107 Employment Law Here & There-Hot Topics in Canadian & US Employment Law

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Overview of Employment Related Issues in the United States: Appendix B

DOCUMENTS RELATED TO RECRUITMENT

Type of Record	Retention Period	Statute	Where to Maintain
Advertisements or notices to the public or to employees relating to job openings, promotions, training programs, or opportunities for overtime work	1-year from the date of the personnel action to which the record relates	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)	"Advertisements and Notices" file
Test papers completed by applicants or candidates for any position which disclose the results of any employer-administered aptitude or other employment test considered by the employer in connection with any personnel action	1-year from the date of the personnel action to which the record relates	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act)	"Aptitude Tests" File. Where applicant is hired, maintain in individual personnel file
Results of any physical examination where such examination is considered by the employer in connection with any personnel action	1-year from the date of the personnel action to which the record relates	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	"Physical Exam" File. Where applicant is hired, establish separate individual medical personnel file and maintain in a locked file cabinet separate from cabinet containing personnel files

DOCUMENTS RELATED TO EMPLOYEE SELECTION

Type of Record	Retention Period	Statute	Where to Maintain
Job applications, resumes, or any other form of employment inquiry whenever submitted to the employer in response to an advertisement or other notice of existing or anticipated job openings, including records pertaining to the failure or refusal to hire any individual	1-year from the date of the personnel action to which the record relates	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	"Application" file. Where applicant is hired, maintain in individual personnel file
Promotion, demotion, transfer, selection for training, layoff, recall, or discharge or an employee	1-year from the date of the personnel action to which the record relates	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	Individual personnel file
INS Form I-9 (Employment Eligibility Form)	3-years from date of hire or 1-year from date of termination, whichever is later	8 U.S.C. § 1324a (Immigration & Nationality Act)	Individual personnel file
EEO-1 Form (for employers with 100 or more employees)	1-year	42 USC §2000e8c; 29 CFR § 1602 (Title VII of the Civil Rights Act of 1964)	"EEO-1" file
Written affirmative action plan, including supporting documents, evaluations, and compliance documents (Government contractors only)	Varies between local, state, and federal regulations. Recommend	Executive Order 11246 and implementing Department of Labor Regulations (federal projects); applicable	"Affirmative Action" file

	maintaining for 5-years	municipal codes and state statutes (local and state projects)	
Written affirmative action program (if maintained)	1-year	29 U.S.C. § 708; 41 C.F.R. § 60-741.30; 29 U.S.C. § 701 et seq.; 29 C.F.R. § 32.49 (Rehabilitation Act of 1973)	"Affirmative Action" file
Written training agreements, summaries of applicant qualifications, job criteria or descriptions, interview notes or records, and identification of minority and female applicants	Duration of training program	29 U.S.C. § 206; 29 U.S.C. § 211; 29 C.F.R. § 516.5 (Fair Labor Standards Act and National Labor Relations Act)	"Applicant" file

DOCUMENTS RELATED TO EMPLOYEE COMPENSATION

Type of Record	Retention Period	Statute	Where to Maintain
Payroll or other records for each employee containing name, address, date of birth, occupation, rate of pay, and compensation earned each week	3-years	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	Individual personnel file
Hours worked each day and each work-week for each employee	3-years	Minn. Stat. § 177.30(3)	General payroll reports
Payroll records; collective bargaining agreements; individual contracts or agreements under the Fair Labor Standards Act; sales and purchase records; certificates and notices of the Department of Labor Wage and Hour Administrator	3-years	29 U.S.C. §§ 206 and 211; 29 C.F.R. § 516.5 (Fair Labor Standards Act and National Labor Relations Act)	General payroll reports; "collective bargaining agreement" file; individual personnel file for FLSA contracts or agreements; "Wage and Hour Cert/Notice" file
Basic employment and	2-years	29 U.S.C. §§ 206	General

earning records, including time cards reflecting daily start and stop time of individual employees. Wage rate tables utilized to calculate hours worked (straight and overtime). Order, shipping and billing records. Records of additions to or deductions from wages paid, including records used to determine costs and charges in the additions or deductions.		and 211; 29 C.F.R. § 516.5 (Fair Labor Standards Act and National Labor Relations Act)	accounting files

DOCUMENTS RELATED TO EMPLOYEE BENEFIT PLANS

Type of Record	Retention Period	Statute	Where to Maintain
Employee benefit plans, such as pension and insurance plans, and written seniority or merit systems	Duration of plan and at least 1-year after termination of the plan	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	"Benefits" file

Memorandum fully outlining the terms of any unwritten employee benefit plans or seniority or merit systems, including notations relating to manner in which communicated to employees and recording any changes or revisions	Duration of plan and at least 1-year after termination of the plan	29 U.S.C. § 626; 29 C.F.R. § 1627.3 (Age Discrimination in Employment Act	"Benefits" file
Basic information supporting plan descriptions, including vouchers, worksheets, receipts, applicable resolutions and participants' elections	6-years after filing date of such documents	29 U.S.C. § 1027; 29 C.F.R. § 2520 (Employee Retirement and Income Security Act)	""Benefits" file

and deferrals			

DOCUMENTS RELATED TO EMPLOYEE EXPOSURE TO TOXIC SUBSTANCES

Type of Record	Retention Period	Statute	Where to Maintain
OSHA 300 Log, the privacy case list, the annual summary, and the OSHA 301 Incident Report Forms	5-years following the end of the calendar year that the records cover	29 U.S.C. § 657; 29 C.F.R. § 1904 (Occupational Safety & Health Act)	"OSHA 300 Log" file
OSHA Form 200 Log and supplemental Form 101	5-years following the end of the calendar year that the records cover	29 U.S.C. § 657; 29 C.F.R. § 1904 (Occupational Safety & Health Act)	"OSHA 200 Log" file
Medical examinations required by law	Duration of employment, plus 30-years, unless OSHA requires otherwise	29 U.S.C. § 657; 29 C.F.R. § 1904 (Occupational Safety & Health Act)	"OSHA Medical Exams" file (Do not include in employee personnel file)
Records of exposure to hazardous materials monitoring	30-years	29 U.S.C. § 657; 29 C.F.R. § 1904 (Occupational Safety & Health Act)	"Hazardous Materials Monitoring" file
Records of employees' "significant adverse reactions to health or environment (manufacturers, processors, or distributors of chemical substances)	30-years from date of first reported or when first known to employer	15 U.S.C. § 2607 (Toxic Substances Control Act)	"Significant Chemical Reactions" file
Records of adverse reactions (note absence of "significant"	5-years from date of first report	15 U.S.C. § 2607 (Toxic Substances Control Act)	"Adverse Chemical Reactions" file

	or when first known to employer		
Consumer allegations of personal injury or harm to health, reports of occupational disease or injury and reports or complaints of injury to the environment submitted to the manufacturer, processor, or distributor from any source	30-years for employee claims of occupational disease or occupational health problems	15 U.S.C. § 2607 (Toxic Substances Control Act)	"Occupational Disease and Health Reports" file

DOCUMENTS RELATED TO CHARGES OF DISCRIMINATION

Type of Record	Retention Period	Statute	Where to Maintain
Personnel records concerning charges of discrimination or actions brought by an individual or agency, including, for example, employment records relating to the complainant and to all other similarly situated employees, applications and testing materials, and information related to unsuccessful applicants for the same or similar position	Until final disposition of the charge or action	29 CFR § 1602.14 (Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act)	Individual charge file for duplicate records submitted to agency; see specific record entries for original records.
Personnel or employment records made or kept by an employer (including requests for reasonable accommodation)	1-year from the date of making the record	29 CFR § 1602.14 (Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act)	Individual personnel file. where record includes employee medical information, establish separate individual medical personnel file and maintain in a locked file cabinet

			separate from cabinet containing personnel files.
Personnel records of involuntarily terminated employees	1-year from the date of termination	29 CFR § 1602.14 (Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act)	Individual personnel file
Records concerning complaints of handicap discrimination and relevant employment records of charging party and employees in similar positions	3-years from the date of the complaint	29 U.S.C. § 701; 29 C.F.R. § 32.49 (Rehabilitation Act of 1973)	"Disability Discrimination Complaints"

DOCUMENTS RELATED TO EMPLOYEE LEAVES OF ABSENCE

Type of Record	Retention Period	Statute	Where To Maintain
Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	General accounting files; individual personnel file
Dates FMLA leave is taken by eligible employees. If such leave is taken in less than one full day, the hours of such leave.	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	Individual personnel file
Copies of employee notices of leave furnished to the employer under FMLA and copies of all general and specific written notices given to	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	Individual personnel files

employees as required under the FMLA			
Any documents (written and electronic) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	"Benefits" or "Handbook" file
Premium payments of employee benefits	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	General "benefits" file
Records of any dispute between the employer and an eligible employee regarding the designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	Individual personnel file. If the record includes employee medical information, establish separate individual medical personnel file and maintain in a locked file cabinet separate from cabinet containing personnel files.
Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members	3-years	29 U.S.C. § 2601; 29 C.F.R. § 825.500 (Family and Medical Leave Act of 1993)	Maintain employee medical records in separate file/records from individual personnel files

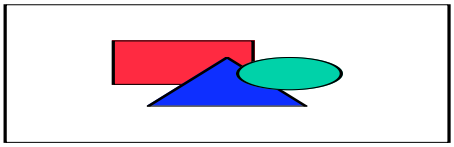
Records related to the education and training of breath alcohol technicians, screening test technicians, supervisors, and employees	Duration of time in which individual performs functions requiring	49 C.F.R. § 382.401	General "drug and alcohol testing" file in a secure location with controlled access

	training and for two years after ceasing to perform those functions		

MEDICAL RECORDS[1]

Type of Record	Retention Period	Statute	Where to Maintain
All medical records and other individually identifiable health information, whether communicated electronically, on paper or orally.	Duration of employment + 6 years (recommen-ded)	65 C.F.R. § 82462	Individual medical personnel file in a secured location with controlled access

[1] Applies only to health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions electronically.



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Overview of Employment Related Issues in the United States

I. Pre-Employment Considerations

Website:
www.eeoc.gov/policy/docs/preemp.html

A. Employment at will – The general rule in the United States is that unless a contract is created, an employee's employment is "at-will," meaning that the employee can be terminated at any time for any reason or no reason, assuming there is no judicial, statutory or contractual limitation.

B. Contract for Employment – To create a contract for employment, an employer and employee need merely agree on one, or more, "terms and conditions" of employment. What constitutes an "agreement" depends on the laws of the individual states and may vary between and among states.

C. Application for Employment – An application must be carefully structured to make sure questions asked are legally acceptable (i.e., that they do not violate any of the protected classifications identified in Section II below):

1. Age, date of birth, date graduated from high school or college.
2. Whether the person has been arrested, employers can only asked if the applicant has been convicted of a crime.
3. Birthplace.
4. Any questions related to an applicants health or history of sick days, etc.
5. Race, color of skin, or height and/or weight when not related to the job.
6. Illegal interview questions (Appendix A).

D. Pre-employment testing – Various anti-discrimination laws restrict testing at the pre-employment stage. Generally, pre-employment tests should be standardized in form and used uniformly among all facilities. Further, the tests should be required of all applicants for the position and should only measure essential job-related abilities.

1. Pre-employment medical or physical tests may be required only after a conditional offer of employment is made.

2. The test must be used solely for determining the person's ability to perform the job for which they applied and must be required of all people conditionally offered employment for the same or similar positions.

E. Fair Credit Reporting Act (FCRA) 15 U.S.C. § 1681a, et seq.- The FCRA controls an employer's use of "consumer reports" or "investigative consumer reports" that are prepared or collected by a "consumer reporting agency."

1. A consumer report is a written or oral summary of a person's credit-worthiness, credit standing, character, general reputation, personal characteristics, or mode of living.

2. A consumer reporting agency includes any person, who regularly compiles or evaluates consumer credit information or other information on consumers for the purpose of providing consumer reports to third parties.

3. If a consumer reporting agency verifies an applicant's job references by checking the facts disclosed on an application, such as dates worked, job title, and final rate of pay, this is a "consumer report."

4. Before an employer obtains a consumer report, the employer must:

   a. Provide the consumer (applicant) with "clear and conspicuous disclosure" that the consumer report may be obtained for employment purposes;
   b. Ensure that the disclosure is written in a document that consists only of the disclosure; and
   c. Receive the consumer's (applicant's) written authorization to obtain the report.

5. If an employer chooses to take an "adverse action" (any decision that adversely affects any current or prospective employee) against an applicant based upon information learned through a consumer report, the employer must:

   a. Provide the applicant a copy of the consumer report;
   b. Provide the applicant a written summary of his or her rights under the FCRA;
   c. Provide notice of the adverse action;

d. Provide the name, address, and phone number of the consumer reporting agency that provided the report to the employer;
e. Provide a statement that the consumer reporting agency did not make the decision to take the adverse action and thus cannot tell the consumer the specific reasons for the adverse action;
f. Provide a statement setting forth the applicant's right to obtain a free disclosure of his or her file from the consumer reporting agency; and
g. Provide a statement of the applicant's rights to dispute directly with the consumer reporting agency the accuracy or completeness of any information provided by the agency.

F. Background Checks – Many employers conduct background checks during the hiring process to verify the suitability of applicants for employment and to determine the veracity of information provided during the hiring process. In addition to FCRA, individual state and federal laws prohibit certain types of inquiries into applicant backgrounds. For example, refusing to hire an applicant based solely on an arrest or conviction record may constitute unlawful discrimination. Factors such as age at the time of the offense, type of offense, remoteness of the offense in time, and rehabilitation should be considered in evaluation conviction records of applicants. Employers should not inquire as to the arrest record of applicants, but limit questioning to actual conviction records. Some states have recently passed laws requiring criminal background checks for individuals working with vulnerable individuals such as elderly, children or person's with disabilities. Individual state laws should be consulted when conducting background checks on applicants or current employees.

G. I-9 – Employment Verification – Every employer is required to verify the work authorization for all of its employees. An employer satisfies this requirement by completing an I-9 employment verification form within three days of commencement of employment for each employee.

1. The I-9 form includes a list of acceptable documents used to verify the employee's eligibility to work.

2. The employee must attest, on the I-9 that he or she is a citizen of the United States, a permanent resident alien, or an alien authorized to work in the United States.

3. The employee must review the documents provided by the employee and determine whether they appear to be genuine documents and that they relate to the individual presenting them.

4. Social security numbers are verified with the Social Security Administration (SSA). If the number does not yield a match, the SSA issues a "no-match" letter to the employer, notifying them of their obligation to discuss the matter with the employee and obtain documentation of a valid social security number.

5. Employers can be subjected to penalties for failure to follow these procedures.

Websites:
http://uscis.gov/graphics/formsfee/forms/index.htm
http://www.uscis.gov/graphics/formsfee/forms/i-9.htm

H. Sarbanes-Oxley Act of 2002 (SOX) Pub.L.No. 107-2004, 116 Stat. 745 – SOX established requirements that publicly traded companies establish audit committees, and establish procedures for filing internal, confidential and anonymous complaints concerning financial irregularities. SOX also forbids destruction, alteration, or falsification or records in deferral investigations and bankruptcy cases. SOX contains whisleblowing provisions that protect employees of publicly traded companies who provide information or assist in federal fraud investigations.

1. The "anti-retaliation" coverage applies to current and prospective employees of publicly traded companies and individuals whose employment is affected by the company.

2. SOX does not cover employees working outside of the United States.

3. Employees are protected if they engage in one of two types of protected activity: (1) provide information, cause information to be provided, or assist in an investigation regarding conduct that they "reasonably believe" constitutes a violation of enumerate criminal statutes (mail fraud, wire fraud, bank fraud and securities fraud), any SEC rule or regulations, or any federal law relating to shareholder fraud; or (2) participate in a proceeding.

4. Employees are protected if they provide information to anyone within one of the following three categories: (1) a federal regulatory or law enforcement official; (2) a member of Congress or any congressional committee; or (3) a person with "supervisory authority over the employee" or a "person working for the employer who has the authority to investigate, discover, or terminate misconduct.

5. Employees who feel that they were retaliated against in violation of SOX must file complaints with the Department of Labor within 90 days of the violation. The 90 day period begins to run when the employee is made aware of the employer's decision to terminate him or her or even when there is a possibility that the termination could be avoided.

6. A SOX complaint is reviewed by the DOL to determine if the employee has made a prima facie showing. An employee must show that:

    a. The employee engaged in a protected activity or conduct;
    b. The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;
    c. The employee suffered an unfavorable personnel action; and
    d. The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

7. If the employee can establish a prima facie case, then the DOL will conduct an investigation to determine whether there is reason to believe that an actual violation occurred. Employers are given an opportunity to file a response within 20 days of receiving notice of a complaint.

8. The DOL technically has 60 days to meet its investigative deadline, however, the DOL does not always meet with deadline and there does not seem to by any recourse or consequence for this failure.
9. At the end of the investigation the DOL will make a written determination of whether discrimination occurred in violation of SOC. Included in the written determination is a preliminary order providing relief to the employee where appropriate.

10. The DOL may order "all relief necessary to make the employee whole." This relief may include reinstatement, back pay with interest, compensation for "special damages" such as litigation costs, expert witness fees, and attorney's fees.

11. Both parties have the right to file an objection within 30 days of receipt of the preliminary order. The DOL will conduct a hearing before an Administrative Law Judge.

12. If the DOL does not issue a final decision (including conducting an investigation and hearing before the ALJ and any subsequent appeals) within 180 days of the filing of the compliant, the employee may file a private cause of action in federal court.

Websites:
www.sec.gov/spotlight/sarbanes-oxley.htm
www.sec.gov/divisions/corpfin/faqs/soxact2002.htm
www.sarbanes-oxley.com

II. Anti-Discrimination Laws

A. Primary Federal Anti-Discrimination Laws

General Knowledge Websites:
www.law.cornell.edu/topics/employment_discrimination
www.elinfonet.com

1. Federal Laws Prohibit Discrimination Based on the Following:

- Race or color (Title VII)
- National Origin (Title VII)
- Religion or Creed (Title VII)
- Sex (Title VII)
- Age (Age Discrimination in Employment Act; Older Workers Benefit Protection Act)
- Physical or Mental Disability (Americans with Disabilities Act)
- Pregnancy (Pregnancy Discrimination Act)
- Retaliation

2. State Laws Mimic the Federal Laws and May Cover the Following:

- Marital Status
- Sexual Orientation
- Public Assistance Status

B. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended – this law covers employers with 15 or more employees, employment agencies and labor organizations. Title VII makes it an unlawful employment practice to discriminate against a current or potential employee with respect to "compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, or national origin."

1. **Harassment** – Harassment based upon a protected category, such as race, sex, disability, or age is illegal.

   - When a supervisor engages in harassment that results in a tangible employment action, the employer is strictly liable for the conduct.
   - If there is no tangible employment action, the employer is not liable if it can show that it used reasonable care to prevent and promptly correct the harassment and that the complaining party unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.
   - A tangible employment action significantly changes the person's employment status. Examples of tangible employment actions are hiring, firing, demoting, promotion and reassigning.
   - What is harassment? Conduct based on a protected category that is offensive to a reasonable person and affects the terms and conditions of employment. Some examples include: epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to an employee's membership in a protected category, written or graphic material that shows hostility or denigrates an employee because of membership in a protected group, dating in the workplace, physical contact, offensive e-mails.

2. **Disparate Treatment** – in a disparate treatment claim the Plaintiff must show that her employer treated her differently from similarly situated men because of her sex. A prima facie case of disparate treatment is:

   - The plaintiff is a member of a group protected by the statute;
   - The plaintiff was qualified for the position;
   - The plaintiff suffered an adverse effect on her employment; and
   - The plaintiff suffered from differential application of work or disciplinary rules.

3. **Disparate Impact** – in a disparate impact claim a Plaintiff claims that a facially neutral employment practice affects one group (i.e. women) more harshly than men. A plaintiff must prove the following elements:

   - The employer engaged in a specific employment practice that had an adverse impact; and
   - There is a causal link between the challenged employment practice and the adverse impact.

- In a disparate impact claim, the employer has an affirmative defense if it can establish that the practice was a business necessity.

Websites:
www.eeoc.gov/abouteeo/overview_law.html
www.eeoc.gov/abouteeo/overview_practices.html
www.eeoc/types/sex.html
www.eeoc.gov/types/sexual_harassment.html
www.eeoc.gov/types/race.html
www.eeoc.gov/types/origin/index.html
www.eeoc.gov/types/religion.html
www.law.cornell.edu/topics/employment_discrimination

C. Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 621 et seq. – The ADEA prohibits discrimination based on age, it specifically protects individuals who are over 40 years old in the discharge, hire, or compensation, terms, privileges or conditions of employment.

1. Because direct evidence is rarely available, the courts have developed a "burden shifting" analysis to analyze ADEA and Title VII cases. The plaintiff must present a *prima facie* case of discrimination, which "shifts" the burden of articulating a legitimate, nondiscriminatory business reason for the decision, the burden then shifts back to the plaintiff to prove that he or she was subjected to age discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

2. There are a few exceptions to the prohibition of discrimination based upon age. An employer may demonstrate, though it is a very high threshold, that its practice involves a bona fide occupational qualification (BFOQ), for example, American Airlines successfully proved that its policy of not hiring older pilot applicants, who, under then existing conditions would not have had time to progress from flight officer to captain was a legitimate BFOQ. EEOC v. American Airlines, Inc., 48 F.3d 164 (5th Cir. 1995). Another exception is that it is not unlawful age discrimination for an employer to observe terms of a "bona fide seniority system" that is not intended to skirt the purposes of the ADEA.

3. Disparate treatment – Under this theory, an employee claims that he or she was intentionally treated differently because of age. To prevail under this theory, the employee must prove that he or she was treated differently than younger employees and he or she

would not have been treated differently "but for" age. This can be demonstrated by direct or circumstantial evidence.

4. Disparate impact – Under this theory, the employee claims that an employer's facially neutral policy operated in a way that had disparately negative impact on the employees because of their age. A recent Supreme Court decision settled a split among the circuits ruling that disparate impact theories are viable under the ADEA.

5. **Older Workers Benefits Protection Act (OWBPA) 29 U.S.C. § 623 et seq. –** OWBPA amended the ADEA to prohibit employers from denying benefits to older employees. The cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and Congress recognized that and that those greater costs would create a disincentive to hire older workers. The OWBPA was enacted specifically to protect the benefits of older workers.

6. **Waivers of ADEA Rights –** Additionally the OWBPA prescribed requirements that must be met when an employer asks an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. In order for a waiver to be considered knowing and voluntary and, therefore, valid, among other requirements, a valid ADEA waiver must:

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

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

Websites:
www.eeoc.gov/abouteeo/overview_laws.html
www.eeoc.gov/abouteeo/overview_practices.html
www.eeoc.gov/types/age.html

D. Americans with Disabilities Act (ADA) 42 U.S.C. § 12101 et seq. – Prohibits employers from discriminating against a qualified individual with a disability in job application procedures, hiring, training, job advancement, compensation, discharge, and in any other terms, conditions, and privileges of employment.

1. A disability is defined by the ADA as "a physical or mental impairment that substantially limits one or more major life activities of an individual."

2. Major life activities are listed as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630(2)(i).

3. A person who has a "record" of a physical or mental impairment that substantially limits a major life activity is also protected from discrimination.

4. Additionally, an individual is protected if he or she is "perceived" or "regarded" as disabled. An employee is protected if the employer treats the person as impaired or as limited in major life activities. (An employer who misinterpreted doctor's restriction that the employee might have difficulty working near dust and fumes to mean that he could not work in the employer's plant perceived the employee as disabled. Ollie v. Titan Tire Corp., 336 F.3d 680 (3rd Cir. 1998).

5. The ADA requires employers to make "reasonable accommodations" to give otherwise qualified disabled persons equal opportunity to work. These accommodations are designed to assist the otherwise qualified individual to perform the essential functions of the job. An employer is expected to engage in the "interactive process" to determine appropriate reasonable accommodations to enable the employee to perform the essential functions of the position.

Websites:
www.eeoc.gov/abouteeo/overview_practices.html
www.eeoc.gov/abouteeo/overview_laws.html
www.eeoc.gov/types /ada.html

E. **Pregnancy Discrimination Act (PDA) 42 U.S.C. § 2000e(k) –** Title VII as amended by the Pregnancy Discrimination Act prohibits employment discrimination on the basis of "pregnancy, childbirth or related medical conditions." It is unlawful to discharge or refuse to promote or hire women due to their pregnancy.

1. An employer may not treat pregnancy differently from other temporary disabilities when establishing a maternity leave plan.

2. A hot topic in this area is the coverage of contraceptives in medical benefits plans. Recently, courts have determined that an employer who excluded prescription contraceptives from its employee health plan violated Title VII as amended by the PDA. The Court ruled that "the intent of Congress in enacting the PDA…shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women." Erickson v. Bartell, 141 F.Supp.2d 1266 (W.D. Wash. 2001). The Court went on the state that employers are not required to provide any specific benefits under Title VII, but that once an employer chooses to do so, it cannot provide unequal benefits. The Court ruled that "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered." Id. at 1277.

Websites:
www.eeoc.gov/types/pregnancy.html
www.eeoc.gov/facts/fs-preg.html

F. **Retaliation –** The majority of federal and state laws that prohibit discrimination based upon a protected characteristic also prohibit retaliation against an employee who makes a complaint under one of those laws. Further, there are other statutes that protect employees from retaliation when engaging in activities such as reporting safety violations, illegal activity or violations of public policy. To demonstrate a *prima facie* case of retaliation a plaintiff must show:

1. That he or she engaged in protected activity (either opposition to discrimination, safety violations, violations of public policy, etc.);

2. He or she suffered an adverse employment action; and

3. There was a causal link between the protected activity and the adverse employment action.

Websites:
www.eeoc.gov/types/retaliation.html
www.dol.gov/dol/compliance/comp-whistleblower.htm

G. Constructive Discharge – A constructive discharge occurs when an employee resigns his or her employment because the employee feels the working conditions are intolerable (subjective belief) and other reasonable employees would also find the environment intolerable (objective belief). A constructive discharge can be considered a tangible employment action if a supervisor's official act precipitates the constructive discharge.

H. Investigations – Employers occasionally need to conduct investigations in response to complaints or discovery of information. Investigations usually result from a complex claim that requires fact finding to fully understand, a dispute about facts among parties, claims that suggest widespread conduct or environmental issues, a claim involving physical contact or any claim that if any of the allegations is true could lead to disciplinary action. The following guidelines should be used in conducting an investigation:

1. Select an investigator;

2. Interview complaining party;

3. Conduct interviews of any and all parties that have relevant information;

4. Gather and analyze evidence;

5. Determine whether any credibility determinations are necessary;

6. Conclusion – decide what is appropriate action, if any to take; and

7. Follow-up with parties.

8. Investigations are not only a good way of demonstrating to employees that their complaints and concerns will be taken seriously but are a smart business practice. A well done investigation can be an affirmative defense should an employee subsequently bring a claim against the company.

III. Affirmation Action Obligations – Federal Contractor Status

A. Affirmative Action, Executive Order 11246 – An equal employment opportunity employer is an employer that is committed to complying with anti-discrimination laws, therefore, all employers should be equal employment opportunity employers. Affirmative Action employers are

those that are required by federal, state or even local laws to have written affirmative action programs that track minorities, women, disabled employees and disabled veterans. An employer must comply with federal affirmative action laws if:

1. They have at least 50 employees and $50,000 in government contracting or subcontracting;

2. They have at least 50 employees and is a financial institution that is an issuing and paying agent for U.S. Savings bonds or notes;

3. They have at least 50 employees and serve as a depository of federal government funds in any amount;

4. They have at least 50 employees and has an open ended or indefinite quantity federal non-construction contract or subcontract that will total $50,000 or more in a 12-month period; or

5. They have at least 50 employees and has government bills of lading which in any 12-month period total or will likely total $50,000 or more.

6. Affirmative Action programs are regulated and monitored by the Office of Federal Contract Compliance Programs.

Websites:
www.dol.gov/esa/ofccp
www.dol.gov/elaws/ofccp.htm
www.dol.gov/esa/regs/compliance/ofccp/aa.htm

B. Office of Federal Contract Compliance Programs (OFCCP) Executive Order 11246, 41 C.F.R. § 60 (generally) – The Office of Federal Contract Compliance Programs (OFCCP) is part of the U.S. Department of Labor's Employment Standards Administration. The OFCCP is responsible for ensuring that employers doing business with the Federal government comply with the laws and regulations requiring nondiscrimination and affirmative action. Specifically, the OFCCP is charged with regulating and monitoring affirmative action programs for government contractors.

As part of its mandate, the OFCCP issues regulations and interpretive guidance for contractors required to have affirmative action plans. The OFCCP recently defined internet "applicants" for the purpose of applicant tracking for Affirmative Action compliance. An individual is considered an applicant if:

1. The individual submits an expression of interest in employment through the internet or related electronic means;

2. The contractor considers the individual for employment in a particular position;

3. The individual's expression of interest indicates that he or she has the basic qualifications for the position; and

4. The individual at no point during the selection process removes him or herself from further consideration or indicates that he or she is no longer interested in the position.

5. How does this change the existing rule?

   a. Defines "Internet Applicants" as job seekers applying for work and from whom contractors must solicit demographic information.
   b. Prescribes the records contractors must maintain about hiring done through use of the Internet or related electronic technologies.
   c. Explains the records OFCCP will require contractors to produce when evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis.

Websites:
www.dol.gov/esa/ofccp/
www.dol.gov/esa/regs/compliance/ofccp/faqs/iappfaqs.htm
www.dol.gov/esa/regs/fedreg/final/2005020176.htm

IV. Leaves During Employment

A. Family and Medical Leave Act (FMLA) 29 U.S.C. § 2601 et seq. – Under the FMLA employees are eligible to take up to 12 weeks of unpaid medical leave in a one year period, for certain circumstances including pregnancy; pregnancy-related concerns; adoption of a child; for a serious health condition of a child, spouse or parent; or for the employee's own serious health condition that makes the employee unable to perform the essential functions of his or her job. To be eligible employees must have worked at least 1,250 hours during the previous 12 months.

1. Under an FMLA leave, an employer is obligated to return employees, other than certain key employees, to the same or an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment, upon return from leave.

2. An employer's obligation to reinstate the employee to their previous position, or equivalent, does not end if the employee is unable to perform their former job duties. If the employee is unable to perform the job duties because of the employee's own medical condition, an employer may have an obligation to make reasonable accommodations that will allow the employee to meet the employer's performance expectations.

3. The FMLA requires that employers maintain coverage and continue payment of premiums under any "group health plan…for the duration of such leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." 29 C.F.R. § 825.210. An employee who contributed to health coverage while at work must continue to contribute while on leave and must pay any increase in insurance premiums that occur while on leave.

4. Strict notice and record keeping requirements apply to the FMLA, so employers must comply with all applicable laws and regulations to protect themselves from potential liability.

Websites:
www.dol.gov/dol/compliance_fmla.htm
www.dol.gov/esa/whd/fmla/
www.eeoc.gov/policy/docs/fmlaada.html

B. Reasonable Accommodation Leave – An employer may be required to provide a leave of absence to an employee that is a qualified person with a disability under the ADA. The specific amount of time for leave is dependent upon the independent facts of each situation or need/request for leave.

Website:
www.eeoc.gov/policy/docs/fmlaada.html
www.eeoc.gov/policy/docs/accommodation.html

C. Uniformed Services Employment and Reemployment Rights Act of 1997 (USERRA) 38 U.S.C. § ch. 43, part III – USERRA protects employment rights for all individuals who have served or may serve in the future in the uniformed services. This includes voluntary or involuntary, active duty, active duty for training, initial active duty for training, inactive duty training and full-time National Guard duty. Employers are required to reinstate employees, and may be required to provide training, and other benefits in certain circumstances.

1. An employee returning from military leave must be reemployed in an "escalator position."
2. The employee must retain same seniority, status and pay, as if he/she had not taken military leave
3. The employer must provide an alternative reemployment position if the employee does not qualify for an escalator position.
4. In seniority based systems, employers are required to award jobs to returning employees, who if not for their military leave, would have otherwise been awarded the position.
5. Employers must retrain employees for an escalator position, if the employee is still not qualified to perform the escalated position, the employee must be re-employed in his/her previous position.
6. Also employees who are injured services members and unable to perform their previous jobs must be retrained for another position.

Websites:
www.dol.gov/elaws/userra.htm
www.dol.gov/vets

V. Workplace Laws

A. Occupational Safety and Health Administration (OSHA) Standards 29 C.F.R. - The purpose of OSHA is to "assure…every working man and woman in the nation safe and healthful working conditions." Workplace inspections may be conducted either in advance or unannounced and violations may be issued for worksites that do not comply with the Act.

Websites:
www.osha.gov
www.osha.gov/comp_links.html
www.osha.gov/dts/osta/oshasoft/index.html

B. Fair Labor Standards Act (FLSA) 29 C.F.R. ch. V – The FLSA sets minimum wage rates, regulates overtime pay, establishes record keeping requirements and enforces child labor standards and penalties.

1. All employees must be classified as exempt or non-exempt.

2. Exempt employees are excluded from overtime and/or minimum wage requirements.

3. All non-exempt employees must be paid not less than minimum wage for every hour worked and at the rate of time and one-half their "regular rate" for all hours worked over 40 hours per week.

4. Exempt employees must meet the tests for one of the "white collar" exemptions: Executive, Administrative, Professional, Computer Employee, Highly Compensated or Outside Sales.

5. Exempt employees must also meet the job duties and salary basis test.

Websites:
www.dol.gov/dol/compliance/comp.flsa.htm
www.dol.gov/dol/topics/wages.htm

C. Document Retention - U.S. law mandates specific retention and storage for various records related to the employment relationship.

1. Job applications, resumes or any other form of employment inquiry submitted to the employer must be retained for 1 year from the date of personnel action to which the record relates.

2. INS Form I-9 (Employment Eligibility Form) must be maintained for 3 years from the date of hire or 1 year from the date of termination, whichever is later.

3. Records related to payroll and itemized weekly compensation for each employee must be maintained for 3 years.

4. Personnel records of involuntarily terminated employees must be maintained for a period of 1 year from the date of termination.

5. Records relating to requested FMLA leave must be maintained for 3 years following the request.

VI. Control of Performance During Employment

A. Performance Reviews – The purpose of performance reviews is to improve employee behavior and performance. Performance reviews also provide a formal process by which employees receive feedback on their performance and their status with the employer. This is often the only time that employees receive feedback. Another purpose for performance reviews is to provide documentation of an employee's performance problems. This can "make or break" an employer if an employee is terminated and subsequently brings a claim or charge against the company. The performance review provides contemporaneous documentation of the employee's performance. Prior to terminating an employee, employers should review all performance reviews of the employee to ensure that they are consistent with the stated reasons for termination.

B. Performance Improvement Plans (PIPs) – PIPs are employer created plans to improve the performance of an employee who is not meeting performance guidelines and also serves as notification to the employee that their performance is not acceptable. The PIP should identify the areas of concern and provide tangible goals by which the employee can be measured during the PIP period and utilized at the end of the PIP period to determine the appropriate next step. PIPs are typically 30/60/90 days.

VII. Post-Employment Considerations

A. Non-Compete/Non-Solicitation Agreements – A non-competition agreement is a contract restricting a former employee's right to compete for a set period of time in a specific area in order to protect the employer's good will, trade secrets, or confidential information. A non-solicitation agreement restricts contact with particular businesses (usually actual customers of the employer) and/or employees of that employer. The application of such a restrictive covenant is controlled by the laws of each state and there is no overarching federal law that applies.

1. Why have a non-competition or non-solicitation agreement?

    a. Protect the employer's business.
    b. Protect the employer's confidential information.
    c. To protect the employer's trade secrets including customer lists.

2. The agreements must be restricted as to time and scope and must be accompanied by independent consideration.

3. The agreements also should contain the following:

    a. Assignability/successorship clause;
    b. Integration clause;
    c. Severability clause;
    d. Notice clause;
    e. Amendment of the agreement clause;
    f. Choice of state law clause;
    g. Anti-raiding clause;
    h. Attorneys fees and costs clause;
    i. Injunctive relief clause; and
    j. Address arbitration issues.

4. Enforcement– There are several steps that should be taken when an employee subject to a non-compete or non-solicit agreement is terminating employment.

a. Prior to the actual departure employers should review carefully the terms of the agreement.

b. Monitor the employee for misappropriation of company material and information.

c. Send a letter to the employee immediately upon departure notifying the employee of the terms of the agreement, the employer's interpretation of the agreement and the employer's intent on enforcing the agreement – if the employer knows the identity of the new employer, copy the new employer on the letter.

d. If the former employee fails to comply with the terms of his/her agreement, the employer must decide whether they will pursue litigation to enforce the agreement. The employer must carefully consider the intent and purpose of pursuing litigation. Is it to set an example for current employees? Send a message to competitors? Protect clients? If the employer does decide to pursue litigation there are a few methods to pursue:

    1. Motion for temporary restraining order.
    2. A temporary or permanent injunction.
    3. Filing a civil lawsuit for monetary damages.