurological	Respiratory
Circulatory	Endocrine
Reproductive functions	

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Age Discrim. In Employ. Act (ADEA)

- Applies to employers with 20 or more employees.
- Protects persons over the age of 40.
- Cannot discriminate or otherwise treat less favorably those persons in the protected category.
- Also, cannot discriminate or otherwise treat less favorably those within the group who are substantially older. (I.e. cannot fire some one who is 64 because they are about to retire and/or in favor of someone who's 45.)
- Watch for age-based comments and discussions with employees about their retirement plans.

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Title VII

- Applies to employers with 15 or more employees.
- Protects employees from discrimination based on race, sex, religion, national origin, and color with regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment.
- Prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals on the basis of sex.
- Prohibits both intentional discrimination (disparate impact) and neutral practices that disproportionately exclude individuals on the basis of the protected characteristics and that are not job related (adverse impact).
- Harassment based upon any of those protected characteristics is prohibited.
- Discrimination based on pregnancy, childbirth, and related medical conditions qualifies as sex discrimination. (Pregnancy Discrimination Act (PDA))
- There is a religious accommodation requirement.

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California (FEHA) Protected Classes

- Race/color
- National origin
- Sex
- Ancestry
- Religious Creed
- Age (40 yrs +)
- Mental or physical disability
- Marital status
- Sexual Orientation
- Gender Identity
- Genetic Characteristics
- Medical Condition (e.g. Cancer)
- HIV status
- Pregnancy

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Washington Protected Classes

- Race/color
- National origin
- Sex
- Creed
- Age
- Mental or physical disability
- Marital status
- Sexual Orientation
- Gender Identity
- Use of trained dog guide or service animal

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Colorado Protected Classes

- Race/color
- National origin
- Sex
- Creed
- Age
- Mental or physical disability
- Marriage to co-worker
- Sexual Orientation
- Use of trained dog guide or service animal

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Oregon Protected Classes

- Race/color
- National origin
- Sex
- Religion
- Age (18 or older)
- Marital status
- Physical/ mental disability
- Injured workers
- Family relationships
- Association with a member of protected class
- Organized militia leave
- Legislative testimony
- Academic degree in Theology
- Portland and other cities have their own ordinances

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Equal Pay Act (EPA)

- Applies to all employers
- Ensures pay equity for male and female employees in positions with substantially equal job duties and responsibilities
- “Equal pay for equal work”
- If there’s a violation of the EPA, it’s probably also a violation of Title VII gender discrimination (However, Title VII doesn’t require that the jobs are substantially equal.)

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Lily Ledbetter Fair Pay Act

- Law follows Ledbetter v. Goodyear Supreme Ct. case
- This amends Title VII damages to allow the statute of limitations to be reset with each paycheck or benefits reimbursement check which reflected the discriminatory rate of pay.
- It allows for the recovery of pay to be lengthened to 2 years prior to the filing of the EEOC charge and commencement of administrative process.
- The way the law is written, it could apply to any employment decision, including failure to promote, demotion, transfer, etc.

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Family Responsibilities Discrimination

There is EEOC Guidance on Disparate Treatment against Caregivers with Family Responsibilities

- 400% rise in claims by caregivers
- Many different theories of claims
- Higher success rate than other EEO claims
- Emerging case law

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Family Medical Leave Act (FMLA)

- Applies to employers with 50 or more employees within a 75 mile radius
- Allows an employee to take up to 12 weeks of time off due to a serious medical condition or to care for a new child
- Allows employee time off to care for a family member with a serious medical condition, as defined by the law
- Can be taken intermittently

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Family Medical Leave Act (FMLA)

Eligibility Requirements:

- 12 months of service
- 1,250 hours of service in prior year
- 50 employees in a 75 mile radius of employee's work location

Eligible employees may request 12 weeks of unpaid Family Medical Leave in each rolling 12 month period

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Acceptable Uses - FMLA

- Birth of employee's child
- Placement of a child with the employee for adoption or foster care
- Care for spouse, child or parent who has a serious health condition
- A serious health condition that makes the employee unable to perform the functions of his/her job



FMLA – Serious Health Condition

Definition:

A serious health condition is an illness, injury, impairment or medical condition which requires inpatient care or continuing treatment by a health care provider

Examples:

Heart conditions, most cancers, back conditions requiring surgery or physical therapy, pneumonia, severe arthritis, complications relating to pregnancy, migraine headaches



Intermittent Family Medical Leave

- Leave may be taken on an intermittent basis or by working a reduced work week if the leave is to care for a family member or the employee's own health condition.
- There is no requirement that intermittent leave be provided for the birth of a child or to care for a child placed for adoption

Examples:

1. Employee has cancer and must take chemotherapy on a weekly basis
2. Employee's spouse is in renal failure and requires bi-weekly dialysis

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Clarification of Other Employee Leave Entitlements

- Leave calculation for employees with fluctuating work schedules based on previous 12 months of work rather than 12 weeks
- Required overtime counts against FMLA leave entitlement
- Light duty does not count toward FMLA entitlement
- Disqualification for bonuses permitted so long as employer does so consistently
- Increased damages for interfering with FMLA leave rights: "any other relief tailored to the harm suffered"

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FMLA – Impact of New Regs

- 12 weeks
- Notice Requirements
- Certification Requirements
- State Law concerns
- Military Leave Provisions

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FMLA 2008 Amendment

Two new types of leave for employees who are already eligible for FMLA:

- 12 weeks of unpaid leave during any 12-month period for any qualifying exigency when employee's spouse, child or parent is on active duty or is notified of an impending call to active duty
- 26 weeks of unpaid leave during one 12-month period for the employee to care for a spouse, child, parent or next of kin who is a service member undergoing medical treatment, is on out-patient status or on the temporary disabled retired list for a serious injury or illness

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FMLA 2008 Amendment

- Employees may take either type of leave intermittently or on a reduced leave schedule
- Any combination of any other FMLA leave with the 26-week leave to care for the wounded warrior is limited to 26 weeks
- Spouses who work for the same employer are limited to a shared 26 weeks to care for a wounded child
- Spouses working for the same employer may only take 12 weeks total when taking leave due to their child's call to active duty

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FMLA 2008 Amendments

- The DOL has not issued any guidance on “qualifying exigency”
- Effective Date of changes - January 28, 2008
- Leave for Qualifying Exigency technically delayed until the DOL issues final regulations; however, employers are encouraged to provide this type of leave in the interim

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Employers' Notice Requirements Expanded

General Notice Obligations Enhanced

- Covered employers must post a general FMLA notice even when they have no FMLA-eligible employees
- Each employee entitled to general FMLA notice unless employer publishes handbook or other summaries of leave rights
- Posting requirements may now be satisfied through electronic posting
 - Note: Preamble to Regulations state employees must have access to all FMLA electronic postings

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Changes to Employee Notice Requirements

- Employees must explain reasons for leave so as to allow an employer to determine whether the leave qualifies under the Act
- “Calling in sick” – Insufficient to trigger FMLA obligations
- Leave may be denied if employee fails to adequately explain
- For further FMLA leave, employees must specifically reference the qualifying reason or need for FMLA leave
- Employees can be required to comply with customary notice and procedural requirements for requesting leave, absent unusual circumstances

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New Rules Governing All Medical Certifications

- Employers “shall state in writing what additional information is necessary to make the certification complete and sufficient”.
- “Incomplete” and “insufficient” certifications defined
- Employees have 7 calendar days to cure deficiencies
- Clarification:
 - Employers need not retain a health care provider to obtain clarification ... **but employee’s supervisor may not contact health care provider**
- Will demand greater effort in administering FMLA leave

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Changes: Initial Medical Certification

- Time to request medical certifications increased from 2 to 5 business days
 - Certifications may be required for paid leave
- If condition extends beyond a leave year, certifications can be requested annually

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Changes: Fitness for Duty Certifications

- Employers may demand more than a “simple statement” of the ability to return to work
- Fitness for duty certifications for intermittent leave may be sought if reasonable safety concerns exist
- No second or third opinions permitted

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New and Improved FMLA Forms (Excluding Military Servicemember Leave)

- New certification of health care provider for employee’s serious health condition
 - WH-380E Form
- New certification of health care provider for family member’s serious health condition
 - WH-380F Form
- Remember! State law may restrict right to receive certain medical information (e.g. California)

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Military Servicemember Leave Definitions

Qualifying Exigency Defined (exclusive list)

- (1) Short-notice deployment
- (2) Military events and related activities
- (3) Childcare and school activities
- (4) Financial and legal arrangements
- (5) Counseling
- (6) Rest and recuperation
- (7) Post-deployment activities
- (8) Additional activities related to active duty or call to active duty

New optional DOL WH-384 Form -- Certification of qualifying exigency for military family leave

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Qualifying Exigency Leave - Notice

- If foreseeable, notice must be “reasonable and practicable” (29 U.S.C. 2612(e)(3))
- DOL interprets as “as soon as practicable” (29 C.F.R. 825.302(a))
- “[A]s soon as practicable” normally means same day or next business day but is circumstantial test (29 C.F.R. 825.302(b))
- If not foreseeable? Comments indicate when employee first seeks to take leave
- Notice not required upon notice of active duty or call to active duty

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Military Caregiver Leave – “Single 12-Month Period”

- 26 weeks of leave in “a single 12-month period”
- 12 month period begins on first date of leave
- Operates independent of method for calculating 12 weeks of other FMLA leave (BAF, SHC, exigency)
- Congress specified “a single 12-month period” (29 U.S.C. 2612(a)) (emphasis added)
- DOL says applies per servicemember, per injury
- No more than 26 weeks of leave in any 12-month period

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Military Caregiver Leave – Son, Daughter and Next of Kin

- Son and daughter can be any age
- Next of Kin does not include spouse, parent, son, or daughter (they already have a right to this leave)
- Servicemember may designate blood relative in writing
- In absence of designation, multiple family members at same level of relationship all are next of kin and may take leave consecutively or simultaneously

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USERRA

- Uniformed Services Employment and Reemployment Rights Act
- Employers must give employees in the military services time off to attend training and when deployed
- Cannot terminate or otherwise alter the employment of such individuals
- Do not have to pay them while they are on military leave
- However, employees are allowed to use their accrued vacation time for such military leave
- Absolute right to reinstatement

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What's on the Horizon?

- Employee Free Choice Act (EFCA)
- Paycheck Fairness Act
- Independent Contractor Proper Classification Act
- Employment Non Discrimination Act (ENDA)
- OSHA expansion

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Employee Free Choice Act (EFCA)

- MAJOR changes in organized labor laws.
- Would do away with secret ballot elections and union campaigning. Essentially, once the union can show that 50% of the employees in the unit have signed union-interest cards, you have a union.
- Must have a contract in place with the union within 130 days or it goes to mandatory arbitration where the arbitrator will write the contract for you.
- We will need to do proactive training of managers and supervisors on spotting union activities and addressing employee issues.

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RESPECT Act

- Current law – “supervisor”
 - is excluded from the collective bargaining unit and pro-union organizing.
 - NLRA defines a supervisor as an employee with the power and independent judgment to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively to recommend such action."
 - the definition of supervisor, specifically includes those employees who assign overall duties, and those who direct employees to specific tasks under independent judgment and accountability, thus removing low-level supervisors from union activities.
- Proposed RESPECT Act
 - deletes the terms "assign" and "or to responsibly direct them" from the NLRA definition of supervisor.
 - Would add an additional requirement to the supervisor definition – that a majority of work time be spent completing supervisory tasks.
- Co-sponsored by then-Senator Obama. Expected to be reintroduced in Congress this year.

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Paycheck Fairness Act

- This would expand the Equal Pay Act by
 - Changing the class action structure
 - May require employers to re-tier employees
 - May limit current criteria used to justify pay differences (i.e. years of service and time in position). Employers may be required to pay for responsibilities and not job history.
- Passed the House.

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Independent Contractor Proper Classification Act of 2007

- Could change the standards used for classifying a person as an independent contractor.
- Would have tax and benefit implications if employees needed to be reclassified.
- Fines and penalties would be increased.
- There will be more audits of records and enforcement of standards tightened.

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Employment Non Discrimination Act (ENDA)

- Similar to Title VII but specifically directed to gay, lesbian, and bisexual employees. Does not include transgender individuals.
- Different from Title VII in that it contains exemptions concerning employer dress codes.
- Twenty states and D.C. already have laws protecting individuals from discrimination based upon sexual orientation.

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Retaliation

- It is unlawful to take an adverse action against someone because
 - (1) he/she opposed a practice that he/she reasonably and in good faith believed to be an unlawful, discriminatory practice participated in the statutory complaint process (i.e. filing a complaint, calling the complaint hotline, complaining to a supervisor/manager) and/or
 - (2) participated in the complaint process (i.e. testify or assist in an investigation, administrative process, or lawsuit).
- Adverse actions can be anything that deters employees from coming forward to report or assist in an investigation into alleged unlawful activity.

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Workplace violence

- Between 1993 and 1999, there were 18,000 reports of workplace assaults.
- The number one reason for violence in the workplace is domestic violence that spills into the employee's workplace.
- 1 in 4 women will be abused at some point
- More than 800,000 cases of domestic violence against men by women reported each year
- 2-4 million women assaulted by male partner each year in the U.S.

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Workplace violence (cont.)

- Can affect the employee productivity, attendance, turnover, increased health care costs, etc.
- Can put co-workers in harm's way
- Types of situations:
 - Abuser stalks employee to the workplace
 - Abuser threatens co-worker who tries to help
 - Abuser accuses employee of having affair with co-worker
 - Office romance begins to show signs of abuse
 - Managing workplace when employee has restraining order

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Workplace Violence (cont.)

- Signs of Abuse:
 - Changes in tardiness/absenteeism?
 - Uncharacteristically moody, depressed, anxious, distracted?
 - Change in work performance?
 - Suddenly wearing more makeup?
 - Suddenly dressing differently (to hide injuries)?
 - Employee refusing to take phone calls or frightened/ jumpy when telephone rings?
 - Caller asking for location information of employee?
 - Employee avoiding social situations?
 - Any visible injuries? How often? How many?

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Equal Opportunity Issues (cont.)

- Harassment
 - Unnecessary to the working relationship
 - Duty to Prevent
 - Training
 - Knew or Should Have Known v. Strict Liability
 - *Faragher – Ellereth* Defense
 - Avoidable Consequences Doctrine

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Release Agreements

- Waivable & Non-Waivable Claims
- Carve Outs
- Known & Unknown Claims
 - SEE e.g. CA: Section 1542 waivers

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Labor Law:

- Responding to a Petition
- Organizing Campaigns
- TIPS!
- Bargaining Subjects & Impasse

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Nat'l Labor Relations Act (NLRA)

- Primary law governing relations between unions and employers in the private sector.
- Administered by the Nat'l Labor Relations Board.
- Guarantees the right of employees to organize and to bargain collectively with their employers or to refrain from all such activity.
- Generally applies to all employers involved in interstate commerce--other than airlines, railroads, agriculture, and government--the Act implements the national labor policy of assuring free choice and encouraging collective bargaining as a means of maintaining industrial peace.
- Prohibiting employees from discussing or reporting problems with working conditions may be a violation of the NLRA even when there is no union present.
- Employees can file a charge with the NLRB to complain of unfair labor practices (ULP). The filing of the charge will prompt an investigation by the NLRB.

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KEY FACTS ABOUT UNIONS: MEMBERSHIP IS DECLINING ...

- Union membership in decline for 20 years
- 12.4% of workers were Union members in 2008
- Less than 8% of private sector workers were Union members in 2008

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... BUT WIN RATES ARE INCREASING

- Union win rates have increased for 7 consecutive years
- Unions have won the majority of NLRB elections in every year since 1996
- Unions won 66.8% of NLRB elections in 2008



SECTION 7 OF THE NLRA SAYS:

“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.”



PREVENTION: THE BEST DEFENSE

- Understand the Conditions that Lead to Employee Dissatisfaction / Union Organizing
- Become Familiar with the Unions in the Industry and Geographic Area
- Implement a Preventive Labor Relations Program

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ISSUE / VULNERABILITY ASSESSMENT

- Conduct Management Interviews
- Review Wages, Benefits and Other Terms/Conditions of Employment
- Review Communications
- Review Client Policies And Practices in all Phases of the Employment Process
- Discuss ADR and Other Preventive Programs
- Evaluate Work Atmosphere
- Evaluate Supervisory Performance
- Identify Issues, Assess Vulnerability to Organizing or Other Third Party Involvement – and Recommend Approaches Consistent With Client Goals

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TRAIN MANAGERS AND SUPERVISORS

- Positive Employee Relations / Supervisory Skills
- Communication and Team-Building
- Company Policies, Practices and Benefits
- Recognizing and Lawfully Responding to Early Warning Signs
- Lawful and Effective Communication
- Lawful Enforcement of Policies

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DEVELOP AND MAINTAIN LAWFUL POLICIES

- Recruitment and Hiring
- Evaluations and Discipline
- Soliciting Employee Issues and Concerns
- Solicitation and Distribution Rules
- Confidentiality and Conflict of Interest Rules
- Union-Free Statements

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**EXAMPLE OF A LAWFUL SOLICITATION/
DISTRIBUTION RULE**

- Solicitation of any kind by one employee of another employee is prohibited while either employee is on his or her working time. Working time is defined as that time when employees are expected to be working and does not include time before work, breaks, meal periods, or time after work. [Solicitation by employees is prohibited at any time in patient care and patient treatment areas.]



**EXAMPLE OF A LAWFUL
SOLICITATION/DISTRIBUTION RULE**

- Distribution of advertising material, handbills, or printed or written literature of any kind is prohibited at any time in [patient care, patient treatment or] work areas.

[Optional] In addition, distribution by one employee to another employee of advertising material, handbills, printed or written literature of any kind is prohibited while either the employee doing the distribution or the employee to whom the distribution is directed is on his or her working time. Working time is defined as that time when employees are expected to be working and does not include time before work, breaks, meal periods, or time after work.



E-MAIL RULES

- * Rules prohibiting all non-business use of e-mail likely will be found unlawful by the Labor Board
- * Rules must be enforced non-discriminatorily

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ACCESS RULES FOR OFF- DUTY EMPLOYEES

- “Employees must leave the premises immediately after the completion of their shift, and not return until their next scheduled shift”
 - Must apply to off-duty employees seeking access to the facility for *any* purpose
 - May only limit access to interior work areas of the facility and other work areas
 - May not limit access to parking lots, gates, and other exterior non-work areas (except where justified by business reasons)
 - Must be clearly disseminated to all employees
 - Must be applied non-discriminatorily
- Tri-County Medical Center, 222 NLRB 1089 (1976)

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BULLETIN BOARD RULES

- OK to prohibit all employee postings
- OK to regulate duration of posting
- OK to regulate size
- OK to regulate content of postings (to a very limited extent)

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EMPLOYEE PARTICIPATION "SAFE HAVENS"

- A "suggestion box" procedure where employees make specific proposals to management unilaterally and on an individual basis
- An "information sharing" group that exists for the purpose of sharing information with the employer
- A "brainstorming" group that generates ideas but does not make proposals
- A committee that is delegated the authority to manage certain matters without engaging in bilateral "dealing with" management

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EEOC Tips

How to Respond to a Charge of Discrimination

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When Should You Mediate?

- Do You Want to Pay Any Money?
- Will CP be reasonable; have an attorney?
- Merits of the Claim
- Amount of potential liability (including similar claims)
- Desire for reinstatement /willingness to consider
- Cost and time of defense
- Availability of witnesses
- Facts Established or Concessions Needed?
- P-I-A factor
- Precedent for current or former employees

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Pros and Cons of Mediation

DOWNSIDE

- Paying money
- Mediators sometimes not helpful
- Decisions made without all of the facts

UPSIDE

- Often resolves claim
- Often cheap resolution
- Avoid discovery of unpleasant facts
- Gain insights early
- Quick, easy and cheap

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Position Statement

General Tips

- Goal: provide enough information to get “No Cause” determination
- Locks in future position (admissions)
 - May not have complete or accurate facts
 - Not heard Charging Party’s story
 - Will be publicly available after charge closed and litigation begins

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Position Statement

General Tips

- Don't attack Charging Party
- Don't speculate about Charging Party's motives
- Professional tone; stick to facts
- Use open-ended phrases (i.e., in addition to other factors)
- Don't overly "lawyer-up" the position



Position Statement

Disclaimers

- Summary only
- Responds only to allegations
- Preliminary/ right to amend
- Confidential
 - Note subject to FOIA if litigation ensues



Position Statement

General Background

- Nature and size of business
- Key players (identify relevant protected category)
- Commitment to EEO
 - Policies and practices followed and enforced
 - Identify EEO officer
 - Training given to managers/supervisors/employees

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Disability, Leave and Health Management Strategies

Legal Risks Associated with Workplace Wellness Programs

- HIPAA
- ADA
- ERISA Retaliation
- State Lifestyle and Discrimination Claims
- The Role of ERISA Preemption

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Independent Contractors

- **Employee versus independent contractor**
- **Industries where concerns commonly arise**
 - Construction
 - IT
 - Telecommunication
 - Messengers and delivery personnel
 - Janitorial workers

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There are ramifications under various laws for erroneous/intentional misclassification

- Tax laws, Payroll, FICA, FUTA, Medicare. State taxes.
- FLSA: overtime, child labor, minimum wage, double the unpaid wages, interest, fees, plus penalties if willful.
- Equal Pay Act prohibiting different pay for different genders for work of similar skill, effort, responsibility, working conditions. (amended FLSA) BIGGEST danger if temps or IC'S work side by side in employee jobs.
- Anti-discrimination, harassment, retaliation statutes Title VII, ADA, ADEA.
- ERISA and COBRA: Big judgments possible-- pension, medical, savings, disability, vacation, etc. May end up settling even if you are right.

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Independent Contractors

- **Warning signs**
 - Performing the same kind of work as employees
 - Competitors use employees for the same function
 - Performing tasks essential to the production work of the business
 - Lack of freedom to select personnel
 - Performing services for only one customer

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Utilizing Leased Employees – Precautions

- Unless you are careful, the contracting business will almost always be deemed “joint” or “special” “employer” jointly responsible for compliance with workers’ compensation, tax, labor, wage and hour, and anti discrimination laws affecting such workers notwithstanding the independent contracting relationship with the leasing firm.
 - See e.g. *Burrey v. PG&E*, 159 F3d 388 (9th Cir. 1998), IRS Letter ruling 200017041
 - In CA, contracting entity is known as a special employer.
- Headcounts may create unexpected compliance and liability issues under statutes such as Title VII and FMLA

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Leased Employees – Precautions

- ERISA Gotcha's – Absent careful wording, contingent workers can be unintentionally covered by a plan
 - Big risk for disqualification
 - Big cost increases
 - Leased employees are counted for non-discrimination testing - IRC 414(n)

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Required Bulletin Board Postings

- Federal:
 - OSHA
 - EEO
 - FMLA
 - FLSA - Minimum Wage information
 - EPPA - Employee Polygraph Protection Act
 - USERRA
- State (check each State's list)
- Can get copies of posters from local Chambers of Commerce or from the governing agencies.

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Affirmative Action Plan (AAP)

- All federal contractors are required to maintain a written affirmative action plan.
- This plan includes all data on the employees numbers sorted by race, gender, disability, and veteran status.
- Oversight by the Office of Federal Contract Compliance Programs (OFCCP), which is part of the Department of Labor.
- The AAP and its supporting data is analyzed by the OFCCP during routine audits of federal contractors.

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Affirmative Action Plan

- Employers are required to maintain records of all employees' race, gender, veteran status, and disability status.
- Employees must be placed in job groups for comparison purposes.
- OFCCP looks for statistical disparities or "gaps" in the employee workforce by job category.
- They also look for gaps in hiring, promotional, and termination rates.

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Affirmative Action Plan

- The applicant tracking information is compared to the analysis of the employer's hiring data to ensure consistency and to determine whether there are problems with the employer's recruiting and hiring practices.
- MUST maintain information for all applicants to every job posted.
- MUST ask all applicants to self-report their race and gender.

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Applicant Tracking Data

- MUST maintain applicant records and track the numbers (after the hiring process is complete).
- These numbers are then reported in our affirmative action plan and reviewed by the Department of Labor if the employer is audited.
- Problems may arise when offices/branches use outside vendors/recruiters to find applicants because the agency may not collect and maintain the required data.

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EEO-1 Reports

- Employers with more than 15 or more employees are required by federal law to track and maintain employee data to help determine whether there is or has been problem with discrimination.
- Required to report annually to the federal gov't the overall employee picture.
- Employee information is "broken down" sorted by race/ ethnicity and gender.
- Can be used as evidence in discrimination litigation.

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EEO-1 Report

Job Categories	Number of Employees (Report employees in only one category)														Total Col A-N
	Race/Ethnicity														
	Hispanic or Latino		Male						Female						
	Male	Female	White	Black or African Amer.	Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African Amer.	Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	
Executive-Senior Level Officers & Managers															
First-Mid-Level Officers & Managers															
Professionals															
Technicians															
Sales Workers															
Administrative Support Workers															
Craft Workers															
Operatives															
Laborers & Helpers															
Service Workers															
Total															
Previous Year Total															

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WORKPLACE & EMPLOYEE PRIVACY

- Privacy in the Electronic Workplace
- Privacy of Persons, Personal Information and Data

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Balancing Rights

- Employee Privacy Rights
 - Right to be secure in person and property
- Management Rights
 - Right to operate the enterprise

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The Employee: Expectation of Privacy

- What is reasonable expectation of privacy in workplace today?
- What can an employee do to protect his/her privacy in the workplace?
- Are there requirements to notify employees of the actual level of privacy in workplace?

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The Company: Right to Monitor

- Courts have consistently allowed electronic monitoring in the workplace.
 - What is the workplace?
- The ECPA provides several exceptions for electronic workplace monitoring.
- Policies regarding monitoring must be made known to employees to be effective

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Better Living Through Electricity

- Telephone Monitoring.
 - Federal & State Wiretap laws.
- E-mail/Pager Monitoring
 - Electronic Communications Privacy Act (ECPA)
 - Stored Communications Act (SCE)
- Computer Monitoring
 - ECPA, SCE, Constitutional protections
- Monitoring of Personal Websites and Blogs
 - Labor Code Sec. 1101, 1102, 1102.5, 96(k)
- Video Monitoring of Work Area.
 - E.g. Civil Code Sec. 435, Notice requirements

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Guidance On Accessing Stored E-mail

- Essential administrative purpose, or
- Investigative purpose based on reasonable suspicion of work-related misconduct.
- Establish and follow written policies
 - ✓ Voiding expectations of privacy
 - ✓ Educating employees that transmissions are essentially permanent, i.e. **Delete ≠ Delete**
 - ✓ Warning re monitoring
 - ✓ Limiting and/or prohibiting personal use
 - ✓ Limiting and/or prohibiting unlawful use
- When appropriate obtain consent
- When in doubt seek legal counsel

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Managing Private Medical Information

- HIPAA
 - Personal Health Information – *PHI (any information relating to the provision, receipt or payment of health care services provided to or in possession of a plan or provider)*
 - Depends on source – Benefit Plan? Health care provider?
 - Most *stringent* duty to protect
- ADA/FEHA & FMLA/CFRA
 - Use generally limited to legitimate purpose of identifying need for and or reasonable accommodations or eligibility for leave.
 - Maintain apart from personnel file records, limited disclosure
 - *Limits on timing, extent and nature of inquiries – MUST be job or absence related*
- Protective State Laws
 - California Medical Privacy Act
 - Workers Compensation Laws
 - H&S Code Sec.120980 re HIV/AIDS testing w/o consent

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Drug/Alcohol & Other Medical Testing

- Drug Free Workplace Acts
- Common Testing Issues (Hill v. NCAA, 7 Cal. 4th 1 (1994))
 - Applicant Testing (Medical s/b business necessity & BFOQ)
 - Particularized Suspicion (i.e. 'for cause' testing)
 - Random Testing (Legally sanctioned vs. private undertaking)
 - Post-Accident (Skinner)
- Psychological Testing
 - Labor Code Sec 1101-1102, 96(k), 98.6
- Privacy of results

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Employee's Personal Information

- Disciplinary records, compensation/position history, performance evals, personal data, pension info, etc.
- Credit Histories (FCRA, State law)
- Employment references, letters of recommendation
 - E.g. Cal. Labor Code 1198.5
- Fingerprints
 - E.g. Cal. Labor Code 1051, 15 USC 78
- Criminal Records, Info re Off Duty Misconduct
 - Driving records, Police reports, Court Orders
 - Limits: Cal. Labor Code Sec. 432.7
- Social Security Numbers

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Global Issues Involving Workplace Privacy

- Competing standards in different jurisdictions
- Single standard approach requires adopting most onerous standards everywhere
- e.g. E-mail/Internet Monitoring
 - Single standard would prohibit monitoring everywhere
 - May be human rights violation in some jurisdictions
 - May even be criminal violation
 - e.g. France v. U.S.

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- **Hybrid Approach:**
- One standard wherever possible:
 - Consistency
 - Simpler
 - General corporate approach
- Differing national and regional standards where necessary and/or strategic

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Workplace Privacy Policy Considerations

- **Contents**
- Definition of “Employee Information” (or “Personal Data”, etc.)
- Identification of information subject to the Policy
- Statements regarding the organization’s Employee Information management practices, including disclosures:
 - Internal and external
 - National and international
- Reasons for the collection, use and/or disclosure of the Employee Information

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Workplace Privacy Policy Considerations (cont.)

- Rights of access and correction of information held
- Nature of consent given for employer access/disclosure, process for withdrawal and consequences
- Retention and destruction practices
- Security measures adopted in protecting information
- Acceptance/acknowledgement

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Business Immigration

L1 – Intracompany Transfer; Business Expansion; or Specialized Knowledge Transfer

- Must be an owner, majority shareholder, executive, Upper-level manager; or a person with specialized knowledge specific to the product or company
- The visa applicant must have worked for the foreign company for at least 1 out of the last 3 years
- The visa applicant's presence in the United States is essential to the success and the smooth operation of the U.S. company
- Initial duration of the visa is for 1 year for a new office or 3 years for transfer to an established subsidiary, with possible extensions to a maximum of 7 years for managers and executives and 5 years for specialized knowledge workers.
- Can be rushed and approved in 7-10 days.

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Business Immigration

- H1B – Employer-sponsored specialized professional work permit
 - quotas – dates April 1 & Oct. 1 of each year
 - must show that can't find suitable employee already eligible to work in U.S.
 - 3 year permit, can be renewed
- TN – NAFTA Professional Work Permit
 - Can get a the border with proper and qualifying documentation
 - Profession must be on the NAFTA list
 - Work must be performed for U.S. employer
 - May require showing of intent to return to home country within 12 months

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Business Immigration

- E1 – Treaty Trader
 - For companies whose volume of trade with the U.S. exceeds 50%
 - Obtain legal status in the U.S. by establishing a branch office
 - Five year visa with unlimited period of renewal.
- E2 – Treaty Investor
 - Legal status in the United States with a substantial investment of capital
 - Often requires a minimum investment of \$1 million and employment of 10 people.
 - Five year visa with unlimited period of renewal.

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Business Immigration (treaty countries)

Albania	Bolivia	Ecuador	Costa Rica
Jordan	Mexico	Romania	Paraguay
Argentina	Bosnia and Herzegovina	Egypt	Croatia
Kazakhstan	Moldova	Senegal	Philippines
Armenia	Bulgaria	Estonia	Poland
Korea (South)	Mongolia	Slovak Republic	Italy
Australia	Cameroon	Ethiopia	Thailand
Kyrgyzstan	Morocco	Slovenia	Iran
Austria	Canada	Finland	Togo
Latvia	Netherlands	Spain	Ireland
Azerbaijan	China (Taiwan)	France	Trinidad & Tobago
Liberia	Norway	Sri Lanka	Tunisia
Bahrain	Colombia	Georgia	Jamaica
Lithuania	Oman	Suriname	Turkey
Bangladesh	Congo (Brazzaville)	Germany	Japan
Luxembourg	Pakistan	Sweden	United Kingdom
Belgium	Congo (Kinshasa)	Grenada	
Macedonia (FRY)	Panama	Switzerland	
Czech Republic		Honduras	

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E-Verify

- The effective date of the final rule requiring certain federal contractors and subcontractors to use E-Verify has been delayed until June 30, 2009.
- The rule will only affect federal contractors who are awarded a new contract after June 30, 2009 that includes the Federal Acquisition Regulation (FAR) E-Verify clause (73 FR 67704).
- Federal contractors may NOT use E-Verify to verify current employees until the rule becomes effective and they are awarded a contract that includes the FAR E-Verify Clause.
- The new rule implements Executive Order 12989, as amended by President George W. Bush on June 6, 2008, directing federal agencies to require that federal contractors agree to electronically verify the employment eligibility of their employees.
- Already required by many states to be in use by companies with state contracts.

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I-9 Verification

- All employees, citizens and noncitizens, hired after November 6, 1986 and working in the United States must complete a Form I-9.
- Form must be completed at the time of hire, which is the actual beginning of employment. Providing the SSN is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify).
- Employers must complete I-9 by physically examining evidence of identity and employment eligibility within three (3) business days of the date employment begins.
- Employers must retain completed Forms I-9 for three (3) years after the date of hire or one (1) year after the date employment ends, whichever is later.
- The Form I-9 may be signed and retained electronically

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Restrictive Covenants

- Non-competes
- Non-solicitations
- Confidentiality agreements
- Continuing employment sufficient consideration?
- Choice of Laws provisions
- Clients, employees, trade secrets

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HANDY RESOURCES

- Wrongful Discharge, Staff Reduction & Employment Practices Manual
- Employment Discrimination & EEO Practice Manual
- Employee Handbook & Personnel Policies Manual
- Employer's Guide to FMLA, 8th ed.
- Wage & Hour Manual for CA Employers
 - www.castlepublications.com
- CalChamber – publications – guide to California laws and regulations
- www.eeoc.gov – Equal Employment Opportunity Commission
- www.dol.gov – U.S. Department of Labor
- www.uscis.gov – U.S. Citizenship and Immigration Services
- <http://www.irs.gov/pub/irs-pdf/fss8.pdf> - Independent contractor or employee?

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Resources (Cont.)

- Employment Discrimination Law, 4th ed.
- The Developing Labor Law, 5th ed.
 - www.bnabooks.com
- Resolving ADA Workplace Questions
- Affirmative Action Guide
 - www.neli.org
- Advising California Employers
 - www.ceb.com
- ADA library of the Job Accommodation Network (JAN)
 - <http://www.jan.wvu.edu/LINKS/adalinks.htm>

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