Bermuda Triangle of Leave:
ADA, FMLA and Workers Compensation

KATRINA GRIDER

Katrina Grider & Associates
14227 Prospect Point Drive
Cypress, Texas 77429
(281) 256-9311 (Office)
(281) 256-9312 (Fax)
(888) ASK-4KAT (Toll Free Office)
katrinagrider@sbcglobal.net

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Katrina Grider

Katrina Grider & Associates
14227 Prospect Point Drive, Cypress, TX 77429
(281) 256-9311 (office)
(281) 256-9312 (fax)
katrinagrider@sbcglobal.net

BIOGRAPHICAL INFORMATION

EDUCATION:

B.S. 1982, Political Science, Oklahoma State University
J.D. 1985, University of Tulsa College of Law
M. Div./M.A. Counseling, (2015 Candidate) Houston Graduate School of Theology

PROFESSIONAL ACTIVITIES:

Board Certified in Labor and Employment Law, Tex. Bd. of Legal Specialization
Former Partner, Labor and Employment Law Section, Bracewell & Giuliani, L.L.P.
Former Trial Attorney, Civil Rights Division, U.S. Department of Justice

State Bar of Texas: State Bar College; Continuing Legal Education Committee (2001-2003, 2006-2008); District 4I Bar Grievance Committee (1993-95); *Texas Bar Journal* Committee; Texas Mentor Program Committee; Past Chairperson and Newsletter Editor-Concerns of the African American Lawyers Section; Past Council Member, Labor and Employment Law Section. *Texas Young Lawyers Association*: Board of Directors (1994-95); Legislative Committee; Women in the Profession Committee; Opportunities for Minorities in the Legal Profession Committee; TYLA Section of the *Texas Bar Journal*. *Other:* State Bar of Oklahoma; Hospice Volunteer and Interfaith Chaplain.

RECOGNITION AND HONORS:

Best of UT Law Online 2012: *Background Checks, Social Media and Other Arresting Developments*, 2012 U.T. Labor and Employment Law Conference**; Best of 2011 CLE Presentations,** *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More***,** 2011 Annual Litigation Update Course, TexasBarCLE; **Best of UT Law Online 2011: Employment Law, School Law, Immigration, and Ethics**, *Advanced Leave Issues: FMLA, ADA/ADAAA, USERRA and WC Stuff*, 2011 U.T. Labor and Employment Law Conference, UT CLE; **Best of 2010 CLE Presentations**, *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More***,** 2010 State Bar College Summer School, TexasBarCLE; **2009 Standing Ovation Award,** Outstanding Volunteer, TexasBarCLE; **Best of 2009 CLE Presentations,** *The Art of Smart Hiring and Lawful Firing*, 2009 Advanced In-House Counsel Course, TexasBarCLE.

Texas SuperLawyer® 2003 - 2006, 2011, **2012**; **Houston's Best Lawyers for the People**, HOUS. MAG., Jan. 2006. Ruth E. Piller, *Houston Lawyers are Houston's Leaders*, 39 HOUS. B. J. 29 (2002).

BOOKS:

Katrina Grider (contrib. ed.), *Social Media & Internet Issues*, in PARTY TALK: ANSWERS TO EVERYDAY LEGAL QUESTIONS FOR TEXAS LAWYERS (Texas Bar Books, 2012); Katrina Grider (contrib. ed.), *Family and Medical Leave Act*, in TEX. EMPL. LAW. CHAP. 25 (Laura Franze *et al*. eds., James Pub., 1999); Grace F. Renbarger & Katrina Grider (contrib. eds.), *Family and Medical Leave Act*, in EMPL. LAW HANDBOOK, CHAP. 26 (Brian S. Greig *et al.* eds., Tex. Ass'n Bus. & Chambers of Comm., 1999 - 2002).

ARTICLES:

Katrina Grider: *Goodbye Flipcharts, Hello Plasma Screens*, 68 TEX. B. J. 567 (2005); *Party Talk–What's a Lawyer to Do: A Little Friendly Advice*, 65 TEX. B. J. 902 (2002); *Lawyers Debate Age Discrimination Cases: Is the Burden Too Heavy on Employees?*, TEX. LAWYER (2000); *A Checklist for Avoiding the Legal Pitfalls of an In-House Investigation*, CORP. COUNS. Q. (1998); *Conducting Sexual/General Harassment Investigations: A Checklist for Employers*, EMPL. L. COUNS. (1998); *Of Work and Family: Implementing an FMLA Policy*, TEX. LAWYER (LABOR & EMPLOYMENT LAW SUPPLEMENT) (1997); *Trends in Real Estate Leasing: Whose Duty Under the ADA?*, TEX. LAWYER (1997); Katrina Grider, *Seven Ways to Survive Law Office Politics*, THE TEX. DOCKET (1996); *Human Resources Management for Lawyers: An Employment Law Primer*, 57 TEX. B.J. 173 (1994); *Worker's Comp and the ADA: To Ask or Not to Ask*, 55 TEX. B.J. 818 (1992); *Employer Liability Under FIRREA*, 109 BANK. L.J. 129 (1992); *Hair Salons and Racial Stereotypes: The Impermissible Use of Discriminatory Pricing Schemes*, 12 Harv. Women's L.J. 75 (1989); *Drug Testing of Employees: Privacy Rights v. Drug Free Workplaces*, 57 Okla. B.J. 3189 (1986); *The Award and Calculation of Statutory Attorneys' Fees in Oklahoma*, 11 Okla. City U. L. Rev. 31 (1986).

Katrina Grider & Tracy Bailey, *The Civil Rights Act of 1991*, 55 TEX. B.J. 36 (1992); Katrina Grider & Kimberly F. Gee, *Glass Ceilings in Corporate America*, 55 TEX. B.J. 42 (1992); Katrina Grider, Nathan Wesely, Tracy Bailey & Kimberly F. Gee, *Sexual Harassment: The Reasonable Woman Standard in Hostile Environment Litigation*, 55 TEX. B.J. 52 (1992); Katrina Grider & Nathan Wesely, *Fetal Protection Policies After Johnson Controls*, 55 TEX. B.J. 64 (1992).

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Appendix 1:

Quick Summary and Analysis of ADAAA Final Rule

Appendix 1:

Quick Summary and Analysis of ADAAA Final Rule

Katrina Grider

The EEOC recently published its long-awaited final regulations and accompanying Interpretive Guidance under the Americans with Disabilities Act Amendments Act (ADAAA) of 2008. The regulations went into effect on May 24, 2011, and employers now have more definitive guidance as to what constitutes a "disability" under the ADAAA, the determination of which in turn triggers an employer's obligations to make reasonable accommodations. Indeed, given the statutory mandate to expand ADAAA coverage for employees, employers should be prepared to take steps to accommodate more employees than in the past. Employers also need to be cognizant that the final regulations confirm the limited burden that employees have to demonstrate that they are disabled. Thus, employers need to be aware of their compliance obligations under the ADAAA, and take proactive steps to minimize risk.

I. BACKGROUND

On September 25, 2008, President George W. Bush signed into law the ADAAA, which went into effect on January 1, 2009. The ADAAA amended the Americans with Disabilities Act (ADA) in response to a perception that the federal courts were taking an unduly narrow view of what constituted a disability. Indeed, a 2006 study found that plaintiffs had lost more than 97% of all ADA employment discrimination claims. The ADAAA specifically overturned several Supreme Court decisions that had limited the ability of an individual to establish a "disability" under the ADA, and made clear that the intent of the amendment was to "reinstate a broad scope of protection" for individuals with disabilities.

As the governing enforcement agency, the EEOC proposed regulations on September 23, 2009 to provide employers and employees with guidance on how to interpret and apply the ADAAA. The EEOC received more than 600 comments during the 60-day public comment period. As a result of the comments, the final regulations reflect some changes to the EEOC's original proposal, but, consistent with the ADAAA's mandate, the final regulations make clear that the ADA's scope of coverage is much broader than it was in the past.

II. HIGHLIGHTS OF THE FINAL RULE

A. Expanding the Meaning of "Substantially Limits"

The ADAAA defines a "disability" as follows:

- A physical or mental impairment that substantially limits a major life activity;
- A record of such an impairment; or
- Being regarded as having such an impairment.

See 42 U.S.C. § 12102.

Prior to the passage of the ADAAA, whether an individual had an actual disability turned on establishing a substantial limitation in a major life activity. Under this standard, an impairment had to significantly restrict or prevent an individual from performing a major life activity to constitute a disability. The impairment also needed to be permanent or long term. In keeping with the statutory requirements, the final regulations make clear that the term "substantially limits" does not have the same meaning as it did before the ADAAA went into effect.

1. <u>Nine (9) Rules of Construction</u>

The final regulations provide that the following nine "rules of construction" apply in determining whether a substantial limitation exists:

RULE #1: The term should be construed "broadly in favor of expansive coverage." It is "not meant to be a demanding standard."

RULE #2: An impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability.

RULE #3: The primary focus should be whether the employer complied with its obligations and whether discrimination occurred, not whether an individual is substantially limited in a major life activity. Therefore, this determination should not require extensive analysis.

RULE #4: The individualized assessment to determine if someone is substantially limited should require a degree of functional limitation that is "lower" than the standard prior to the enactment of the ADAAA.

RULE #5: The analysis of whether an individual's performance of a major life activity as compared to most people in the general population usually will not require scientific, medical, or statistical analysis.

RULE #6: The determination of whether a substantial limitation exists shall be made without regard to the ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses).

RULE #7: An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

RULE #8: An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered substantially limiting.

RULE #9: The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting. Therefore, even conditions of short duration (e.g., a few months) can meet this definition.

2. Employer Obligations

In the past, many employers looked at the "permanent or long-term" nature of a condition to conclude whether it constituted a disability. It is especially important to note that the EEOC's rules of construction make clear that short-term and/or episodic conditions may be substantially limiting.

For example, the Interpretative Guidance provides that an individual with a back impairment that results in a 20-pound lifting restriction that lasts for several months is substantially limited in the major life activity of lifting and would have an actual disability.

The final regulations also caution an employer against conducting a substantial analysis when making a determination as to whether an employee has a condition that substantially limits a major life activity by demanding extensive medical documentation from the employee to support a substantial limitation claim.

While ameliorative or mitigating measures[1] are not to be considered to determine whether an individual is substantially limited, the regulations do make clear that the nonameliorative side effects of a mitigating measure may be taken into account to determine if a substantial limitation exists, such as the negative side effects of medication.

The final regulations also reinstate the use of the "condition, manner, or duration" standard to evaluate a substantial limitation. This concept had been eliminated from the proposed rule. However, the Interpretative Guidance makes clear that when referring to "duration," the analysis involves the time it may take an employee to perform a major life activity or the length of time an individual can perform a major life activity, as compared to most people in the general population. It is not referring to whether the impairment is permanent or long term.

B. What Constitutes a Major Life Activity

The ADAAA expanded the list of "major life activities" covered by the ADA to include major bodily functions such as hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular functions. The final regulations make clear that a "major life activity" need not be one that is "of central importance to daily life." Moreover, the final regulations clarify that the list of major life activities and major bodily functions is meant to be nonexhaustive. Given these changes, many more "activities" may be covered by the ADAAA in the future.

The EEOC noted that language related to the major life activity of "working" was intentionally moved from the regulations to its Interpretative Guidance since no other major life activity had been singled out in the regulatory text. Given the addition of major bodily functions to the definition of what constitutes a "major life activity," the

EEOC noted that this category should be rarely used. If it is necessary, however, the final regulations reinstate the "class or broad range of jobs in various classes as compared to most people having comparable training, skills and abilities" standard for purposes of conducting the "major life activity of working" analysis (it had been removed from the proposed regulations), but provide examples of individuals who could be considered substantially limited in working under the "lower standard" for establishing a disability under the revised definition.

C. "Predictable Assessments" of Impairments

The EEOC was heavily criticized for creating in its proposed regulations a "per se" list of disabilities to be covered by the ADA since an "individualized" analysis has always been the hallmark of the ADA disability analysis. The EEOC makes clear in the final regulations that an "individualized analysis" still is required with regard to all disabilities. However, section 1630.2(j)(3)(I) through (iii) of the final regulations lists conditions that "in virtually all cases" will satisfy the definition of "disability" due to certain characteristics associated with the impairments. Included in this list are autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

The regulations provide that "with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward." 29 C.F.R. § 1630.2(j)(3). The proposed regulations had contained a list of conditions that typically would not qualify as disabilities under the ADA; this list was removed from the final regulations.

D. "Regarded As" vs. "Record of" or "Actual" Disability

The ADAAA expressly broadened the "regarded as" prong of the definition of a "disability" by prohibiting discrimination based on the employer's alleged perception of a mental or physical impairment, even if that impairment is not perceived as one that substantially limits a major life activity. The final regulations and Interpretative Guidance make clear that there is no duty to accommodate based on an individual being "regarded as" an individual with a disability.

The final regulations emphasize, however, that if an accommodation request is not at issue, the "regarded as" prong of the test should be the "primary" means for bringing a disability discrimination claim, as it will be easier for an employee to establish a "disability" under this prong of the test. *See id.* §1630.2(g), (j). The regulations provide that to demonstrate an ADA violation, the employee would have to prove that (1) he or she has an impairment or was perceived by a covered entity to have an impairment and (2) the covered entity discriminated against him or her because of the impairment in violation of the statute. *See Preamble to Final Rule* at 32.

The final regulations confirm that an individual with a "record of" a disability is entitled to an accommodation. For example, an employee may need an accommodation to attend follow-up medical appointments related to a past condition.

E. Defense to "Regarded As" Claims

The final regulations provide that in the case of a "regarded as" disability claim, an employer can use the defense that the impairment is "transitory and minor." "Transitory" is defined as a condition that lasts less than six months. Consistent with the statutory language, both prongs of the test (transitory and minor) must be satisfied.

F. Practical Implications

The definition of a "disability" implicates several important aspects of the reasonable accommodation process. As a result of the final regulations, an employer should do the following:

1. Reevaluate its procedures for requesting medical information when a request for an accommodation is made to avoid making the process unduly burdensome for an employee to establish that he or she has a disability. While an employer still may request documentation to support the existence of a disability and/or need for an accommodation if it is not obvious or known by the employer, extensive analysis should not occur as to whether the employee is entitled to an accommodation.

2. Ensure it has a robust accommodation process in place that meets its obligations to engage in the "interactive process" when an individual with a disability requests an accommodation. This includes having policies and procedures in place to notify

employees with disabilities of accommodation processes. In the past, many employers did not have their accommodation practices challenged since claims were dismissed on the basis of whether a "disability" existed, but in the future the focus is expected to be on whether an employer meets its obligation to accommodate.

3. Through regular training, ensure that managers and supervisors understand their obligation to make employment decisions on objective business facts without regard to an individual's impairment in the workplace.

4. Check EEO and other nondiscrimination policies to make sure they comply with the amended ADA and regulatory requirements.

5. Review job descriptions to ensure regulatory compliance-detailing the essential functions in a job description will help ensure that applicants and employees with disabilities are not discriminated against because they cannot perform marginal job duties.

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[1] The final regulations broadly define "mitigating measures" as including, but not limited to, medication; medical supplies, equipment, or appliances; low-vision devices (devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses); prosthetics including limbs and devices; hearing aids and cochlear implants or other implantable hearing devices; mobility devices; and oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations or "auxiliary aids or services"; learned behavioral or adaptive neurological modifications; or psychotherapy, behavioral therapy, or physical therapy.

Appendix 2:

Index of Relevant EEOC Policy Guidances

APPENDIX 2:

Index of EEOC Policy Guidances
Katrina Grider

	#	POLICY GUIDANCE	DATE	LOCATION
	1	Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964	04/12	http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
	2	Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII	04/12	http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm
	3	Questions and Answers on EEOC Final Rule on Disparate Impact and "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act of 1967	03/29/12	http://www.eeoc.gov/laws/regulations/adea_rfoa_qa_final_rule.cfm
•	4	Notice Concerning The Americans With Disabilities Act (ADA) Amendments Act of 2008	06/17/09	http://www.eeoc.gov/ada/amendments_notice.html
•	5	Employer Best Practices for Workers with Caregiving Responsibilities	05/22/09	http://www.eeoc.gov/policy/docs/caregiver-best-practies.html
•	6	Q&A: Background Information for EEOC Notice of Proposed Rulemaking On Title II of the Genetic Information Nondiscrimination Act of 2008	05/12/09	http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html
	7	Employment Discrimination and the 2009 H1N1 Flu Virus (Swine Flu)	05/11/09	http://www.eeoc.gov/facts/h1n1.html
	8	ADA-Compliant Employer Preparedness For the H1N1 Flu Virus	05/04/09	http://www.eeoc.gov/facts/h1n1_flu.html
	9	Q&A: Mediation Providers: Mediation and the Americans with Disabilities Act (ADA)		http://www.eeoc.gov/mediate/ada/ada_mediators.html
	10	Q&A: Parties to Mediation: Mediation and the Americans with Disabilities Act (ADA)		http://www.eeoc.gov/mediate/ada/ada_parties.html
•	11	Employer Best Practices for Workers with Caregiving Responsibilities	04/09	http://www.eeoc.gov/policy/docs/caregiver-best-practices.html
	12	Enforcement Guidance on Recent Developments in Disparate Treatment Theory (effect of *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003).	07/92 (as amended 01/09)	http://www.eeoc.gov/policy/docs/disparat.html
•	13	The ADA: Applying Performance And Conduct Standards To Employees With Disabilities	10/14/08	http://www.eeoc.gov/facts/performance-conduct.html
•	14	Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce	09/30/08	http://www.eeoc.gov/federal/qanda-employment-with-disabilities.html

	#	POLICY GUIDANCE	DATE	LOCATION
•	15	Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce	09/30/08	http://www.eeoc.gov/policy/guidace.html
••	16	The ADA: Your Responsibilities as an Employer	08/01/08	http://www.eeoc.gov/facts/ada17.html
••	17	Veterans with Service-connected Disabilities in the Workplace and the ADA	05/28/08	http://www.eeoc.gov/facts/veterans-disabilities.html
••	18	Veterans with Service-connected Disabilities and the ADA: a Guide for Employers	02/29/08	http://www.eeoc.gov/facts/veterans-disabilities-employers.html
	19	Employment Test and Selection Procedures	12/07	http://www.eeoc.gov/policy/guidace.html
••	20	Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities	5/23/07	http://www.eeoc.gov/policy/docs/caregiving.html
••	21	Q&A: EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities	05/23/07	http://www.eeoc.gov/policy/docs/qanda_caregiving.html
	22	Q&A: Health Care Workers and the ADA	02/26/07	http://www.eeoc.gov/facts/health_care_workers.html
••	23	Q&A: Deafness and Hearing Impairments in the Workplace and the ADA	07/26/06	http://www.eeoc.gov/facts/deafness.html
••	24	Reasonable Accommodation for Attorneys With Disabilities	07/27/06	http://www.eeoc.gov/facts/accommodations-attorneys.html
	25	Final Report on Best Practices for the Employment of People with Disabilities in State Government	11/01/05	http://www.eeoc.gov/facts/final_states_best_practices_report.html
••	26	Work At Home/Telework as a Reasonable Accommodation	10/27/05	http://www.eeoc.gov/facts/telework.html
	27	Fact Sheet on Obtaining and Using Employee Medical Information as Part of Emergency Evacuation Procedures	10/27/05	http://www.eeoc.gov/facts/evacuation.html
••	28	Q&A: Blindness and Vision Impairments in the Workplace and the ADA	10/24/05	http://www.eeoc.gov/facts/blindness.html
••	29	Q&A: The Association Provision of the ADA	10/17/05	http://www.eeoc.gov/facts/association_ada.html
••	30	Cancer in the Workplace and the ADA	08/03/05	http://www.eeoc.gov/facts/cancer.html
•	31	The ADA: Your Employment Rights as an Individual With a Disability	05/21/05	http://www.eeoc.gov/facts/ada18.html
•	32	Job Applicants and the ADA	03/21/05	http://www.eeoc.gov/facts/jobapplicant.html

	#	POLICY GUIDANCE	DATE	LOCATION
•	33	Guide: How to Comply with the ADA: A Guide for Restaurants and Other Food Service Employers	10/28/04	http://www.eeoc.gov/facts/restaurant_guide.html
•	34	Q&A: Persons with Intellectual Disabilities in the Workplace and the ADA	10/20/04	http://www.eeoc.gov/facts/intellectual_disabilities.html
••	35	Q&A: Epilepsy in the Workplace and the ADA	08/24/04	http://www.eeoc.gov/facts/epilepsy.html
	36	The ADA: A Primer for Small Business	02/04/04	http://www.eeoc.gov/ada/adahandbook.html
••	37	Q&A: Diabetes in the Workplace and the ADA	10/29/03	http://www.eeoc.gov/facts/diabetes.html
	38	ADA Technical Assistance Manual Addendum	10/29/02	http://www.eeoc.gov/policy/docs/adamanual_add.html
••	39	Revised Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the ADA	10/17/02	http://www.eeoc.gov/policy/docs/accommodation.html
•	40	Q&A: Enforcement Guidance: Application of the ADA to Contingent Workers Placed by Temporary Agencies and Other Staffing Firms	12/27/00	http://www.eeoc.gov/policy/docs/qanda-contingent.html
•	41	Enforcement Guidance: Application Of The ADA To Contingent Workers Placed By Temporary Agencies And Other Staffing Firms	12/22/00	http://www.eeoc.gov/policy/docs/guidance-contingent.html
••	42	The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964	07/06/00	http://www.eeoc.gov/policy/docs/fmlaada.html
••	43	Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA	07/27/00	http://www.eeoc.gov/policy/docs/guidance-inquiries.html
••	44	Q&A: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA	07/27/00	http://www.eeoc.gov/policy/docs/qanda-inquiries.html
	45	Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors	06/18/99	http://www.eeoc.gov/policy/docs/harassment.html
	46	See also: Questions & Answers for Small Employers on Employer Liability for Harassment by Supervisors		http://www.eeoc.gov/policy/docs/harassment-facts.html
	47	Small Employers and Reasonable Accommodation	03/01/99	http://www.eeoc.gov/facts/accommodation.html
••	48	EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities	03/25/97	http://www.eeoc.gov/policy/docs/psych.html
••	49	EEOC Enforcement Guidance: Workers' Compensation and the ADA	09/96	http://www.eeoc.gov/policy/docs/workcomp.html

	#	POLICY GUIDANCE	DATE	LOCATION
	50	Enforcement Guidance on *O'Connor v. Consolidated Coin Caterers Corp*.	12/96	http://www.eeoc.gov/policy/docs/oconnor.html
	51	Enforcement Guidance on After-acquired Evidence and *McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879 (1995)	12/95	http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm
••	52	ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations	10/10/95	http://www.eeoc.gov/policy/docs/preemp.html
••	53	Facts About the Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964	09/95	http://www.eeoc.gov/policy/guidace.html
•	54	Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States	10/93	http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html
	55	Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991	07/92	http://www.eeoc.gov/policy/docs/damages.html
	56	Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964	09/90	http://www.eeoc.gov/policy/docs/arrest_records.html
	57	Policy Guidance on Current Issues of Sexual Harassment	03/90	http://www.eeoc.gov/policy/docs/currentissues.html
	58	Policy Guidance on Employer Liability under Title VII for Sexual Favoritism	01/90	http://www.eeoc.gov/policy/docs/sexualfavor.html
	59	Policy Guidance: Application of the Age Discrimination in Employment Act of 1967 (ADEA) and the Equal Pay Act of 1963 (EPA) to American Firms Overseas, Their Overseas Subsidiaries, and Foreign Firms	03/89	http://www.eeoc.gov/policy/docs/extraterritorial-adea-epa.html
	60	Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment	07/29/87	http://www.eeoc.gov/policy/docs/convict2.html
	61	Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)	02/87	http://www.eeoc.gov/policy/docs/convict1.html

APPENDIX 3

INDEX OF DOL FMLA OPINION LETTERS:

APPENDIX 3
INDEX OF DOL FMLA OPINION LETTERS:

Katrina Grider

PRACTICE NOTE:

The FMLA provides that a court shall award liquidated damages doubling the amount of lost compensation plus interest for violation of the FMLA. An employer may avoid liquidated damages if it proves to the satisfaction of the court that: (1) it acted in god faith; and (2) the employer had reasonable grounds for believing that the act or omission was not a violation of the FMLA. The employer bears the burden of establishing both good faith and reasonable grounds in order to avoid liquidated damages.

In certain cases, an employer's reliance upon a DOL FMLA opinion letter, and review of the statute and DOL FMLA regulations, in light of its prior experience with the FMLA, may be sufficient to establish good faith and reasonable grounds for believing that the employer has not violated the FMLA for purposes of damages.

DOL FMLA OPINION LETTERS
1993 - 2002

OPINION	DATE	SUBJECT	CITATION
FMLA-1	06/15/93	Medical Insurance and Maintaining Health Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-1.htm
FMLA-2	08/16/93	No Fault Attendance Policies and Bonuses	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-2.htm
FMLA-3	09/09/93	Return to Equivalent Position	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-3.htm
FMLA-4	09/09/93	Definition of Employer (Condominium Associations in Hawaii)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-4.htm
FMLA-5	09/27/93	Changes in Leave Policies	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-5.htm
FMLA-6	10/01/93	Disability Insurance and Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-6.htm
FMLA-7	10/08/93	Volunteers	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-7.htm
FMLA-8	10/15/93	Joint Employment Relationships	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-8.htm
FMLA-9	10/18/93	Applicability of FMLA to Employees in Foreign Countries	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-9.htm
FMLA-10	10/27/93	Effect of FMLA on State Leave Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-10.htm
FMLA-11	11/02/93	Emergency Leave and Contact with Employee	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-11.htm
FMLA-12	11/02/93	Designation of Leave	http://www.dol.gov/whd/opinion/fmla_prior2002_content.htm

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OPINION	DATE	SUBJECT	CITATION
FMLA-13	11/02/93	Deferred Compensation Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-13.htm
FMLA-14	11/03/93	Multi-employer Benefit Plans	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-14.htm
FMLA-15	11/05/93	Furnishing Lodging to Employees	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-15.htm
FMLA-16	11/15/93	Medical Certification for Family Members	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-16.htm
FMLA-17	11/15/93	Light Duty	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-17.htm
FMLA-18	11/15/93	1,250 Hours (Definition of Employee)	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-18.htm
FMLA-19	12/06/93	Cash Supplements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-19.htm
FMLA-20	12/07/93	Holiday Pay	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-20.htm
FMLA-21	12/07/93	Care of Grandparents	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-21.htm
FMLA-22	12/09/93	Employer Coverage (Corporation with Multiple Divisions)	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-22.htm
FMLA-23	12/28/93	Health Care Premiums and Maintenance of Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-23.htm
FMLA-24	01/06/94	Definition of Employer (FMLA Requirements)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-24.htm
FMLA-25	01/10/94	Long Term Disability Insurance/ Preexisting Policies	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-25.htm
FMLA-26	01/14/94	Group Health Plan Premiums (Collective Bargaining Agreements)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-26.htm
FMLA-27	01/31/94	Substance Abuse Policies and Return to Work	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-27.htm
FMLA-28	01/31/94	FMLA Definition of Eligible Employees	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-28.htm
FMLA-29	02/07/94	Intermittent Leave Issues	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-29.htm
FMLA-30	03/18/94	Multi-employer Welfare Trusts	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-30.htm
FMLA-31	03/21/94	Attendance, Safety and Production Bonuses	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-31.htm
FMLA-32	03/24/94	Maternity Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-32.htm
FMLA-33	03/29/94	Vacation and Sick Leave (Substitution of Paid Leave)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-33.htm
FMLA-34	04/12/94	Compensatory Time	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-34.htm
FMLA-35	04/19/94	Reasonable Accommodation	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-35.htm

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OPINION	DATE	SUBJECT	CITATION
FMLA-36	05/18/94	Requirements of FMLA and Effect on Other Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-36.htm
FMLA-37	07/07/94	Temporary Employee	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-37.htm
FMLA-38	07/21/94	FECA Benefits and Light Duty	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-38.htm
FMLA-39	07/21/94	Collective Bargaining Agreements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-39.htm
FMLA-40	07/25/94	Exhaustion of FMLA Leave and Workers' Compensation Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-40.htm
FMLA-41	08/08/94	Coverage of Hospital Residents	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-41.htm
FMLA-42	08/23/94	Intermittent Leave and Transfer to Accommodate	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-42.htm
FMLA-43 (Under review)	08/24/94	Serious Health Questions	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-43.htm
FMLA-44	09/13/94	Intermittent Leave Taken in Blocks of Time	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-44.htm
FMLA-45	10/14/94	Multiple Births	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-45.htm
FMLA-46	10/14/94	Hours Worked Eligibility Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-46.htm
FMLA-47	10/17/94	Inability to Perform Job	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-47.htm
FMLA-48	10/19/94	Medical Certification (Second and Third Medical Opinions)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-48.htm
FMLA-49 (Under review)	10/27/94	Leave Substitution and Designation	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-49.htm
FMLA-50	11/23/94	Definition of Key Employee	http://www.dol.gov/whd/opinion/fmla/prior2002/FMLA-50.htm
FMLA-51	11/28/94	Care of Child	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-51.htm
FMLA-52	12/28/94	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-52.htm
FMLA-53	12/29/94	Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-53.htm
FMLA-54	02/22/95	Continued Service (Effect of Vesting Upon Pension Benefits)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-54.htm
FMLA-55	03/10/95	Light Duty and Interplay Between ADA, FMLA and Workers' Comp.	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-55.htm
FMLA-56	03/28/95	Attendance Bonus Policy	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-56.htm
FMLA-57 Superceded by FMLA-86	04/07/95	Serious Health Condition and Attendance Bonus	
FMLA-58	04/28/95	Return to Work Certification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-58.htm

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OPINION	DATE	SUBJECT	CITATION
FMLA-59	04/28/95	Substance Abuse	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-59.htm
FMLA-60	05/02/95	Serious Health Condition	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-60.htm
FMLA-61	05/12/95	Use of Accrued Leave (Substitution of Paid Leave)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-61.htm
FMLA-62	05/17/95	Employer Notice Requirements	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-62.htm
FMLA-63	06/19/95	Chiropractor Treatment (Definition of Health Care Provider)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-63.htm
FMLA-64	06/21/95	Maintaining Medical Insurance Coverage	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-64.htm
FMLA-65	07/13/95	Deduction from Wages for Insurance Premium Payments	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-65.htm
FMLA-66	07/19/95	Unmarried Couples	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-66.htm
FMLA-67 Superceded by FMLA2002-5-A	07/21/95	Counting Leave and Reinstatement Rights	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-67.htm
FMLA-68	07/21/95	Unrequested Designation Against Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-68.htm
FMLA-69	07/21/95	Alcohol Abuse & Substance Abuse Treatment	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-69.htm
FMLA-70	08/23/95	Overtime Hours	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-70.htm
FMLA-71	09/14/95	Medical Certification Form	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-71.htm
FMLA-72	09/20/95	Physician Assistant as Health Care Provider	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-72.htm
FMLA-73	10/26/95	Care of Sibling	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-73.htm
FMLA-74	10/30/95	Extending Leave Beyond 12 Weeks	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-74.htm
FMLA-75	11/14/95	Certification and Notice Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-75.htm
FMLA-76	11/30/95	Definition of Employer (Religious Institutions)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-76.htm
FMLA-77	01/30/96	Serious Health Condition (Medical Certification)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-77.htm
FMLA-78	02/14/96	Full-time Teachers and Hours Requirement	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-78.htm
FMLA-79	02/23/96	Safety Incentive Program	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-79.htm
FMLA-80	04/24/96	Probationary Teachers	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-81.htm

DOL FMLA OPINION LETTERS 1993 - 2002			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-81	06/18/96	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-81.htm
FMLA-82	07/31/96	Effect of FMLA on Other Laws	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-82.htm
FMLA-83	08/07/96	Designation of Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-83.htm
FMLA-84	10/25/96	Foster Care of Children	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-84.htm
FMLA-85	11/18/96	Substitution of Paid Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-85.htm
FMLA-86	12/12/96	Definition of Serious Health Condition	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-86.htm
FMLA-87	12/12/96	Definition of Serious Health Condition/Cold or Flu/Visit to the Doctor/Definition of "continuing treatment"	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-87.htm
FMLA-88	12/13/96	Changes in Determining the 12-Month Period	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-88.htm
FMLA-89	07/03/97	Salary Basis Requirements of FLSA	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-89.htm
FMLA-90 Superceded by FMLA2002-5-A	07/03/97	Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-90.htm
FMLA-91	12/09/97	Employer Plans With More Generous Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-91.htm
FMLA-92	12/12/97	Temporary Disability of Workers' Compensation Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-92.htm
FMLA-93	02/06/98	Intermittent Leave/Administrative Leave (Physical Fitness Activities)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-93.htm
FMLA-94	02/27/98	Attendance at Care Conferences Regarding Mother's Health	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-94.htm
FMLA-95	06/03/98	Restoration to Same or Equivalent Position (Compelling Business Interest)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-95.htm
FMLA-96	06/04/98	Parents-In-Law/"Legal Ward"/FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-96.htm
FMLA-97	07/10/98	Job Accommodations of ADA	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-97.htm
FMLA-98	11/18/98	Care for Domestic Partner (Definition of Spouse)	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-98.htm
FMLA-99	01/12/99	Siblings Who Work for Same Employer	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-99.htm
FMLA-100	01/12/99	No-Fault Attendance Policies	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-100.htm

DOL FMLA OPINION LETTERS 1993 - 2002			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA-101 superceded by FMLA2009-1-A	01/15/99	Attendance-Control Policies/Employee Notification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-101.htm
FMLA-102	03/26/99	Counting Leave in Determining Vacation Benefits	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-102.htm
FMLA-103 superceded by FMLA2002-5-A	03/26/99	Length of Leave/Employer's More Generous Policy	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-103.htm
FMLA-104	05/21/99	Licensing Board/Employer Coverage	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-104.htm
FMLA-105	06/16/99	Eligibility for Leave Under Employer's New 12-Month Period	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-105.htm
FMLA-106	07/01/99	Work at Second Job During Leave	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-106.htm
FMLA-107	07/19/99	"Usual and Normal Workweek"	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-107.htm
FMLA-108	04/13/00	Employer's Medical Certification Procedures	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-108.htm
FMLA-109	09/08/00	Accrual of Seniority	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-109.htm
FMLA-110	09/11/00	Employer's Bonus Incentive Program	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-110.htm
FMLA-111	09/11/00	Professional Employer Organization/Integrated Employer	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-111.htm
FMLA-112	09/11/00	Intermittent Leave and the 1,250 hours test for eligibility	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-112.htm
FMLA-113	09/11/00	Fitness for Duty Test./Employer Certification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-113.htm

Note: the numbering system of Family and Medical Leave Act opinion letters was changed in 2002. Prior to 2002, opinion letters were listed simply in chronological order. To facilitate searches, the numbering system used beginning in 2002 includes the year the letter was issued and the appendage "-A" for Administrator-signed letters.

DOL FMLA OPINION LETTERS 2002 - PRESENT			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA2002-1	05/09/02	Leave Entitlement for Part-Time Employees	http://www.dol.gov/whd/opinion/FMLA/2002_05_09_1_FMLA.htm
FMLA2002-2	07/19/02	Unforeseeable Intermittent Leave	http://www.dol.gov/whd/opinion/FMLA/2002_07_19_2_FMLA.htm

DOL FMLA OPINION LETTERS 2002 - PRESENT			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA2002-3	07/19/02	Failure to Designate FMLA-Qualifying Leave	http://www.dol.gov/whd/opinion/FMLA/2002_07_19_3_FMLA.htm
FMLA2002-4	07/23/02	Intermittent Leave After Child's Birth or Adoption	http://www.dol.gov/whd/opinion/FMLA/2002_07_23_4_FMLA.htm
FMLA2002-5-A	08/06/02	"Deeming Provision" for Otherwise Ineligible Employees	http://www.dol.gov/whd/opinion/FMLA/2002_08_06_5A_FMLA.htm
FMLA2002-6	12/04/02	Recertification for Intermittent Leave/1,250 Hour Eligibility Test	http://www.dol.gov/whd/opinion/FMLA/2002_12_04_6_FMLA.htm
FMLA2003-1-A	03/05/03	Arbitration Agreements/Complaint Investigations	http://www.dol.gov/whd/opinion/FMLA/2003_03_05_1A_FMLA.htm
FMLA2003-2	06/30/03	Eligibility of Guardian of Adult Disabled Sister	http://www.dol.gov/whd/opinion/FMLA/2003_06_30_2_FMLA.htm
FMLA2003-3-A	07/24/03	Bankrupt Employer	http://www.dol.gov/whd/opinion/FMLA/2003_07_24_3A_FMLA.htm
FMLA2003-4	07/29/03	No Fault Attendance Policy	http://www.dol.gov/whd/opinion/FMLA/2003_07_29_4_FMLA.htm
FMLA2003-5	12/17/03	Vacation and Sick Leave/Designation and Notice of FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2003_12_17_5_FMLA.htm
FMLA2004-1-A	04/05/04	50-Employee Threshold/Day Laborers	http://www.dol.gov/whd/opinion/FMLA/2004_04_05_1A_FMLA.htm
FMLA2004-2-A	05/25/04	Medical Recertification and 29 C.F.R. § 825.308	http://www.dol.gov/whd/opinion/FMLA/2004_05_25_2A_FMLA.htm
FMLA2004-3-A	10/04/04	Substitution of Paid Sick or Medical Leave	http://www.dol.gov/whd/opinion/FMLA/2004_10_04_3A_FMLA.htm
FMLA2004-4	10/25/04	Drug Testing/Fitness-for-Duty Certification	http://www.dol.gov/whd/opinion/FMLA/2004_10_25_4_FMLA.htm
FMLA2005-1-A	08/26/05	Placement of Child for Foster Care or Adoption	http://www.dol.gov/whd/opinion/FMLA/2005/2005_08_26_1A_FMLA.htm
FMLA2005-2-A	09/14/05	New Medical Certifications and 2nd or 3rd Opinions	http://www.dol.gov/whd/opinion/FMLA/2005/2005_09_14_2A_FMLA.htm

DOL FMLA OPINION LETTERS 2002 - PRESENT			
OPINION	**DATE**	**SUBJECT**	**CITATION**
FMLA2005-3-A	11/17/05	"Rolling" 12-month leave period and the 1250 hours test for eligibility	http://www.dol.gov/whd/opinion/FMLA/2005/2005_11_17_3A_FMLA.htm
FMLA2006-1-A	01/17/06	Vacating Employer-provided Lodging While on FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_17_1A_FMLA.htm
FMLA2006-2	01/20/06	Making Contributions to Multi-employer Group Health Plans for Employees on FMLA leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_20_2_FMLA.htm
FMLA2006-3-A	01/31/06	Cafeteria Plan Allotments and Maintenance of Group Health Benefits During FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_01_31_3A_FMLA.htm
FMLA2006-4-A	02/13/06	Whether FMLA Leave Counts As Hours Worked for Future Health Insurance Eligibility	http://www.dol.gov/whd/opinion/FMLA/2006/2006_02_13_4A_FMLA.htm
FMLA2006-5-A	05/24/06	SCA Health and Welfare Payments and Maintenance of Group Health Benefits During FMLA Leave	http://www.dol.gov/whd/opinion/FMLA/2006/2006_05_24_5A_FMLA.htm
FMLA2006-6-A	10/05/06	Dental Insurance as a Group Health Plan and Continuation of Benefits for Instructional Employees During Summer Vacation	http://www.dol.gov/whd/opinion/FMLA/2006/2006_10_05_6A_FMLA.htm
FMLA2009-1-A	01/06/09	Employee Notice and Call-In Procedures	http://www.dol.gov/whd/opinion/FMLA/2009/2009_01_06_1A_FMLA.htm
FMLA2010-3	06/22/10	Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child.	http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm

APPENDIX 4

FMLA BEST PRACTICES CHECKLIST

APPENDIX 4
FMLA BEST PRACTICES CHECKLIST
Katrina Grider

A. EMPLOYER COMPLIANCE

- ❑ Make certain that the FMLA leave plan is coordinated with and does not violate the applicable laws of each state or local government which has an FMLA leave statute.

- ❑ Review and update employee handbooks, personnel manuals and policies, and insurance policies, so that they refer to the plan and are in compliance with the Act.

- ❑ Bear in mind that the Act will complicate COBRA compliance. Pay special attention to COBRA issues involving employees who take family or medical leave.

- ❑ If the employer has an ERISA-covered employee benefit plan providing health care coverage, summaries of material modifications relating to the Act's required continuation of benefits must be filed with the Department of Labor and distributed to participants and beneficiaries within 210 days after the end of the plan year in which the modification occurred.

- ❑ Training in the requirements imposed by the Act should be provided to all HR staff , managers and supervisors.

- ❑ Determine whether or not you are a covered employer.

- ❑ If you are a covered employer, post the required Department of Labor's (DOL) notice at each worksite. The notice must be posted in a conspicuous and prominent place where it can be readily seen by employees and applicants.

- ❑ Include an explanation of the FMLA, including employees' right and employers' responsibilities, in the employee handbook. If you do not have an employee handbook, prepare an information sheet to give to employees (the DOL's Fact Sheet can be used for this purpose).

- ❑ Be prepared to provide the explanation of rights and obligations under the FMLA to employees taking leave.

- ❑ Establish the 12-month period for measuring FMLA leave entitlement and communicate it to employees. Any of the following measurements may be applied to the 12-month period:

  - the calendar year;

  - any fixed 12-month "leave year" such as a fiscal year, a year required by state law, or a year starting on the employee's "anniversary" date;

  - the 12-month period measured forward from the date any employee's first FMLA leave begins; or

  - a "rolling" 12-month period measured backward from the date an employee uses FMLA leave.

NOTE: ***The recommended method for measuring leave is the rolling period. Be sure to establish a different 12-month period for Servicemember caregiver leave.***

- ❑ Review all of the employment policies and procedures to ensure compatibility with the law. If not already accomplished, employers should adopt a family leave policy tailored to their own workplace practices and, perhaps most importantly, it is critical that this policy be communicated to employees. Employees can not be bound by procedures of which they have no knowledge.

  - ■ Are you providing the updated FMLA policy to all new hires?

  - ■ Have you provided the FMLA policy to employees in the language they will best understand?

- Have you posted the new DOL FMLA poster in all work sites, whether or not there are eligible employees at a work site?
- Have you posted the new DOL FMLA poster in the language employees will best understand?

❑ Make certain that your recordkeeping system can accommodate a family leave designation.

❑ Determine when, and under what circumstances, employees will be required to substitute available paid leave for FMLA leave.

❑ Ensure that your benefit plans can be administered in a way that complies with the FMLA.

❑ Establish a procedure for collecting premiums or other payroll deductions while an employee is on leave. If the employee fails to pay his/her share of the premium, the employer must provide written notice stating that coverage will be canceled unless the premium is paid by a specified date. This notice must be given at least 15 days prior to cancellation of coverage.

❑ ***Keep medical information, including all DOL FMLA Forms, separate from the employee's regular personnel file in a place where it will remain confidential.***

B. FMLA TRIGGERING EVENTS

❑ The employee requests leave:

30 days notice is required when the need for leave is foreseeable. When advance notice is not possible, the employee must provide notice as soon as practical. **➜ OR ←**

❑ The employee has called in sick three days and/or requires time off work due to serious health condition for self or immediate family member. **➜ OR ←**

❑ The employer is "on notice" that an employee's absences may be for an FMLA qualifying reason.

C. DETERMINATION OF ELIGIBILITY

❑ Requested Start Date for FMLA Leave _____

❑ Employee has:

- At least 12 months cumulative service over the past seven years
- Worked at least 1250 hours in prior 12 months
  - Is the individual an employee, as opposed to an independent contractor?
  - Is there a possible joint employment relationship with another company regarding this individual?

❑ Company had at least 50 employees within a 75 mile radius.

❑ Is employee eligible for FMLA leave?
YES _____ NO _____

If ***NO***, give employee the Notice of Eligibility and Rights & Responsibilities (WH-381) form indicating the basis for ineligibility.

If ***YES***, continue through the checklist.

❑ FMLA leave is normally limited to 12 weeks in a 12-month period (or 26 weeks if Servicemember Family Leave).

Has this employee used FMLA leave during this 12 month period?
YES _____ NO _____

If ***YES***, when did the leave begin?
_____

Remaining entitlement for FMLA lave: _____ weeks. (Remember that the full 26-weeks is available for a request for Servicemember Family Leave when it is first requested.)

- ❑ Reason(s) for Leave:
  - ☐ pregnancy;
  - ☐ to care for a newborn;
  - ☐ to care for a newly adopted child, or a child recently placed into employee's foster care.
    - ▸ If so, the employee must plan to take leave all at once and within 12 months of the event, unless a different leave is mutually agreed to with the company.
    - ▸ Does the employee's spouse also work for the company? If so, they can be required to split the total amount of FMLA leave for this reason between them. They are not both eligible for the full amount of available leave.
  - ☐ employee's own serious health condition (other than pregnancy);
  - ☐ to care for a child, spouse, or parent with a serious health condition
  - ☐ to attend to a qualifying exigency
  - ☐ to care for a covered service member
  - ☐ Other: _____ _____

- ❑ As soon as possible, and within five (5) days of receiving notice that an employee has requested FMLA leave or may have an FMLA qualifying condition, issue to the employee the Employee Information Packet, which contains:

- ❑ **FMLA Notice of Eligibility and Rights and Responsibilities (completed by the employer) (DOL Form WH-381); and**

- ❑ FMLA Certification of Health Care Provider form for Employee's Serious Health Condition (WH-380E); ***or***

- ❑ FMLA Certification of Health Care Provider for Family Member's Serious Health Condition Form (WH-380F); ***or***

- ❑ FMLA Certification of Qualifying Exigency form (WH-384); ***or***

- ❑ FMLA Certification for Serious Injury or Illness of Covered Service member form (WH-385)

- ❑ Employee Information Packet provided to employee on _____(date).
  By: _____(initials of staff member)

  Method: In Person _____
  Certified Mail _____ Email _____

- ❑ Employee is told:
  - ☐ The employee can call Human Resources to discuss FMLA leave.
  - ☐ The employee can keep the FMLA Notice of Eligibility and Rights and Responsibilities.

1. **<u>Employee's Serious Health Condition (DOL Form WH-380E)</u>:**

   - ❑ The employee completes Section II of DOL Form WH-380E and gives it to HR. HR and the employee should discuss at that time the use of accrued paid leave and timekeeping. Any use of paid leave should be consistent with existing leave policy guidelines. An employee will not be denied FMLA leave, if otherwise eligible, based upon failure to submit the FMLA forms.

   - ❑ HR completes Section I of DOL Form WH-380E and provides a copy to the employee.

   - ❑ ***HR must staple a copy of the employee's current job description to the form.***

   - ❑ The employee then has the treating physician or health care provider complete the Section III of DOL Form WH-380E. The employee must Form WH-380E to HR within 15 calendar days of the request for certification.

2. **<u>Serious Health Condition of Employee's Family Member (DOL Form WH-380F)</u>:**

   - ❑ The employee completes Section II of DOL Form WH-380F and gives it to HR. HR and the employee should discuss at that time the use of accrued paid leave and

timekeeping. Any use of paid leave should be consistent with existing leave policy guidelines. An employee will not be denied FMLA leave, if otherwise eligible, based upon failure to submit the FMLA forms.

- ❑ HR completes Section I of DOL Form WH-380F and provides a copy to the employee.

- ❑ The employee then has the family member's treating physician or health care provider complete the Section III of DOL Form WH-380F. The employee must submit Form WH-380F to HR within 15 calendar days of the request for certification.

3. Military Qualifying Exigency (DOL Form WH-384):

- ❑ The employee completes Section II of DOL Form WH-384 and gives it to HR.

- ❑ If the leave is requested for a qualifying exigency, the employee will need to provide the basis for the qualifying exigency leave request. If the qualifying exigency involves meeting with a third party, the employee will need to provide sufficient information to enable the employer to verify the meeting at its discretion. Copies of military orders or other documents supporting the basis for the request should be attached to the certification form.

- ❑ HR completes Section I of DOL Form (WH-384) and provides a copy to the employee.

- ❑ Are you permitting the spouse, children, or parents of a servicemember (in the National Guard or Reserves) called to active duty up to 12 weeks of FMLA active duty leave in the following circumstances:

  - ☐ short notice deployment;

    - military events and related activities;
    - childcare and school activities;
    - financial and life arrangements;
    - counseling;
    - rest and recuperation;
    - post-deployment activities; and
    - other activities agreed to by the employer and employee.

4. Serious Injury or Illness of Covered Servicemember (DOL Form WH-385):

- ❑ The employee and/or the covered servicemembers for whom the employee is requesting leave completes Section I of DOL Form WH-385 and gives it to HR.

- ❑ Section II of DOL Form Wh-385 must be completed by U.S. Dept. of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a U.S. Dept. of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; or (3) a DOD non-network TRICARE authorized private health care provider.

- ❑ If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).

- ❑ Are you permitting the spouse, child, parent or "next of kin" to take up to 26 weeks in a single 12 month period of unpaid FMLA leave to care for a seriously ill or injured servicemember?

- ❑ Are you defining "next of kin" for the purposes of caregiver leave as the servicemember's nearest blood relative, then ranked in order of siblings, grandparents, aunts and uncles, and first cousins.

- ❑ Are you seeking to determine whether a servicemember has designated in writing another blood relative who should be considered "next of kin."

- ❑ If a servicemember has not designated in writing the "next of kin" are you defining "next of kin" in the order of priority as set forth in the regulations?

D. DESIGNATION OF FMLA LEAVE (DOL FORM WH-382)

- ❑ Upon receipt of the employee's documentation, HR should confirm that the certification has been returned within 15 days from the date of the request. If FMLA is denied because certification was late, be sure the employee was clearly notified of time frame and the consequences for failure to return certification on time. If certification is not late, evaluate whether the leave requested is protected by the FMLA. The employee, his or her supervisor and the payroll/benefits dept. will be notified if the request is approved, provisionally approved, or denied, in writing within five (5) days after receipt of the certification.

- ❑ ***HR will only tell the supervisor that the employee has been approved for FMLA leave for a designated time period and/or intermittently. HR will not and should not tell the supervisor any information regarding the underlying medical reasons why leave was granted.***

- ❑ ***If the certification is approved, the FMLA Designation Notice (completed by the employer) (DOL WH-382) should be sent to employee's home address via certified mail.***

  - ☐ If the certification is incomplete or insufficient, the employer shall state in writing what additional information is necessary to make the certification complete and sufficient. The employer must provide the employee with seven (7) calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency.
  - ☐ If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave.

    - A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.
    - A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive.
    - A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

- ❑ If employee fails to return the Certification of Health Care Provider within 15 days from the date of the request, HR Resources should send a 15-day follow-up letter, giving the employee another opportunity to provide the certification. If the medical certification is not produced, the absences should be denied under the Family and Medical Leave policies and may be considered unapproved.

  - ☐ ***Consult with legal counsel prior to taking any disciplinary action.***

  - ☐ Note: the 15-day follow-up letter is not required by law, but may show that the employer engaged in good faith compliance efforts, if the employee later files an FMLA claim.

E. ADMINISTRATION OF FMLA LEAVE

- ❑ Are you telling employees that they must comply with the company's customary call in procedures if they are absent for reasons that may be FMLA qualifying (unless unusual circumstances exist)?

- ❑ Are you treating all forms of paid leave the same for FMLA purposes?

- ❑ Are you taking into account employees' FMLA absences when determining perfect attendance or other similar performance bonuses if you also do so for non-FMLA related absences?

- ❑ The employee begins approved FMLA leave. Create an FMLA log and track the hours used by the employee for approved FMLA leave.

- ❑ If necessary, create an intermittent FMLA log and track the hours used by the employee.
  - ■ Are you tracking intermittent or reduced schedule FMLA leave using an increment no greater than the shortest period of time that the company uses to account for other forms of leave, provided that amount is not greater than one hour?
- ❑ Conversion to Leave without Pay: If employee exhausts paid leave, then designate leave as unpaid, or the equivalent of "Leave Without Pay" in the payroll system.
- ❑ HR will send a per pay period billing statement to the employee's home regarding the employee's portion of insurance premiums & some elected voluntary benefits during unpaid status. Payments will need to be submitted to [insert company or benefits entity].
- ❑ Depending on the length of FMLA leave, employee may require periodic recertification. Use the FMLA Certification forms for all recertifications.
- ❑ Update the FMLA log and send the employee a notification each month as to how many hours of FMLA have been used, and how many remain. Employees should be told, in writing, their absences are being counted as FMLA.
- ❑ All FMLA supporting documentation will be maintained as confidential medical records in a secure file separate from the employee's personnel file. Human Resources will maintain FMLA records for at least three (3) years.

F. FMLA RETURN TO WORK

- ❑ Are you considering whether to require a fitness-for-duty examination specifically to address an employee's an ability to perform the essential functions of the job prior to an employee's return to work after FMLA leave?
- ❑ If you have job safety concerns, are you requiring a fitness-for-duty certification before permitting an employee on intermittent leave to return to work?
- ❑ The employee returns to work. If required, collect and evaluate Return to Work Certification immediately upon employee's return to work.
- ❑ HR must provide the employee with a copy of his/her current job description. The employee must provide the job description to the health care provider along with the Return to Work Certification.
- ❑ If the employee is certified to return to work with limited or light duty restrictions, determine availability prior to the employee's return to duties. If FMLA leave is not expired, a certified request for reduced hours must be granted.
  - ☐ Are you ensuring that light duty work is not counted against an employee's FMLA entitlement?
  - ☐ Are you ensuring that an employee's job restoration rights are held in abeyance while he or she is performing light duty work?
- ❑ ***Check with legal counsel to determine any accommodation obligations under the ADA and ADAAA***.

Appendix 5:

Advanced Leave Issues:
FMLA, ADA/ADAAA, USERRA, and WC Stuff

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Advanced Leave Issues:
FMLA, ADA/ADAAA, USERRA, and WC Stuff
Katrina Grider

I. FMLA 2012 EMPLOYER CHECKLIST

What should employers do to minimize FMLA claims? ***Prepare.*** Consider implementing the following to minimize FMLA liability and put the company in the best position to administer the FMLA:

❶ ***Update the company's FMLA policy and any relevant personnel policies (and inform employees!).*** Many employers still have not updated their FMLA policies after the new regulations or the more recent military leave amendments took effect? Now is the time to review and revise FMLA policies as well as other personnel policies and procedures (*e.g.*, call-in procedures, leave policies) so that leave can be efficiently administered and the company can fully assert its rights in preventing FMLA fraud and misuse. At a minimum, update company policies to adhere to the new GINA regulations. See our post regarding GINA compliance.

❷ ***Update the company's Employee Handbook to include the newly revised FMLA policies.*** The FMLA regulations require all employers who maintain an employee handbook to publish their FMLA policy within the handbook. Easy enough -- take the newly updated FMLA policy and publish it in the company handbook and distribute over the internet or intranet.

❸ ***Change the FMLA leave year to a rolling year measured "backward."*** The FMLA allows employers to define the 12-month FMLA year in a number of different ways, such as a calendar year, a look-forward period (from the time the employee first takes leave), or a "rolling" 12-month period measured backward from the date an employee uses any FMLA leave.

The rolling 12-month period typically is the best choice for employers, since it avoids stacking 12-week FMLA periods back-to-back. Keep in mind, though, that employers must provide employees with 60 days' notice of any change to the FMLA 12-month period.

❹ ***Ensure that the company's FMLA forms are up to date and useful.*** Many companies are still using pre-2009 DOL forms for FMLA leave. The new regulations require employers (and employees) to use a whole new suite of FMLA forms. Consider adapting FMLA forms to ensure that the company is obtaining all the information available to it under the rules.

❺ ***Update job descriptions ASAP!*** When employers seek medical certification of an employee's serious health condition, they now may require the employee's health care provider to identify in the medical certification form those "essential duties" the employee cannot perform. Similarly, employers also may require a health care provider to confirm in a fitness-for-duty certification that the employee can perform all essential job functions upon his/her return to work. Updating job descriptions will help promote an efficient and accurate certification process.

❻ ***Revise severance agreements***. Employees now may release past FMLA claims. However, many employers are not including the requisite language in severance and settlement agreements. Consider updating the company's model agreements to maximize its protection, and use outside or in-house employment counsel to ensure the language is sufficient.

Under the old FMLA regulations, employees could not waive their rights under the FMLA. Federal appellate courts interpreted this provision to mean that employees could not waive any FMLA claims, including past FMLA claims, without court or DOL approval (adopting a similar approach under the FLSA). This holding effectively prevented employers from settling past FMLA claims without getting a court or the DOL involved.

The new FMLA regulations clarify the DOL's position on this point. Now, any release or settlement of an employee's past FMLA claims (*e.g.,* through a general release contained within a separation agreement) is valid. (*See* 29 C.F.R. § 825.220(d)). However, an employee still cannot waive any prospective FMLA claim.

❼ ***Analyze bonus programs/criteria***. As companies set and review new goals for 2011, keep in mind that the new FMLA regulations allow employers to deny such bonuses as "perfect attendance" awards to employees who take FMLA leave. Has this change been taken into account for 2011?

❽ ***As always, Train! Train! Train!*** From the front-line supervisor to the top executive, managers must understand their responsibilities to effectively manage an employee with a medical condition. Properly training managers as to their responsibilities under the FMLA should become a regular part of an employer's operations, as it will significantly reduce the risk of legal liability.

II. NEW FMLA RULING AFFECTS EMPLOYERS (SAME-SEX PARTNERS)

On June 22, 2010, DOL issued Administrator's Interpretation No. 2010-3 which is intended to make clear (among other things) that an employee can qualify for Family and Medical Leave Act (FMLA) leave to care for the son or daughter of a same-sex partner. This is because the statutory definition of "son or daughter" includes a child of a person standing "in loco parentis," regardless of biological or legal relationship.

WHD ADMIN. INTERP. NO. 2010-3, http://www.dol.gov/whd/opinion/adminIntrprtn/ FMLA/2010/ FMLAAI2010_3.pdf (June 22, 2010).

III. JOB DESCRIPTIONS: "OTHER DUTIES AS ASSIGNED DOESN'T CUT IT ANYMORE"

A. Are We Legally Required to Have Job Descriptions? Everyone at This Company Already Knows How to Do Their Job Anyway.

Job descriptions are not required by federal law for most employers, ***but they are advisable and strongly recommended for many reasons***. Job descriptions are used directly or indirectly to:

- Assign work and document work assignments.
- Help clarify missions.
- ***Establish performance requirements***.
- Assign occupational codes, titles, and/or pay levels to jobs.
- Recruit for vacancies.
- ***Explore reasonable accommodation***.
- Counsel people on career opportunities and their vocational interests.
- Check for compliance with legal requirements related to equal opportunity, equal pay, overtime eligibility, *etc*.
- Make decisions on job restructuring.
- ***Evaluate requests for accommodation under the ADA***.
- ***Evaluate requests for any type of leave under the FMLA (including return to work qualifications)***

1. <u>Simple Approach to Job Descriptions</u>

Here is a simple approach to job descriptions. Make sure that the descriptions tell:

- Who (usually the incumbent or the supervisor).
- Does what work (including review of the work of others).
- Where (the work is done).
- When (or how often).
- Why (the purpose or impact of the work).
- How (it is accomplished).

To the extent practicable, the job description writer should use action verbs with an implied subject (who) and explicit work objects and/or outputs (what).

For example:

— *(Implied subject)* Evaluates *(action verb)* jobs *(what)* by assigning official title, occupational code and grade in accordance with the job evaluation system *(how)*.

— *(Implied subject)* Collects *(action verb)* key job information *(what)* from various sources, *e.g.*, work interviews and direct observation *(where)*.

2. An "Essential" Task Can Be a Small Part of the Workload

Typically, the tasks that comprise the bulk of the workload are the "essential functions." But a job that is just a small part of the workload could also be essential, particularly if the jobholder is the only one qualified to do it.

For example, a particular task may require a certified person, whether that task is an accounting filing or boiler inspection. Or, as another example, if only one person is available to answer the phone during the receptionist's lunch period, then answering the phone could be an essential function even though it is only an hour a day.

B. Do the Feds Want to See Job Descriptions in Place?

1. Make the DOL Happy

Yes. The DOL obviously thinks that job descriptions are important because it has included several places on DOL FORM WH-380-E: CERTIFICATION OF HEALTH CARE PROVIDER FOR EMPLOYEE'S SERIOUS HEALTH CONDITION (FAMILY AND MEDICAL LEAVE ACT) to discuss it. Specifically, Form 380-E provides for the following information to be completed:

SECTION I: For Completion by the EMPLOYER

Employee's essential job functions_____

Check if job description is attached:_____

PART A: MEDICAL FACTS

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

Is the employee unable to perform any of his/her job functions due to the condition: __ No __ Yes.

If so, identify the job functions the employee is unable to perform:_____
_____

* * * * *

PART B: AMOUNT OF LEAVE NEEDED

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

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2. Make the EEOC Happy

Yes. On October 14, 2008, the EEOC published a guidance entitled, "The ADA: Applying Performance and Conduct Standards to Employees with Disabilities", *see* http://www. eeoc. gov/facts/performanceconduct.html. This guidance (as well as other EEOC related publications) is premised upon the fundamental concept that an employer can identify and articulate the essential and marginal functions of a particular job. During an investigation, the Commission always requests a copy of the job description. An employer who has no job descriptions in place, or outdated or poorly written decisions faces harsh scrutiny, and the inference may be drawn that the employer's conduct regarding that employee was not based on a legitimate business necessity or other clearly articulated objective criteria.

C. How Do I Create a Job Description That Is Compliant with the ADA?

Writing job descriptions that are compliant with the ADA/ADAAA is tricky. In your efforts to be clear, you can also be exclusionary.

Take, for example, the requirement to be "able to walk"

around the office. That language would be unnecessarily exclusionary if the actual requirement is just to be able to move around the office, from a desk to a file cabinet and back. That could easily be accomplished by, for example, an employee in a wheelchair who can't "walk." Here are some tips on managing the wording for most common tasks and demands:

1. Wording for Time Required

Here's some suggestions of the following terms for describing the amount of time a task takes:

- Task takes less than one-third of the time — describe as "seldom" to "occasionally"
- Task takes one-third to two-thirds of the time — describe as "occasionally" to "frequently"
- Task takes more than two-thirds of the time — describe as "constantly"

If the amount of time spent on a task or responsibility is "none," then omit that task from the job description.

2. Wording for Describing Physical Demands

a. *General Descriptions*

The general idea here, as mentioned above, is to avoid unnecessary exclusionary words. Also, if a physical demand is not essential in the performance of the job, reference to that demand should be omitted. The following table is instructive:

Physical Demand	ADA/ADAAA Compliant Words	Job Description Language Example
Stand or Sit	Stationary position	Must be able to remain in a stationary position 50% of the time.
Walk	Move, Traverse	The person in this position needs to occasionally move about inside the office to access file cabinets, office machinery, etc.
Use hands/fingers to handle or feel	Operate, Activate, Use, Prepare, Inspect, Place, Detect, Position	Constantly operates a computer and other office productivity machinery, such as a calculator, copy machine, and computer printer.

Physical Demand	ADA/ADAAA Compliant Words	Job Description Language Example
Climb (stairs/ladders) or balance	Ascend/Descend, Work atop, Traverse	Occasionally ascends/descends a ladder to service the lights and ceiling fans.
Stoop, kneel, crouch, or crawl	Position self (to), Move	Constantly positions self to maintain computers in the lab, including under the desks and in the server closet.
Talk/hear	Communicate, Detect, Converse with, Discern, Convey, Express oneself, Exchange information	The person in this position frequently communicates with students who have inquiries about their tuition bill or financial aid package. Must be able to exchange accurate information in these situations.
See	Detect, Determine, Perceive, Identify, Recognize, Judge, Observe, Inspect, Estimate, Assess	Must be able to detect funnel clouds from long distances.
Taste/Smell	Detect, Distinguish, Determine	Occasionally must be able to distinguish sweet and bitter flavors when creating desserts for Applewood Bakery's customers.
Carry weight, lift	Move, Transport, Position, Put, Install, Remove	Frequently moves Audio/Visual equipment weighing up to 50 pounds across campus for various classrooms and events needs.
Exposure to Work	Exposed, Work around	Constantly works in outdoor weather conditions.

b. *Specific Descriptions*

EQUIPMENT/DEVICE OPERATION	
List all computers, peripherals, and other hardware **required** to perform this job:	
List all computer software **required** to perform this job:	
List all office machines **required** to perform this job:	
List any other machines (including heavy equipment) **required** to perform this job:	
List all tools involving manipulation that are **required** to perform this job:	
List all vehicles that **must** be operated to perform this job:	

3. Wording for Describing Mental Demands

a. *General Descriptions*

MENTAL DEMAND	FUNCTION
General Intelligence (typical requirement for machine operators, office staff, *etc*.)	Does the employee have the ability to learn and comprehend basic instructions and orientation on the job?
Motor Coordination Skills (typical for a hand assembler, automobile mechanic, watch repair technician)	Is the employee able to coordinate eyes, hand, and fingers rapidly and accurately and handle precise movements?
Coordination of Eyes, Hand and Feet (typical for a tractor trailer driver, foot press operator)	Does the employee have the ability to coordinate the eyes, hand, and feet with each other in response to visual stimuli?
Verbal Intelligence (typical for a sales clerk, production supervisor)	Does the employee have the ability to understand the meanings of words and respond effectively?
Numerical Intelligence (typical for an accounting clerk, a shipping checker)	Does the employee have the ability to perform basic arithmetic accurately and quickly?

b. *Specific Descriptions*

MENTAL FUNCTION	DESCRIPTION
Comprehension	Ability to understand, remember, and apply oral and/or written instructions or other information
	Ability to understand, remember, and communicate routine, factual information
	Ability to understand complex problems and to collaborate and explore alternative solutions
	Ability to understand opposing points of view on highly complex issues and to negotiate and integrate different viewpoints
Organization	Ability to organize thoughts and ideas into understandable terminology
	Ability to organize and prioritize own work schedule on short-term basis (longer than one month)
	Ability to organize and prioritize work schedules of others on short-term basis
	Ability to organize and prioritize work schedules of others on long-term basis
Reasoning and Decisionmaking	Ability to apply common sense in performing job
	Ability to make decisions which have moderate impact on immediate work unit
	Ability to make decisions which have significant impact on the immediate work unit and monitor impact outside immediate work unit

MENTAL FUNCTION	DESCRIPTION
	Ability to make decisions which have significant impact on the department's credibility, operations, and services
Communication	Ability to understand and follow basic instructions and guidelines
	Ability to complete routine forms, use existing form letters and/or conduct routine oral communication
	Ability to compose letters, outlines, memoranda, and basic reports and/or to orally communicate technical information
	Ability to communicate with individuals utilizing a telephone, computer or other electronic device; requires ability to hear and speak effectively on phone, and to use a computer or other electronic device
	Ability to express or exchange ideas by means of the spoke word, communicating orally with others accurately, loudly, and quickly
	Ability to make informal presentations, inside and/or outside the organization. Speaking before groups
	Ability to compose materials such as detailed reports, work-related manuals, publications of limited scope or impact, etc., and/or to make presentations outside the immediate work area
	Ability to formulate complex and comprehensive materials such as legal documents, authoritative reports, official publications of major scope and impact, etc., and/or to make formal presentations
Mathematics	No/some/extensive mathematical ability is required
	Ability to count accurately
	Ability to add, subtract, multiply, divide and to record, balance, and check results for accuracy
	Ability to compute, analyze, and interpret numerical data for reporting purposes
	Ability to compute, analyze, and interpret complex statistical data and/or to develop forecasts and computer models
Other	Additional comments regarding mental capability requirements:

4. Wording for Describing Workplace Environmental Conditions

ENVIRONMENTAL CONDITION	FUNCTION
Noise Conditions (typical environmental condition for a manufacturing plant worker)	Is the employee exposed during a shift to constant or intermittent sounds at a level sufficient to cause hearing loss or fatigue?
Heat (typical for furnace operator or heat treater)	Is the employee subject to high temperatures that result in significant body discomfort?

ENVIRONMENTAL CONDITION	FUNCTION
Cold (typical for an outdoor worker in cold climates or a freezer operator)	Is the employee exposed to low temperatures that result in significant body discomfort?
Injury Exposure (typical for electricians, forklift truck operators, tractor trailer drivers)	Is the employee exposed to workplace hazards more frequently than normal? To potential injuries?
Atmospheric Exposure (typical for welders, solvent handlers)	Is the employee exposed to dusts, fumes, vapor or mists that could affect the occupational health of the employee?

D. What Criteria Should Be Used to Differentiate Between Marginal and Essential Functions?

Marginal functions are those that are:

> Passable
> Peripheral
> Minimal
> Incidental
> Extra
> Accessory
> Borderline
> Nonessential

Essential functions are those that are:

* Critical
* Indispensable
* Crucial
* Fundamental
* Integral
* Necessary
* Primary
* Imperative

E. What Are the Most Common "Essential Function" Mistakes?

1. Most Common Mistake—Function vs. Method

One common mistake in identifying essential functions is confusing method with function. "An essential function is what the completed task is, not how that task is completed." Use results-oriented language wherever possible to avoid this problem. For example, do not say employees have "to lift 50-pound boxes" when the actual task is "to relocate 50-pound boxes." And do not say employees have to "walk" from one place to another when the actual requirement is to "move" from one station to another.

The second common mistake is to rely on assumptions about what the employee does in the job. "It is imperative that the employee actually perform the particular function for it to be considered essential." Therefore, do not rely on job titles or traditional roles for jobs. Find out what the person on the job actually does.

A third common mistake is to use percentages to determine essential functions. Generally, that is probably not good practice because the amount of time spent performing a function is not always indicative of whether or not a function is "essential."

2. Factors to Determine Essential Functions

So what criteria do you use? Typically, a number of factors are used to determine essential functions. No one factor is necessarily determinative. Here are the main considerations:

a. *Employer's Judgment*

An employer's judgment as to which functions are essential is important evidence; however, it is not the only evidence or prevailing evidence. Rather, the employer's judgment is a factor to be considered along with other relevant evidence. The employer's judgment can be quickly discounted if, for example, a court finds that the employer doesn't actually require all employees in a particular position to perform an allegedly essential function. Typically, however, the employer will not be second-guessed on production quality or quantity standards that must be met by a person holding the job, nor will the employer be required to set lower standards for the job.

b. *Written Job Description*

The written description of the job or position, based on job analysis, is also critical information. Note that the job description should be prepared before advertising or interviewing for the job. Job descriptions prepared after

hire, or after a suit is filed, will be suspect, at best. A job description must accurately identify and clearly describe the functions that the employee is actually required to perform. An inaccurate or incomplete job description can be detrimental in court. Typically, employers may not claim functions as essential when they are not on a job description.

c. *Amount of Time Spent Performing the Function*

While the amount of time spent performing a particular function is clearly relevant to determine whether or not it is essential for purposes of the ADA, there are circumstances under which a function must be deemed essential regardless of the fact that it may be performed infrequently or have little time spent on it. For example, a clerical worker may spend only a few minutes a day answering telephones, but this could be an essential function of the position if no one else is available to answer the phones at that time and business calls would otherwise go unanswered.

d. *The Consequences of Not Performing the Function*

Another factor for determining whether a particular function is essential is the consequences of not requiring the incumbent of the position to perform the function. For example, although an airline pilot may spend only a few minutes of a flight landing an airplane, or a firefighter may only occasionally have to carry a heavy person from a burning building, these are essential functions of their jobs because of the very serious consequences emanating from the inability of employees to perform them.

e. *A Collective Bargaining Agreement's Terms*

The terms of a collective bargaining agreement may be relevant to determining the essential functions of a position.

f. *On-the-Job Experience*

Another factor can be the work experience of people who have performed the job or are performing it. Given that past and current incumbents have actually performed the duties, their opinions should be an important indicator about whether a particular job function is essential.

IV. SUMMARY OF SIGNIFICANT REVISIONS TO FMLA FINAL RULE

The Department of Labor (DOL) states the revisions were designed to clarify the requirements and to improve communication between employers and employees. To some extent, these goals may be met, but the changes and challenges are many. Here are summaries of some of the significant revisions included in the final rules:

A. The FMLA's Quirkiest Rule—Perfect Attendance Awards—Is Gone.

Probably the most bizarre rule of the old FMLA was the one that allowed employees to miss 12 weeks of work and still get a perfect attendance award. The final rule changes how perfect attendance awards are treated to allow employers to deny awards to an employee who does not have perfect attendance because he or she took FMLA leave (but only if the employer treats employees taking non-FMLA leave in an identical way).

B. Intermittent Leave Now Requires "Reasonable Effort."

The new rule clarifies that employees who take intermittent FMLA leave have a statutory obligation to make a "reasonable effort" to schedule such leave so as not to unduly disrupt the employer's operations. (Under the old rule, they just had to "attempt.") That is good news. Here are some other changes regarding intermittent leave:

The rules clarify that temporary transfers are allowed for employees taking planned intermittent leave only. (The department declined to expand temporary transfers to unplanned, unscheduled, or unforeseeable intermittent leave.)

The final rule also clarifies that accounting for leave need not be in the smallest increments that the employer's timekeeping system can handle, but rather in the smallest increments the employer uses to account for other types of leave, provided it is not greater than one hour.

And here is one more tricky change—the new rules prohibit employers from charging employees for the period of time that they are working. So, for example, if an employee stops working 30 minutes before the end of shift, and you use hourly increments, the employee cannot be charged for one hour of leave.

C. Serious Health Condition Definition Clarified.

While the rule retains the six individual definitions of "serious health condition," it adds guidance on some regulatory matters.

First, the rule clarifies that if an employee is taking leave based on more than three consecutive calendar days of incapacity plus two visits to a healthcare provider, the two visits must occur within 30 days of the period of incapacity. The first visit must occur within 7 days of onset of incapacity.

Second, it defines "periodic visits to a healthcare provider" for chronic serious health conditions as
at least two visits to a healthcare provider per year.

D. Gaps in 12-Month Service Defined.

The final rule does not change the requirements for 12 months of employment and 1,250 hours of service in the 12-month period preceding the leave. The final rule also continues the standard that the 12 months of employment need not be consecutive. However, it adds that employment prior to a continuous break in service of 7 years or more need not be counted.

E. Light Duty Is Not Leave.

Under the final rule, time spent in "light duty" work does not count against an employee's FMLA leave entitlement, and the employee's right to job restoration is retained during the light-duty period, but only until the end of the 12-month period that the employer uses to calculate the FMLA leave.

V. FMLA (IN GENERAL)

A. To Curb Abuse, We Have Managers or HR Reps Call Employees on Leave to Make Sure They Aren't Trying to Use FMLA as a Substitute for Vacation Time. Is That Legal?

Yes. That can be an effective way to prevent abuse, and courts have found policies like that to be reasonable. In fact, some companies have even gone as far as hiring a private investigator to watch an employee suspected of FMLA abuse and were able to win in court.

However, employers should be cautioned against violating the FMLA rules regarding how often they may contact employees while on FMLA leave, and regarding who the appropriate designated personnel are for making such contacts.

B. Can I Fire an Employee Who Tells Me That He Plans to Take FMLA Leave Once He Reaches His 12-month Anniversary?

No. Generally, in order to eligible for FMLA leave, your employees must work for the company for at least 12 months and clock at least 1,250 hours during those 12 months leading up to FMLA leave. But employers should pay attention to a recent court ruling which held that employees who request FMLA leave before they have met those thresholds can be protected from FMLA-related retaliation. If an employee would otherwise be eligible for FMLA leave and he gives early notice, you can not terminate him without a separate, valid business reason, such as poor performance.

The case in point here is *Reynolds v. Inter-Industry Conference on Auto Collision Repair*, 594 F. Supp. 925 (N. D. Ill. 2009). The facts are as follows: nine days short of his one-year anniversary on the job, Christopher Reynolds told his boss at an Illinois car repair shop that he'd need FMLA leave in a few months. Reynolds' son had just been born prematurely and was expected to remain in neonatal care for several months. Reynolds intended to take 12 weeks of FMLA leave once his son was released from the hospital. Reynolds also asked HR about adding his son to the company health insurance plan.

The next day, Reynolds was fired. Reynolds sued and stated that the firing was retaliation for his FMLA leave request. The company tried to argue that it was legal to terminate Reynolds because he had not reached the FMLA's 12-month threshold; and therefore, he wasn't protected from the law's retaliation provision.

The court disagreed. The FMLA states that employees must give their employers notice if they know they will need FMLA leave, and to punish someone for doing so is wrong. Finally, note that a jury could also conclude that the repair shop fired this employee to save on health care costs for the premature baby. That conduct would be illegal under ERISA—the Employee Retirement Income Security Act.

C. One of Our Employees Has a Serious Medical Condition. We've Offered Him Leave, but He Refuses to Take It. What Do We Do Now?

That depends on the nature of his condition. If he qualifies for FMLA, and the condition prevents him from doing his job safely — or he presents a risk to himself or co-workers — you can make him take leave. Otherwise, forcing leave could cause problems. In one recent case, a company lost in court after putting an employee on leave against his will. The court ruled his condition was not serious enough to qualify for FMLA and the employee was still able to perform his job safely. *See Wysong v. Dow Chemical Co*., No. 05-4197, 2007 U.S. App. LEXIS 22975 (6th Cir. Oct. 1, 2007).

If you are in a situation where you do not need to put the employee on FMLA, make sure you document the fact that leave was offered and denied — that will come in handy if the employee later claims he was denied FMLA.

D. The Law Defines a Health Condition as Serious If the Employee Is Treated by a Healthcare Provider for More than 3 Consecutive, Full Calendar Days. So an Employee Could See a Provider on a Friday and the Following Monday and Still Qualify? I Would Have Hoped it Would Be Workdays.

No. It is not workdays. Saturday and Sunday are included for the purpose of defining a serious health condition.

E. Regarding the Definition of a "Key Employee" for FMLA, must the Person Be Paid a Salary? What If a Top 10% Earner Is Paid on a Commission Basis or with Hourly Wages? Can He or She Still Qualify as a Key Employee?

No, he or she cannot. Not only must key employees be salaried, they must also be among the 10 highest-paid employees within a 75-mile radius that work for the company. And, such key employees must be informed of their status; you cannot wait until they come back from leave to make the designation. Remember that you must still grant leave to key employees. The distinction is that you would not guarantee reinstatement to their former jobs on their return from leave. What is the advantage of taking leave to the key employee if there's no guarantee of reinstatement? The employee gets to continue health coverage.

F. We Have an Employee Who Has Been out for 8 Weeks Because of Pregnancy Complications, and Her Baby Has Still Not Been Born. When it Is Delivered, must We Give the Mother an Additional 12 Weeks' Leave for Care of a Newborn? In Other Words, Do the Complications and the Childbirth Each Qualify for 12 Weeks' Leave?

Normally, no. Under the FMLA, the employee is allowed only 12 weeks' leave in a 12-month period for any combination of conditions, such as the two separate needs of your employee. So, in most cases, only a total of 12 weeks would be allowed in your employee's situation.

However, the complete answer depends on the way you count your year for FMLA purposes. If you use a fixed calendar year, and if the timing were right, the woman might qualify for 8 weeks of leave at the end of one year, and then another 12 weeks at the beginning of the next year. To avoid this possibility, many employers choose one of the rolling year options for counting the 12-month period. Note that leave to care for a child can be taken by either men or women, must be within 12 months of the child's birth or adoption, and does not require medical certification.

G. What Can You Do About FMLA Malingerers?

There are always malingerers – employees who work the system. These employees are the perfect example of the old adage that 20% of these people seem to take up 80% of your time in dealing with these situations. The best you can do to control them is to watch carefully, track their hours, and take advantage of all your opportunities for re-certification. First of all, recertifications may be requested once every 6 months, even for ongoing or lifetime serious health conditions.

Unless you can show "changed circumstances" or have reason to doubt the continuing validity of the leave, you may not require recertification until the initial period of leave is completed. For example, if the original certification said that one "flare-up" a week could be expected, and your employee is experiencing four flare-ups a week, you can ask for a recertification.

H. How Should I Handle an Employee Returning From FMLA with Light-Duty Restrictions?

While the FMLA generally requires an employee to be restored to his or her former position upon return,

restoration is not necessarily required under FMLA if the employee physically is unable to perform the essential functions of his or her position. An employer also is not required to create a new position simply to accommodate the employee's need for light-duty.

Light-duty should not be confused with a reduced or intermittent leave schedule, which employers may be obligated to provide under FMLA. Under a reduced or intermittent leave schedule, an employee works a modified work schedule in the same (or an equivalent) position. Conversely, a light-duty position involves restricted duties or an entirely different job.

Though light-duty jobs are not guaranteed under FMLA, an employee may have a right to a light-duty job under the ADA. Under the ADA, if the employee's serious health condition rises to the level of a disability, the employee may have a right to a reasonable accommodation, which could include a light-duty position. However, like the FMLA, the ADA does not require that an employer create an entirely new position to accommodate an employee, though it does require an employer to consider whether a vacant position might be a viable alternative. The EEOC has published guidance on this topic.

Employers often offer light-duty work for employees who are returning from an injury covered under workers' compensation. This tactic can be helpful in reducing overall workers' compensation costs, while not specifically required under workers' compensation laws or FMLA. While an employer cannot mandate or require the employee to accept a light-duty position, if light-duty is offered and the employee declines the work, the employee may become disqualified for workers' compensation benefits.

If an employee does not return to work from FMLA leave (in other words, the employee refused to return to light-duty) when he or she has medical restrictions that constitute a serious health condition, the leave is still covered under the FMLA until the time it has been exhausted 29 C.F.R. §825.207.

VI. INTERMITTENT FMLA

A. An Employee Needs Follow-up Treatments after Surgery and Asks to Take Intermittent FMLA — Every Other Friday Afternoon. Do We Need to Let Her Leave Early?

For the most part, the answer's yes, but you do have some options. After you get her medical certification, you can ask for a second opinion to make sure she really needs leave. Then, ask if there is any reason she needs to get treated on Fridays — and have her give you verification from her doctor. If there is no medical reason to take leave at those times, you are allowed to ask her to schedule the treatments after work or on other days.

B. We Have an Employee on Intermittent FMLA. At First, His Absences Were Sporadic, but Now He Takes off Frequently, Always on Monday or Friday. What Can We Do?

Get recertification. Employers are allowed to ask employees on intermittent FMLA to get certified every 30 days — or at any time, if circumstances change, or the company has reason to think something fishy is going on. According to a Department of Labor Opinion Letter (DOL FMLA2004-2-A), a pattern of Monday/Friday absences is enough to warrant recertification.

VII. FMLA AND WC

The FMLA and state workers' compensation laws may both cover an employee who suffers a serious health condition while on the job. The Department of Labor (DOL) has issued revised regulations which implement the FMLA. Though the interplay between the FMLA and workers' compensation leaves was addressed within those regulations, a number of DOL letter rulings have also clarified the interaction of these laws. The following discussion answers common questions regarding employee leaves, which qualify for protection under both the FMLA and workers' compensation laws.

A. Does FMLA Leave Run Concurrently with a Workers' Compensation Absence?

The employee's FMLA leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a "serious health condition." Thus, an employee could receive workers' compensation benefits to replace lost wages, while at the same time having health benefits maintained under the FMLA. However, if appropriate, the employer must be sure to designate this leave as FMLA qualifying leave and must give notice of the same to the employee. If the employer fails to designate this leave as FMLA leave, the employee may still be entitled to FMLA leave once the workers' compensation absence has ended.

B. Can an Employer Require an Employee to Substitute Accrued Paid Leave If the Employee Is on Workers' Compensation and FMLA Leave?

Since the workers' compensation absence is already considered paid leave, the FMLA provision for substitution of the employee's accrued paid leave for unpaid FMLA leave does not apply. More specifically, if the employee has elected to receive workers' compensation benefits, the employer cannot require the employee to substitute any accrued paid leave for any part of the absence that is covered by the payments under a workers' compensation plan. However, an employee is also thus precluded from relying upon the FMLA's substitution provision to insist upon receiving both workers' compensation and accrued paid leave benefits during such an absence. However, employers and employees may agree, where state law permits, to have paid leave supplement the disability plan or workers' compensation benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

C. What Benefits Is an Employee Entitled to While on Concurrent Workers' Compensation and FMLA Leave?

If the employer designates the workers' compensation absence as FMLA leave, then the employee is entitled to all employment benefits accrued prior to the date on which the leave commenced. The FMLA does not entitle the employee to the accrual of any seniority or employment benefits during any period of FMLA leave, nor to any right, benefit or position of employment other than that to which he or she would have been entitled had the employee not taken the leave. Thus, an employee on FMLA leave does not accrue seniority or employment benefits during the absence by operation of the FMLA. Nevertheless, in addition to the group health benefits guaranteed under the FMLA, an employee on FMLA leave, whether paid or unpaid, may be entitled to additional benefits while absent, depending on the employer's established policy for providing such benefits when employees are absent on other forms of leave.

D. How May an Employee on Concurrent Workers' Compensation and FMLA Leave Pay for Group Health Coverage? For Other Non-health Benefit Premiums?

An employee who is receiving payment as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking unpaid FMLA leave. It is important that the employer make such arrangements with the employee in advance of the leave or shortly after the leave begins since the FMLA provision for recovery of the employer's share of health insurance premiums does not apply. That is, the FMLA statute only authorizes the recovery of the employer's share of insurance premiums that are paid to maintain coverage for the employee under a group health plan during any period of unpaid leave. Leave taken pursuant to a workers' compensation plan is not unpaid leave within the meaning of the FMLA.

Likewise, an employer will also want to make prior arrangements for employee payment of other non-health benefit premiums when an employee is receiving payment as a result of a workers' compensation injury and is simultaneously taking unpaid FMLA leave. Again, neither the FMLA statute nor its regulations provide for the employer's recovery of any such premiums paid during a paid leave as opposed to during an unpaid leave.

E. What May an Employer Do If It Questions the Adequacy of a Medical Certification?

If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider, the employer may follow the workers' compensation provisions. That is, the employer may have direct contact with the employee's health care provider in the manner in which the workers' compensation statute provides. Further, the revised FMLA regulations also provide that an employer can contact an employee's health care provide to authenticate or obtain clarification of the medical certification, so long as the employer has first given the employee a chance to cure any deficiencies.

F. Is an Employee Required to Return to a "Light Duty" Job When it Is Not the Same Job or Is Not Equivalent to the Job the Employee Left?

If the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a light duty job, the employee may decline the employer's offer of a light duty job if it is not the same or is not an equivalent job to the job the

employee left. However, as a result of turning down such light duty job, the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the FMLA entitlement is exhausted. Additionally, when the workers' compensation benefits cease, the employee may elect or the employer may require the use of accrued paid leave.

If the employee accepts the light duty position in lieu of FMLA leave or returns to work before the FMLA leave entitlement ends, the employee retains the right to the original or to an equivalent position. However, the period of time employed in a light duty assignment cannot count against FMLA leave entitlement. The right to restoration is held in abeyance during the period of time the employee performs a light-duty assignment. That right is not unlimited and ceases at the end of the applicable 12-month FMLA leave year. Restoration is dependent on the employee's ability to perform the essential functions of the same or equivalent position at the end of FMLA leave.

G. What Happens to an Employee on Concurrent Workers' Compensation and FMLA Leave Once the FMLA Leave Entitlement Has Run Out?

If the employee is unable to return to work or is still in a light duty job after the FMLA leave entitlement has run out, the employee no longer has the protections of the FMLA and must look to the workers' compensation statute or to the federal Americans with Disabilities Act (if the employee is a "qualified individual with a disability") for any further relief or protections.

VIII. ADA (IN GENERAL)

A. Are Caregivers a Protected Group under the EEO Statutes?

No. The federal EEO statutes do not prohibit discrimination based solely on parental or other caregiver status. Under the federal EEO laws, discrimination must be based on a protected characteristic such as sex or race. However, some state or local laws may provide broader protections for caregivers. A particular caregiver also may have certain rights under other federal laws, including the Family and Medical Leave Act.

B. When Does Discrimination Against a Worker with Caregiving Responsibilities Constitute Unlawful Disparate Treatment?

Unlawful disparate treatment arises where a worker with caregiving responsibilities is subjected to discrimination based on a protected characteristic under federal EEO law. Generally, this means that, under Title VII of the Civil Rights Act of 1964, unlawful disparate treatment arises where a caregiver is subjected to discrimination based on sex and/or race.

Unlawful disparate treatment of a caregiver also can arise under the ADA/ADAAA where an employer discriminates against a worker based on his or her association with an individual with a disability.

IX. ADA AND USERRA

A. Fifth Circuit USERRA Case

Carder v. Continental Airlines, No. 10-20105, 2011 U.S. App. LEXIS 5847 (5th Cir. Mar. 22, 2011).

USERRA does not provide for hostile work environment claims.

Carder sued the employer for violation of the Uniformed Services Employment and Reemployment Rights Act (USERRA) alleging a hostile work environment. The trial court granted the employer's partial motion to dismiss because USERRA did not provide for a hostile work environment claim. The Fifth Circuit affirmed.

The court found that the plain language of USERRA did not provide for a hostile work environment claim. In Title VII, prohibiting discrimination with respect to the "terms, conditions, or privileges of employment," the United States Supreme Court inferred a hostile work environment claim where the harassment was "sufficiently severe or pervasive to alter the conditions of the victim's employment." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

The court noted that the Americans with Disabilities Act (ADA), passed after the *Meritor* decision, contained the "conditions" language of Title VII, which was interpreted to infer an ADA hostile work environment cause of action; but the USERRA enacted after *Meritor* did not contain the "conditions" language of Title VII. The court acknowledged that Title IX and the Rehabilitation Act (RA) lacked the

"conditions" language of Title VII but have been interpreted to provide for hostile work environment causes of action.

The court distinguished Title IX and the RA stating the beneficiaries of those acts were members of historically disadvantaged minorities, like the beneficiaries of Title VII; members of the military were not historically disadvantaged minorities. The court observed that the Department of Labor regulations implementing USERRA make no mention of a hostile work environment claim. Based on the distinct text of USERRA, its legislative history, and its policies and purposes, the court declined to infer a cause of action for hostile work environment under USERRA.

B. Are There Any Laws That Protect Veterans with Service-connected Disabilities?

Yes. At least two federal laws provide important protections for veterans with disabilities. The Uniformed Services Employment and Reemployment Rights Act (USERRA) has requirements for reemploying veterans with and without service-connected disabilities. The U.S. Department of Labor (DOL) enforces USERRA. In addition, Title I of the Americans with Disabilities Act (ADA) prohibits private and state and local government employers with 15 or more employees from discriminating against individuals on the basis of disability. Title I of the ADA also generally requires covered employers to make reasonable accommodations – changes in the workplace or in the way things are usually done that provide individuals with disabilities equal employment opportunities. The EEOC enforces Title I of the ADA. Finally, Section 501 of the Rehabilitation Act applies the same standards of non-discrimination and reasonable accommodation as the ADA to Federal Executive Branch agencies and the United States Postal Service.

C. How Does USERRA Differ from the ADA?

USERRA prohibits employers from discriminating against employees or applicants for employment on the basis of their military status or military obligations. It also protects the reemployment rights of those who leave their civilian jobs (whether voluntarily or involuntarily) to serve in the uniformed services, including the U.S. Reserve forces and state, District of Columbia, and territory (*e.g.*, Guam) National Guards.

Both USERRA and the ADA include reasonable accommodation obligations; however, USERRA requires employers to go further than the ADA by making reasonable efforts to assist a veteran who is returning to employment in becoming qualified for a job. The employer must help the veteran become qualified to perform the duties of the position whether or not the veteran has a service-connected disability requiring reasonable accommodation. This could include providing training or retraining for the position. *See* 38 U.S.C. § 4313; 20 C.F.R. §§ 1002.198, 1002.225-.226. Additionally, reasonable accommodations may be available under USERRA for individuals whose service-connected disabilities may not necessarily meet the ADA's definition of "disability." USERRA also applies to all employers, regardless of size. Information on the reemployment rights of uniformed service personnel can be found on DOL's website at www.dol.gov/vets.

Title I of the ADA prohibits employers from discriminating against qualified individuals with disabilities with respect to hiring, promotion, termination, and other terms, conditions, and privileges of employment. The ADA also prohibits disability-based harassment and provides that, absent undue hardship (significant difficulty or expense to the employer), applicants and employees with disabilities are entitled to reasonable accommodation to apply for jobs, to perform their jobs, and to enjoy equal benefits and privileges of employment (*e.g.*, access to the parts of an employer's facility available to all employees and access to employer-sponsored training and social events). Under the ADA, an individual may ask for a reasonable accommodation at any time during the application process or during employment. It is best to request a reasonable accommodation as soon as possible after recognizing that one is needed. Additionally, an employer may have to provide someone who has been given one type of reasonable accommodation with a different or additional one (*e.g.*, if the nature of the disability or the job changes, or if another type of accommodation becomes available). Documents explaining Title I of the ADA can be found on EEOC's website at www.eeoc.gov.

D. I Was Severely Injured During Active Duty but Don't Think of Myself as "Disabled." How Do I Know If I Am Protected by the ADA?

You are protected if you meet the ADA's definition of disability. The ADA defines an "individual with a disability" as a person who: (1) has a physical or mental impairment that substantially limits one or more major life activities

(*e.g.*, hearing, seeing, speaking, sitting, standing, walking, concentrating, or performing manual tasks); (2) has a record of such an impairment (*i.e.* was substantially limited in the past, such as prior to undergoing rehabilitation); or (3) is regarded, or treated by an employer, as having a substantially limiting impairment, even if no substantial limitation exists.

The ADA covers more than just individuals who were born with disabilities. It also covers individuals who use wheelchairs, were blinded, or became deaf because of an accident or injury and individuals who are diagnosed with medical conditions such as traumatic brain injury, major depression, and PTSD at any point in their lives.

The ADA does not require that someone be completely unable to work or perform other major life activities. In fact, the law recognizes that many people with physical or mental impairments are capable of working and protects them from discrimination that results from employer misperceptions or from the failure to make what are often simple workplace modifications.

E. I Have Been Found to Have a Service-connected Disability for Purposes of Receiving Benefits Related to My Military Service. Does this Mean I Am Covered by the ADA?

It depends. The definition of "disability" under the ADA may differ from the definition used in other laws. For example, you may be considered a "disabled veteran" if you served on active duty in the armed forces, were honorably discharged, and have a service-connected disability, or are receiving compensation, disability retirement benefits, or pension because of a public statute administered by the Department of Veterans Affairs or a military department. *See* 5 U.S.C.A. § 2108. It is possible that you may be a "disabled veteran" but not covered under the ADA. For example, if you receive benefits based on a 10% disability rating for service-connected tinnitus (which causes ringing in the ear), but are not substantially limited in hearing or some other major life activity, do not have a record of a substantial limitation, and are not treated by an employer as if you are substantially limited, then you do not have a disability under the ADA.

However, it is certainly possible that you will meet both the definition of "disabled veteran" and the ADA's definition of "individual with a disability." For example, if you have a complete loss of vision due to a combat-related injury, you are a "disabled veteran" entitled to military benefits and also an individual with a disability under the ADA.

F. Is an Employer Required to Hire Me over Other Applicants Because I Have a Service-connected Disability?

In most cases, no. The ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual." This means that if you are qualified for a job, an employer cannot refuse to hire you because you have a disability or because you may need a reasonable accommodation to perform the job. You are considered qualified under the ADA if you are able to meet the employer's requirements for the job, such as education, training, employment experience, skills, or licenses and are able to perform the job's essential or fundamental duties with or without reasonable accommodation. Even if you are qualified for a job, however, an employer may choose another applicant without a disability because that individual is better qualified.

Though it is not required to do so, an employer may decide to give a veteran with a service-connected disability a preference in hiring. In fact, federal agencies may use specific rules and regulations, called "special hiring authorities," to hire individuals with disabilities outside the normal competitive hiring process, and sometimes may even be required to give preferential treatment to veterans, including disabled veterans, in making hiring, promotion, or other employment decisions.

See the U.S. Office of Personnel Management's question-and-answer guide on "EXCEPTED SERVICE—APPOINTMENT OF PERSONS WITH DISABILITIES AND CAREER AND CAREER- CONDITIONAL APPOINT-MENTS" at www.opm.gov/disability/appointment_ disabilities.asp and OPM's "Vet Guide" at www.opm.gov/veterans/html/vetguide.asp; *see also* OPM's Disabled Veterans Affirmative Action Program at www.opm.gov/veterans/ dvaap.asp.

G. During a Job Interview, May an Employer Ask about My Missing Arm, Why I Am in a Wheelchair, or How I Sustained Any Other Injury I May Have?

No. Even if your disability is obvious, an employer cannot ask questions about when, where, or how you were injured. However, where it seems likely that you will need a reasonable accommodation to do the job, an employer may ask you if an accommodation is needed and, if so, what type. In addition, an employer may ask you to describe or demonstrate how you would perform the job with or without an accommodation. For example, if the job requires that you lift objects weighing up to 50 pounds, the employer can ask whether you will need assistance or ask you to demonstrate how you will perform this task. Similarly, if you voluntarily reveal that you have an injury or illness and an employer reasonably believes that you will need an accommodation, it may ask what accommodation you need to do the job.

H. Do I Have to Disclose an Injury or Illness That Is Not Obvious During an Interview or Indicate on a Job Application That I Have a Disability?

No. The ADA does not require you to disclose that you have any medical condition on a job application or during an interview, unless you will need a reasonable accommodation to participate in the application process, such as more time to take a test or permission to provide oral instead of written responses. Some veterans with service-connected disabilities, however, may choose to disclose that they have medical conditions, such as PTSD or a TBI, because of symptoms they experience or because they will need a reasonable accommodation at work. Once an employer makes a job offer, it may ask you questions about your medical conditions, and perhaps even require you to take a medical examination, as long as it requires everyone else in the same job to answer the same questions and/or take the same medical examination before starting work.

I. Some Applications Ask Me to Indicate Whether I Am a "Disabled Veteran." Is this Legal?

Yes, if the information is being requested for affirmative action purposes. *See* EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990 (1995) at www.eeoc.gov/policy/docs/preemp.html. An employer may ask applicants to voluntarily self-identify as individuals with disabilities or "disabled veterans" when the employer is: (1) undertaking affirmative action because of a federal, state, or local law (including a veterans' preference law) that requires affirmative action for individuals with disabilities; or (2) voluntarily using the information to benefit individuals with disabilities, including veterans with service-connected disabilities.

If an employer invites you to voluntarily self-identify as a disabled veteran, it must clearly inform you in writing (or orally, if no written questionnaire is used) that: (1) the information is being requested as part of the employer's affirmative action program; (2) providing the information is voluntary; (3) failure to provide it will not subject you to any adverse treatment; and (4) the information will be kept confidential and only used in a way that complies with the ADA.

J. What Types of Reasonable Accommodations May I Want to Request for the Application Process or on the Job?

The following are examples of types of accommodations that may be needed for the application process or while on the job:

- written materials in accessible formats, such as large print, Braille, or on computer disk;
- extra time to complete a test for a person who has difficulty concentrating or has a learning disability or traumatic brain injury;
- recruitment fairs, interviews, tests, and training held in accessible locations;
- modified equipment or devices (*e.g.*, assistive technology that would allow a blind person to use a computer or someone who is deaf or hard of hearing to use a telephone; a glare guard for a computer monitor used by a person with a TBI; a one-handed keyboard for a person missing an arm or hand);
- physical modifications to the workplace (*e.g.*, reconfiguring a workspace, including adjusting the height of a desk or shelves for a person in a wheelchair);
- permission to work from home;
- leave for treatment, recuperation, or training related to the disability;
- modified or part-time work schedules;

- a job coach who could assist an employee who initially has some difficulty learning or remembering job tasks;

- reassignment to a vacant position where a disability prevents performance of an employee's current position or where any reasonable accommodation in the current position would result in undue hardship (*i.e.*, significant difficulty or expense).

K. How Do I Ask for a Reasonable Accommodation?

You simply have to indicate – orally or in writing -- that you need an adjustment or change in the application process or at work for a reason related to a medical condition. For example, if you have a vision loss and cannot read standard print, you would need to inform the employer that you need the application materials in some other format (*e.g.*, large print or on computer disk) or read to you. You do not have to mention the ADA or use the term "reasonable accommodation." The request also can be made by someone acting on your behalf, such as a family member, rehabilitation counselor, health professional, or other representative.

L. What Happens after I Request a Reasonable Accommodation?

A request for reasonable accommodation is the first step in an informal interactive process between you and the employer.

The process will involve determining whether you have a disability as defined by the ADA (where this is not obvious or already known) and identifying accommodation solutions. An employer also may ask if you know what accommodation you need that will help you apply for or do the job. There are extensive public and private resources to help identify reasonable accommodations for applicants and employees with particular disabilities.

For example, the website for the Job Accommodation Network (JAN) provides a practical guide for individuals with disabilities on requesting and discussing reasonable accommodations and on finding the right job.

See JAN's website at www.jan.wvu.edu/portals/ /individuals.htm

M. I Am Not Sure Whether I Will Need a Reasonable Accommodation. If I Don't Ask for One Before I Start Working, Can I Still Ask for One Later?

Yes. You can request an accommodation at any time during the application process or when you start working even if you did not ask for one when applying for a job or after receiving a job offer. Generally, you should request an accommodation when you know that there is a workplace barrier that is preventing you from competing for or performing a job or having equal access to the benefits of employment. As a practical matter, it is better to request a reasonable accommodation before your job performance suffers.

APPENDIX 9

EEOC FACT SHEET ON RETALIATION

APPENDIX 6
EEOC FACT SHEET ON RETALIATION

http://www1.eeoc.gov/laws/types/facts-retal.cfm?renderforprint=1

U.S. Equal Employment Opportunity Commission

Facts About Retaliation

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an **adverse action** against a **covered individual** because he or she engaged in a **protected activity**. These three terms are described below.

Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

- employment actions such as termination, refusal to hire, and denial of promotion,
- other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and
- any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

For more information about adverse actions, see EEOC's Compliance Manual Section 8, Chapter II, Part D.

Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his

spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example,"whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

Protected Activity

Protected activity includes:

Opposition to a practice believed to be unlawful discrimination:

Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

- Complaining to anyone about alleged discrimination against oneself or others;
- Threatening to file a charge of discrimination;
- Picketing in opposition to discrimination; or
- Refusing to obey an order reasonably believed to be discriminatory.

Examples of activities that are NOT protected opposition include:

- Actions that interfere with job performance so as to render the employee ineffective; or
- Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding.

Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

- Filing a charge of employment discrimination;
- Cooperating with an internal investigation of alleged discriminatory practices; or
- Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

For more information about Protected Activities, see EEOC's Compliance Manual, Section 8, Chapter II, Part B - Opposition and Part C - Participation.

APPENDIX 7

DOL FACT SHEET #77A: FLSA RETALIATION

APPENDIX 7
DOL FACT SHEET #77A: FLSA RETALIATION

http://www.dol.gov/whd/regs/compliance/whdfs77a.htm

U.S. Department of Labor
Wage and Hour Division

December 2011

Fact Sheet # 77A: Prohibiting Retaliation Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the FLSA's prohibition of retaliating against any employee who has filed a complaint or cooperated in an investigation.

The Wage and Hour Division of the Department of Labor administers and enforces the FLSA, the federal law of most general application concerning wages and hours of work. All covered nonexempt employees must be paid not less than the current federal minimum wage for all hours worked and overtime pay, at time and one half the regular rate, for all hours worked over 40 in a workweek. The Wage and Hour Division investigates FLSA violations through its complaint-based and directed investigation programs.

Prohibitions

Section 15(a)(3) of the FLSA states that it is a violation for *any person* to **"discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."**

Employees are protected regardless of whether the complaint is made *orally* or in *writing*. Complaints made to the Wage and Hour Division are protected, and **most courts have ruled that internal complaints to an employer are also protected.**

Coverage

Because section 15(a)(3) prohibits "any person" from retaliating against "any employee", the protection applies to all employees of an employer even in those instances in which the employee's work and the employer are not covered by the FLSA.

For additional information on FLSA Coverage, please visit Fact Sheet 14 at http://www.dol.gov/whd/regs/compliance/whdfs14.htm

Section 15(a)(3) also applies in situations where there is no current employment relationship between the parties; for example, it protects an employee from retaliation by a former employer.

Enforcement

Any **employee** who is **"discharged or in any other manner discriminated against"** because, for instance, he or she has filed a complaint or cooperated in an investigation, may file a retaliation complaint with the Wage and Hour Division or may file a private cause of action seeking appropriate remedies including, but not limited to, employment, reinstatement, lost wages and an additional equal amount as liquidated damages.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243

APPENDIX 8

RETALIATION PREVENTION CHECKLIST

APPENDIX 8
RETALIATION PREVENTION CHECKLIST
Katrina Grider

1 Are you prepared for a retaliation complaint?

1.1 Do your non-discrimination and harassment policies cover retaliation and include a strong anti-retaliation statement?

1.2 Do you have a complaint process that employees are aware of, understand, and can follow easily?

1.3 Do your employees know to whom and how to submit complaints?

1.4 Do you have a way for complaints to be submitted via an employee hotline?

1.5 Are you training your supervisors on your anti-retaliation policy?

1.6 Do you have an employee relations department or a designated individual to periodically review and implement anti-retaliation policies and procedures, conduct investigations, and provide training?

1.7 Do you consistently and fairly implement disciplinary action?

1.8 Do you keep documentation of all employee performance appraisals and disciplinary actions to document that your practices are fair and not influenced by a complaint of illegal discrimination or other unlawful employment practice?

1.9 Do you keep comprehensive records of all complaints, investigations, and responses?

1.10 Do you discipline and retrain any supervisors who engage in retaliation?

1.11 Do you provide the same information in references for all former employees?

2 Does a potential for retaliation or for a retaliation complaint exist regarding alleged illegal discrimination or other unlawful employer activity exist?

2.1 Is the employee raising informal concerns with a supervisor or manager?

2.2 Is the employee threatening to file a complaint?

2.3 Has the employee filed an internal compliant?

2.4 Has the employee filed a complaint with a state or federal agency?

2.5 Is the employee supporting a co-worker who has filed a complaint?

If the answer is Yes to any of the above,

- Is there any employment action pending on the employee, *i.e.*, promotion, transfer, performance appraisal, demotion, change in job duties, benefits or pay, termination?

  Has the employee asked for a letter of recommendation or reference to be provided to a prospective employer?

- Are any policies or practices being applied differently for this employee?

If the answer is Yes to any of the above, the employers response and action(s), if considered adverse by the employee, may result in retaliation compliant. If a retaliation complaint is received, determine:

- The date of the employment action compared to the date of activity in Section 2 above.

- Documentation of the employees past poor performance or other reason for any adverse employment action.

- If employees in similar situations were treated differently.

- If the person who made the adverse employment action decision was aware of any concern or compliant from the employee alleging illegal discrimination or unlawful employment activity.

APPENDIX 9

EEOC AND OFCCP MOU (COORDINATION OF FUNCTIONS AND MEMORANDUM OF UNDERSTANDING)

APPENDIX 9

EEOC AND OFCCP MOU
(COORDINATION OF FUNCTIONS AND MEMORANDUM OF UNDERSTANDING)

Federal Register / Vol. 76, No. 221 / Wednesday, November 16, 2011 / Notices 71029

EPA may not be able to consider your comment.

Use of the *http://www.regulations.gov* Web site to submit comments to EPA electronically is EPA's preferred method for receiving comments. The electronic public docket system is an "anonymous access" system, which means EPA will not know your identity, email address, or other contact information unless you provide it in the body of your comment. In contrast to EPA's electronic public docket, EPA's electronic mail (email) system is not an "anonymous access" system. If you send an email comment directly to the Docket without going through *http://www.regulations.gov,* your email address is automatically captured and included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

Dated: November 4, 2011.

Kevin McLean,

Acting Associate General Counsel.

[FR Doc. 2011–29644 Filed 11–15–11; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–9492–5; Docket ID No. EPA–HQ–ORD–2011–0671]

Draft Toxicological Review of n-Butanol: In Support of Summary Information on the Integrated Risk Information System (IRIS)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period; extension.

SUMMARY: EPA announced a 60-day public comment period on August 31, 2011 (76 FR 54227) for the external review draft human health assessment titled, "Toxicological Review of n-Butanol: In Support of Summary Information on the Integrated Risk Information System (IRIS)" (EPA/635/R–11/081A). On September 15, 2011, the public comment period was extended by one week because of a one-week delay in the release of the Toxicological Review to the public (76 FR 57033). In this Notice, EPA is extending the public comment period an additional 30 days to December 7, 2011, at the request of the American Chemistry Council's Oxo Process Panel. The draft assessment was prepared by the National Center for Environmental Assessment (NCEA) within the EPA Office of Research and Development (ORD). EPA is releasing this draft assessment for the purposes of public comment and peer review. This draft assessment is not final as described in EPA's information quality guidelines, and it does not represent and should not be construed to represent Agency policy or views. After public review and comment, an EPA contractor will convene an expert panel for independent external peer review of this draft assessment. The public comment period and external peer review meeting are separate processes that provide opportunities for all interested parties to comment on the assessment. The external peer review meeting will be scheduled at a later date and announced in the **Federal Register**. Public comments submitted during the public comment period will be provided to the external peer reviewers before the panel meeting and considered by EPA. Public comments received after the public comment period closes will not be submitted to the external peer reviewers and will only be considered by EPA if time permits.

DATES: The public comment period will be extended to end December 7, 2011. Comments should be in writing and must be received by EPA by December 7, 2011.

ADDRESSES: The draft "Toxicological Review of n-Butanol: In Support of Summary Information on the Integrated Risk Information System (IRIS)" is available primarily via the Internet on the NCEA home page under the Recent Additions and Publications menus at *http://www.epa.gov/ncea.* A limited number of paper copies are available from the Information Management Team (*Address:* Information Management Team, National Center for Environmental Assessment (Mail Code: 8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW, Washington, DC 20460; *telephone:* (703) 347–8561; *facsimile:* (703) 347–8691). If you request a paper copy, please provide your name, mailing address, and the draft assessment title.

Comments may be submitted electronically via *http://www.regulations.gov,* by email, by mail, by facsimile, or by hand delivery/courier. Please follow the detailed instructions provided in the **SUPPLEMENTARY INFORMATION** section of the August 31, 2011, Notice (76 FR 54227).

SUPPLEMENTARY INFORMATION: For information on the docket, *www.regulations.gov,* or the public comment period, please contact the Office of Environmental Information (OEI) Docket (*Mail Code:* 28221T), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; *telephone:* (202) 566–1752; *facsimile:* (202) 566–9744; or *email: ORD.Docket@epa.gov.*

For information on the draft assessment, please contact Dr. Ambuja Bale, National Center for Environmental Assessment (8601P), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; *telephone:* (703) 347–8643; *facsimile:* (703) 347–8689; or *email: FRN_Questions@epa.gov.*

Dated: November 9, 2011.

Darrell A. Winner,

Acting Director, National Center for Environmental Assessment.

[FR Doc. 2011–29650 Filed 11–15–11; 8:45 am]

BILLING CODE 6560–50–P

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Coordination of Functions; Memorandum of Understanding

AGENCY: Equal Employment Opportunity Commission.

ACTION: Notice.

SUMMARY: The Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor (DOL), Office of Federal Contract Compliance Programs (OFCCP) have updated their Memorandum of Understanding (MOU), last published at 64 FR.17,664 (April 12, 1999). These updates include: using contemporary office names and titles; designating a "Coordination Advocate" at both agencies; reorganizing and/or condensing language for clarity; streamlining the Compliance Coordination Committees; and clarifying the complaint/charge referral procedures.

FOR FURTHER INFORMATION CONTACT: Claudia Gordon, Special Assistant to the Director, Office of Federal Contract Compliance Programs, Department of Labor, (202) 693–1073; Tanisha R. Wilburn, Senior Attorney Advisor, Office of Legal Counsel, Equal Employment Opportunity Commission, (202) 663–4909 (voice), (202) 663–7026 (TTY).

SUPPLEMENTARY INFORMATION: The purpose of this Memorandum of Understanding (MOU) is to further the agencies' joint objectives in ensuring equal employment opportunities for applicants and employees under Title VII of the Civil Rights Act of 1964 (Title VII) and Executive Order 11246 (E.O. 11246), to promote greater efficiency and coordination, and to eliminate conflict and duplication of effort. The agencies first entered into this MOU on

May 20, 1970, and revised it in 1974, 1981, and most recently in 1999.

In this update, the agencies edited the MOU's Introduction and added paragraphs 1 and 10 to support coordination generally and specifically to create a Coordination Advocate at each agency. They edited paragraph 6 to clarify the tasks of the Compliance Coordination Committees at Headquarters and Field offices. They also explained that disability complaints/charges are not coordinated under this MOU, but rather pursuant to the 1992 joint regulation at 29 CFR part 1641 and 41 CFR part 60–742 (''joint disability regulation'').

To improve the clarity of the MOU's provisions describing the referral process for complaints/charges under Title VII and E.O.11246, the agencies revised paragraph 7 and added new paragraph 8. Thus, language formerly in paragraph 7(d) of the 1999 MOU was moved to the beginning of paragraph 7(a), to state that OFCCP is the EEOC's agent to accept the Title VII component of an E.O. 11246 complaint. Consistent with equivalent provisions in the agencies' 1992 joint disability regulation, OFCCP expressly agreed to refer complaints to the EEOC when OFCCP determines that it lacks jurisdiction, and EEOC made a similar referral pledge in new paragraph 8. *See* 29 CFR 1641.5(d) and § 1641.6(c). In both instances, the date of filing with the first agency is deemed the date of filing with the second.

Finally, the agencies updated the description of DOL's structure and the titles of officials at both agencies. They also made minor editorial changes.

The text of the revised MOU follows below. The major changes to the MOU are in paragraphs 1(a), 6(a), 7(a), 8 and 10. The revised MOU is also available on the EEOC's Home Page at *http://www.eeoc.gov* and OFCCP's Home Page at *http://www.dol.gov/ofccp.*

Dated: November 9, 2011.

Jacqueline A. Berrien,

Chair, Equal Employment Opportunity Commission.

* * * * *

Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) first entered into this Memorandum of Understanding (MOU) in 1970 to further the objectives of Congress under *Title VII of the Civil Rights Act of 1964, as amended (Title VII),* in coordination with *Executive Order 11246, 30 FR 12319, as amended (E.O. 11246),* and *Executive Order 12067, 43 FR 28967 (E.O. 12067)* (the EEOC's government-wide coordination authority). This MOU broadly promotes interagency coordination in the enforcement of equal employment opportunity (EEO) laws and also serves to maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistency among the operations, functions and jurisdictions of the parties to the MOU. It includes specific coordination procedures for complaints/charges of employment discrimination filed with OFCCP under E.O. 11246 and/or Title VII, which deal with discrimination on the basis of race, color, religion, sex, or national origin. Further, the MOU includes provisions for sharing information as appropriate and to the extent allowable under law.

This MOU sets forth the complaint/charge referral procedures and information sharing provisions between the agencies as they relate to the enforcement of Title VII and E.O. 11246. However, the agencies' Compliance Coordination Committees (¶ 6) are not limited to these two requirements, and may consult on any other topic that will enhance the agencies' mutual enforcement interests under any of the laws within their respective jurisdiction. This MOU does not extensively discuss interagency coordination efforts involving disability and other bases, apart from the broad mandate for the agencies' Compliance Coordination Committees (¶ 6). In 1992, the EEOC and OFCCP issued joint procedural regulations providing for information sharing, confidentiality, and complaint/charge referral under *Title I of the Americans with Disabilities Act* and *Section 503 of the Rehabilitation Act.* See *29 CFR part 1641* (EEOC), and *41 CFR part 60–742* (OFCCP).

The parties to this MOU agree as follows:

1. Sharing Information

(a) EEOC and OFCCP shall share any information relating to the employment policies and/or practices of employers holding government contracts or subcontracts that supports the enforcement mandates of each agency as well as their joint enforcement efforts. Such information shall include, but is not limited to, affirmative action programs, annual employment reports, complaints, charges, investigative files, and compliance evaluation reports and files.

(b) OFCCP shall make available to the appropriate requesting official of the EEOC or his or her designee for inspection and copying and/or loan, any documents in its possession pertaining to the effective enforcement or administration of any laws or requirements enforced by the EEOC including: (i) *Title VII*; (ii) *the Equal Pay Act of 1963 (EPA)*; (iii) *the Age Discrimination in Employment Act of 1967 (ADEA)*; (iv) *the Genetic Information Nondiscrimination Act of 2008 (GINA)*; (v) *the Americans with Disabilities Act (ADA)* (in accordance with *29 CFR part 1641*); and (vi) E.O. 12067. All documents will be made available within ten days of such request, or as soon as practical thereafter. Disclosure of such material by EEOC shall be in accordance with paragraphs 4 and 5 of this Agreement. All transfers of information under this and other paragraphs of this MOU shall only be made where not otherwise prohibited by law and in accordance with paragraph 5 of this Agreement.

(c) The EEOC shall make available to the appropriate requesting official of the OFCCP or his or her designee for inspection and copying and/or loan any documents pertaining to the enforcement and administration of (i) E.O. 11246; (ii) the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, *38 U.S.C. § 4212*; (iii) Section 503 of the Rehabilitation Act of 1973 (in accordance with *41 CFR part 60–742*); and (iv) E.O. 12067. All documents in its possession (or to which it has access through a work-sharing agreement as described in paragraph 4(b) of this Agreement) will be made available within ten days of such request, or as soon as practical thereafter. Disclosure of such material by OFCCP shall be in accordance with paragraphs 4 and 5 of this Agreement.

2. ''Appropriate Requesting Officials'' shall, for the purpose of this Agreement, include the following officials and staff:

(a) For the EEOC—

(1) The Chair
(2) A Commissioner
(3) The General Counsel
(4) The Deputy General Counsel
(5) The Associate General Counsel
(6) The Legal Counsel
(7) The Director of the Office of Research, Information and Planning
(8) Any Regional Attorney
(9) Any EEOC District, Field, Area or Local Office Director
(10) Director, Office of Field Programs

(b) For the DOL/OFCCP—

(1) The Secretary or Deputy Secretary of Labor

(2) The Solicitor or Deputy Solicitor of Labor
(3) The Director or Deputy Director, OFCCP
(4) Any Associate Solicitor
(5) Any OFCCP Regional, District or Area Office Director
(6) Any Regional Solicitor of Labor
(7) Any OFCCP Division Director

3. Requests directed to a headquarters office of one agency from a field office of the other shall first be forwarded through the headquarters of the requesting agency. Responses to all requests for information shall be made to the official making such request, or his/her designee.

4. Disclosure of Information

(a) All requests by third parties to this Agreement, including charging parties, respondents, and their attorneys, for disclosure of information shall be coordinated with the agency that initially compiled or collected the information. The decision of that agency regarding disclosure shall be honored.

(b) Subparagraph 4(a), above, is not applicable to requests for data in EEOC files made by any state or local agency designated as a 706 agency with whom EEOC has a current charge resolution contract and a work-sharing agreement containing provisions required by Sections 706 and 709 of Title VII. Provided, however, that any such agency shall not disclose to third parties, including charging parties, respondents, and their attorneys, any of the information initially collected or compiled by OFCCP without express written approval by the Director, OFCCP.

5. Confidentiality

(a) When EEOC provides information to OFCCP, the confidentiality requirements of sections 706(b) and 709(e) of Title VII, apply to that information. When OFCCP receives the same information from a source independent of EEOC, the preceding sentence does not preclude disclosure of the information received from the independent source. However, OFCCP will also observe any confidentiality requirements imposed on such information by the Trade Secrets Act or the Privacy Act.

(b) When OFCCP obtains information from its receipt, investigation, and processing of the Title VII component of a dual filed charge, or when OFCCP creates documents that exclusively concern the Title VII component of a dual filed charge, OFCCP will observe any confidentiality requirements imposed on such information by the Trade Secrets Act, the Privacy Act, and sections 706(b) and 709(e) of the Civil Rights Act of 1964.

(c) Questions concerning confidentiality under Title VII, the EPA, the ADA or GINA shall be directed to EEOC's Office of Legal Counsel.

(d) Questions concerning confidentiality under E.O. 11246, 38 U.S.C. § 4212 (Section 402 of VEVRAA), or Section 503 of the Rehabilitation Act shall be directed to OFCCP, Director, Division of Program Operations.

6. EEOC and OFCCP shall establish procedures for notification and consultation at various stages of their respective compliance activities in order to develop potential joint enforcement initiatives, increase efficiency, ensure coordination and minimize duplication. Such procedures shall include:

(a) Establishment of ongoing Compliance Coordination Committees (CCC)—

1. Field Committees: OFCCP's and EEOC's District Directors and Regional Attorneys will meet, not less than biannually, to review enforcement priorities, systemic investigations of mutual interest, compliance review schedules, potential Commissioner Charges, and potential litigation. The Field Committees will work to increase efficiency, and eliminate competition and duplication, and may engage in consultation regarding any topic that enhances the agencies' mutual enforcement interests. In addition to sharing information about investigations of discrimination based on race, color, religion, sex, and national origin, the Field Committees may also share information related to the enforcement of the EPA, the ADEA, GINA, and the ADA and Section 503 of the Rehabilitation Act (in accordance with 29 CFR part 1641 (EEOC) and 41 CFR part 60–742 (OFCCP)).

2. Headquarters Committee: Representatives from OFCCP's and EEOC's Headquarters shall meet not less than biannually to discuss topics of mutual interest to both agencies, including, but not limited to:

(i) Procedures for routine access to and exchanges of electronic databases, including, but not limited to, lists of proposed and completed compliance evaluations; systemic and individual investigation files; and conciliation agreements and settlements;

(ii) Consistent analytical approaches to identifying and remedying employment discrimination under Title VII;

(iii) Joint and cross-training programs and materials;

(iv) Joint policy statements; and

(v) Procedures for coordinated collection, sharing and analysis of data.

(b) Contact by each agency at the commencement of and during a field investigation or compliance evaluation where appropriate to obtain information in the possession of the agency on the employer being investigated.

(c) Notification of OFCCP when EEOC has made a finding of cause, determined that attempts to conciliate have been unsuccessful, decided not to file a lawsuit, and learned or believes that the respondent is a federal contractor subject to E.O. 11246.

(d) Consultation with the appropriate field office of OFCCP when an EEOC field office is contemplating recommending a Commissioner Charge or litigation, and coordination of its activities.

(e) Consultation with the appropriate field office of EEOC when an OFCCP Regional Office is contemplating recommending the issuance of an administrative complaint and coordination of its activities.

7. Receipt, Investigation, Processing, and Resolution of Complaints Filed with OFCCP

(a) Dual-Filed Complaints/Charges—Pursuant to this MOU, OFCCP shall act as EEOC's agent for the purposes of receiving the Title VII component of all complaints/charges. All complaints/charges of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints/charges simultaneously dual-filed under Title VII. In determining the timeliness of such complaint/charge, the date the matter is received by OFCCP, acting as EEOC's agent, shall be deemed the date it is received by EEOC. When OFCCP receives such a complaint/charge and determines that the employer is not a federal contractor subject to E.O. 11246, it shall transfer the charge to EEOC within 10 days of that determination and notify the parties. Such notification shall explain that OFCCP, as EEOC's agent, has received the Title VII charge and that the date OFCCP received it will be deemed the date it was received by EEOC.

(b) Systemic or Class Allegations—OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges. OFCCP will promptly notify EEOC of OFCCP's receipt of such allegations, by forwarding a copy of the complaint/charge (and third party certificate, if any). OFCCP shall make available to EEOC, upon request, information obtained in processing such allegations,

pursuant to paragraphs 1 and 6(b) herein. However, in appropriate cases, the EEOC may request that it be referred such allegations to avoid duplication of effort and to ensure effective law enforcement.

(c) Individual Allegations—OFCCP will refer to EEOC allegations of discrimination of an individual nature on a Title VII basis in dual filed complaints/charges. However, in appropriate cases, OFCCP may request that it retain such allegations so as to avoid duplication and to ensure effective law enforcement.

(d) Investigating, Processing and Resolving Dual-Filed Complaints/Charges—OFCCP will act as EEOC's agent for the purposes of investigating, processing and resolving the Title VII component of dual filed complaints/charges that it retains under this paragraph. OFCCP shall investigate, process and resolve such complaints/charges as set forth in this subparagraph, and in a manner consistent with Title VII principles on liability and relief.

(1) Notice of Receipt of Complaint/Charge—Within ten days of receipt, OFCCP shall notify the contractor/respondent that it has received a complaint/charge of employment discrimination under E.O. 11246 and Title VII. This notification shall include a copy of the complaint/charge, if taken on OFCCP's complaint form, or otherwise state the name of the charging party, respondent, date, place and circumstances of the alleged unlawful employment practice(s).

(2) Fair Employment Practice Agency (FEPA) Deferral Period—Pursuant to work-sharing agreements between EEOC and state and local agencies designated as fair employment practice agencies, the deferral period for dual filed Title VII complaints/charges that OFCCP receives will be waived.

(3) Not Reasonable Cause Findings—If the OFCCP investigation of a dual filed complaint/charge results in a not reasonable cause finding under Title VII, OFCCP will issue a Title VII dismissal and notice of right-to-sue, close the Title VII component of the complaint/charge and promptly notify EEOC's Director, Office of Field Programs, of the closure.

(4) Reasonable Cause Findings—If the OFCCP investigation of a dual filed complaint/charge results in a reasonable cause finding under Title VII, OFCCP will issue a reasonable cause finding under Title VII. OFCCP will attempt conciliation to obtain relief, consistent with EEOC's standards for remedies, for all aggrieved persons covered by the Title VII finding.

(i) Successful Conciliation—Conciliation agreements will state that the complainant/charging party agrees to waive the right to pursue the subject issues further under Title VII. OFCCP will close the Title VII component of the complaint/charge, and promptly notify EEOC.

(ii) Unsuccessful Conciliation—If conciliation is not successful, OFCCP will consider the E.O. 11246 component of the complaint/charge for further processing under its usual procedures. At the conclusion of OFCCP processing, it shall transmit the Title VII charge component to EEOC for any action EEOC deems appropriate. If EEOC declines to pursue further action, it will close the Title VII charge and issue a notice of right-to-sue.

(5) Issuance of Notice of Right-to-Sue Upon Request—Consistent with 29 C.F.R. § 1601.28, once 180 days have passed from the date the complaint/charge was filed, OFCCP shall promptly issue upon request a notice of right-to-sue on the Title VII component of a complaint/charge that it has retained. Issuance of a notice of right-to-sue shall terminate OFCCP processing of the Title VII component of the complaint/charge unless it is determined at that time, or at a later time, that it would effectuate the purposes of Title VII to further process the Title VII component of the complaint/charge.

(6) Subsequent Attempts to File a Charge with EEOC Covering the Same Facts and Issues—If an individual who has already filed an OFCCP complaint/charge that is dual-filed under Title VII subsequently files a Title VII charge with EEOC covering the same facts and issues, EEOC will forward the charge to OFCCP for consolidated processing.

8. Complaints Misfiled with EEOC—When EEOC receives a complaint not within its purview, but over which it believes OFCCP has jurisdiction, it will refer the complaint to OFCCP. In determining the timeliness of such complaint, the date the matter is received by EEOC shall be deemed the date it is received by OFCCP.

9. EEOC and OFCCP shall conduct periodic reviews of the implementation of this agreement, on an ongoing basis.

10. Coordination Advocate—OFCCP and EEOC seek to ensure consistent compliance and enforcement standards and procedures, and to make the most efficient use of their available resources through coordination. Therefore, within sixty (60) days of the effective date of this MOU, the headquarters offices of each agency shall appoint a Coordination Advocate who will be available to assist, as necessary, in obtaining a full understanding of, and compliance with, the procedures set forth in this MOU.

11. Effect of Agreement

This agreement is an internal Government agreement and is not intended to confer any rights against the United States, its agencies, or its officers upon any private person.

Nothing in this agreement shall be interpreted as limiting, superseding or otherwise affecting either party's normal operations or decisions in carrying out its statutory, Executive Order, or regulatory duties. This agreement does not limit or restrict the parties from participating in similar activities or arrangements with other entities.

This agreement does not itself authorize the expenditure or reimbursement of any funds. Nothing in this agreement obligates the parties to expend appropriations or enter into any contract or other obligations.

12. Effective Date. This MOU will take effect once signed by both parties.

13. Signatures

Dated: 11/7/2011.

/s/

Patricia A. Shiu,
Director, Office of Federal Contract Compliance Programs.

Dated: 11/7/2011.

/s/

Jacqueline A. Berrien,
Chair, Equal Employment Opportunity Commission.

[FR Doc. 2011–29568 Filed 11–15–11; 8:45 am]

BILLING CODE 6570–01–P

FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD

Notice of Renewal of FASAB Charter

AGENCY: Federal Accounting Standards Advisory Board.

ACTION: Notice.

Board Action: Pursuant to 31 U.S.C. 3511(d), the Federal Advisory Committee Act (Pub. L. 92–463), as amended, and the FASAB Rules of Procedure, as amended in October 2010, notice is hereby given that under the authority and in furtherance of the objectives of 31 U.S.C. 3511(d), the Secretary of the Treasury, the Director of OMB, and the Comptroller General (the Sponsors) have established and agreed to continue an advisory committee to consider and recommend accounting standards and principles for the federal government.

For Further Information, or to Obtain a Copy of the Charter, Contact: Ms. Wendy M. Payne, Executive Director,

APPENDIX 10

HR: YOUR ROLES, DUTIES AND RESPONSIBILITIES

WHAT IS YOUR ROLE IN HR?

Advisor	or	Employee Advocate
Decisionmaker and Onion Peeler	or	Rubberstamper and Ostrich
Professional	or	One of the Gang
Neutral Factfinder	or	Prosecutor, Judge and Jury
Proactive	or	Reactive
Dynamic Leadership	or	Status Quo
Role Model	or	Part of the Problem

APPENDIX 11

Of Cat's Paws and Courts

Kat Grider

The "cat's paw" theory gets its name from a French fable penned by Jean de LaFontaine (1621-1695) titled "The Monkey and the Cat," in which a clever but unscrupulous monkey persuades a cat to pull chestnuts from a fire for the monkey to eat. The cat burns its paws, while the monkey enjoys the chestnuts.

This marriage of French literature and employment law is now used to explain what happens when someone manipulates a decision-maker to commit discrimination, harassment or retaliation.

I. The Cat's Paw Employment Case:

The cat's paw theory of liability developed by the U.S. Supreme Court in *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011) is gaining ground in employment discrimination cases. ***Today the cat's paw theory of liability refers to one used by another to accomplish his purposes. All HR managers should understand that if they make a decision to fire someone based upon the facts provided to them from another manager, if that manager had a discriminatory bias, the employer can be liable for an employment discrimination case even though the HR managers had no such biases.***

Therefore, if HR managers take those statements at face value without doing their own investigation and as a result fire an employee, the fired employee may have valid employment discrimination claims against the company.

In *Staub v. Proctor Hosp*., Staub was employed as an angiograpy technician by Proctor Hospital while being a member of the United States Army Reserve. Both Staub's immediate supervisor and that supervisor's supervisor were hostile to Staub's military obligations. Proctor's V.P. of Human Resources, after having heard complaints from those supervisors, fired Staub. Staub sued under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") which forbids an employer to deny reemployment, retention in employment, promotion, or any benefit of employment based upon a person's membership in or obligation to perform services in a uniformed service and provides liability of an employer if that person's uniformed service membership is a motivating factor in the employer's action.

The jury found Proctor liable at trial and awarded Staub damages, but the Seventh Circuit Court of Appeals reversed holding that Proctor Hospital was entitled to judgment as a matter of law because the decision maker, the V.P. of Human Resources, had relied on more than the two supervisors' advice in making her decision.

The Supreme Court found that under the cat's paw theory of liability that since the supervisors were hostile to Staub's military obligations, Proctor Hospital was liable under the USERRA because that hostility towards Staub's obligations was a ***motivating factor*** in the decision to fire him. From the Supreme Court decision, it appears there might have been a different result had the Vice President of Human Resources not taken at face value the supervisors' comments, but did her own investigation.

II. The Key Lessons from Staub:

- The "cat's paw" doctrine can be thought of as an application of the "motivating factor" doctrine; the monkey's malevolent intent is imputed to the employer. So if the employer can't show that the monkey's supervisor, who did the actual firing (or took some other adverse employment action), had a lawful motive uncontaminated by the monkey that would have led the supervisor to fire the employee even without the monkey's interference, the employee is entitled to damages.

- When deciding whether to terminate an employee, HR needs to conduct more than a cursory review of an employee's personnel file. HR must thoroughly and impartially review the employee's performance and job history before making an employment decision adverse to the employee.

- The message to employers is that they will need to evaluate carefully the practices they employ in making termination decisions and conducting investigations. Employers must be careful to look at the process leading up to each termination including who provided input into the decision and what their motivation might be.

- ***It is critical that decision makers avoid "rubber-stamping" decisions rather than conducting independent investigations into the underlying facts and motivation***. This is especially important in companies with off-site human resource departments where decision makers may be completely unfamiliar with not only the individual employees but also the supervisors evaluating them.

Cat's paw cases put employers in a bind. Courts often let such cases go to trial, trusting a jury to sort out whether the employer should be held liable for retaliation or discrimination.

However, employers can win cat's paw cases—if they can prove that the employment decision was based on a thorough and independent evaluation. If they can do that, courts may decide that the decision wasn't tainted by the malicious party's bias. And that means no unlawful discrimination or retaliation took place.

How to Reduce 'Cat's Paw' Liability

Here's what HR can do to reduce the risk that it will be burned by "cat's paw" liability:

✓ Review employee/supervisor relationships. Be alert for any history of potential adversarial dealings between employees and their bosses.

✓ Avoid relying on recommendations from anyone who may harbor potentially improper motives.

✓ Have somebody who is neutral independently evaluate any reports or recommendations that will be the basis for employment decisions.

✓ Include a review process to ensure that neutral decision-makers aren't simply rubber-stamping improper recommendations.

✓ Completely document neutral decision-makers' independent reviews and the factors they weighed when making their decisions.

III. The Third Circuit's Road Map

In a Cat's Paw Scenario, Third Circuit Effectively Puts Burden on Employer to Prove Decisionmaker Was "Independent" of the Biased Supervisor, and that the Decision Was Not Substantially Caused by the Biased Supervisor

In *McKenna v. City of Philadelphia*, 649 F.3d 171 (3d Cir. 2011), *cert. denied*, 2012 U.S. App. LEXIS 1136 (2012), the Third Circuit had its first opportunity to address the cat's paw theory of employer liability for discrimination and/or retaliation under circumstances where an adverse employment action was influenced, but not ultimately made, by an employee with discriminatory or retaliatory animus. The Third Circuit held that, where the plaintiff seeks to hold an employer liable for the improper motives of a non-decisionmaker, the burden shifts from the plaintiff to the employer to prove that the decision was not substantially caused or influenced by the biased non-decisionmaker.

A. *Background*

Raymond Carnation, a terminated police officer, filed a Title VII claim against the City of Philadelphia, arguing that his discharge was in retaliation for protesting the discriminatory treatment afforded his African American colleagues. At trial, the plaintiff produced evidence that he had complained to his supervisor about racial tensions within his squad. When his supervisor failed to respond to that issue to his satisfaction, the plaintiff complained to his supervisor's manager that his supervisor was condoning racism by failing to address the issue.

According to the plaintiff, the manager reacted to his protests by assigning him to dangerous and unpleasant duties, and warned that any complaint to the Equal Employment Opportunity Commission would lead him to

make the plaintiff's life "a living nightmare." After the plaintiff continued to complain about his supervisor's failure to take action to resolve the issues plaguing his squad, the manager ordered the plaintiff not to call his supervisor to discuss the matter again. Despite the manager's order, the plaintiff called his supervisor the following day and, in fact, resolved many of his concerns.

When the plaintiff informed the manager of his discussion with his supervisor and requested a meeting with his superiors to discuss any remaining issues, the manager responded by filing charges against the plaintiff for insubordination and neglect of duty. The manager submitted the charges to the Police Board of Inquiry ("the PBI"), a three-person panel that receives written and testimonial evidence from both the employee and the party submitting charges. Based on the evidence received, the PBI then recommends an appropriate sanction for the employee to the Commissioner of Police, who would make the ultimate decision as to whether the sanction should be imposed.

After a three-hour hearing, during which the plaintiff was represented by counsel and both the plaintiff and the manager testified, the PBI found the plaintiff guilty of the charges submitted, as well as an additional charge that the PBI added for conduct unbecoming an officer. The PBI recommended the plaintiff's dismissal. Shortly thereafter, the Commissioner gave the plaintiff notice of the City's intent to terminate his employment.

At the trial of the plaintiff's Title VII claim, the jury concluded that the plaintiff's termination was an act of retaliation for his protests at the treatment of African American officers and/or for raising a complaint of discrimination. The City sought judgment notwithstanding the verdict. The City argued that, although the plaintiff was discharged as a result of disciplinary proceedings begun by the manager, the recommendation to terminate was made by the PBI and the ultimate decision to terminate was made by the Commissioner. As such, the City contended that the independent decision-making of the PBI and the Commissioner severed the causal connection between the termination decision and the manager's improper animus. The district court denied the City's motion, concluding that a reasonable jury could find that the manager's retaliatory motive played a substantial role in the decision to terminate the plaintiff's employment.

B. *The Third Circuit's Decision*

On appeal, the Third Circuit had its first opportunity to apply *Staub*. In *Staub*, the Supreme Court declined to adopt a bright-line rule that a decisionmaker's independent investigation would negate the effect of a non-decisionmaker's discrimination, instead reasoning that liability may not attach where the employer's investigation leads to a termination for reasons unrelated to the supervisor's original, biased action, but that liability may exist where the decision to terminate is based on the original discriminatory report.

The question posed in *McKenna* was this: on which side of the dividing line did the PBI's investigation and recommendation to terminate fall? The Third Circuit began its analysis by defining proximate cause in relation to complaints of discrimination and a subsequent adverse action. Although the plaintiff had the burden to establish that his termination was motivated by retaliatory animus, the Third Circuit effectively imposed an even heavier burden on the City, requiring it to come forward with evidence showing that: (1) the decision to take the adverse action was made by an independent, unbiased decisionmaker; and (2) the adverse action was taken for reasons unrelated to a single actor's retaliatory animus.

In examining the district court's denial of the City's motion for judgment as a matter of law, the Third Circuit observed the lack of factual evidence in the record to support the City's motion. For example, the record at trial failed to show the extent to which the PBI truly employed quasi-judicial features, such as whether the plaintiff could have freely called witnesses on his own behalf or cross-examined the City's witnesses.

Even more importantly, the record at trial did not reflect the basis and weight of the PBI's recommendation to terminate, nor did the record reflect what the ultimate decisionmaker, the Commissioner of Police, saw or relied upon when making the decision to terminate. Rather, the evidence demonstrated only that "[the manager] retaliated against Carnation by referring the [charges] against him, the PBI affirmed those charges, and the Commissioner then terminated Carnation." Under those circumstances, the Third Circuit concluded that the jury was entitled to conclude that the plaintiff's termination was caused by the manager's decision to retaliate against him.

C. *Practical Implications for Employers*

Although the outcome in *McKenna* was unfavorable to the employer, the Third Circuit has provided employers with a roadmap to insulate themselves against liability in "cat's paw" scenarios. In light of *McKenna*, employers contemplating a termination should bear in mind the following considerations and take the following steps.

- When asserting a lack-of-causation defense, an employer must remember that it has the burden to prove that the ultimate decision was made by an "independent" decisionmaker whose decision was not caused, or unfairly influenced, by a supervisor's retaliatory animus.

  - ☐ To meet that burden, an employer should begin by identifying the independent decisionmaker and clearly defining his or her role in the decision-making process.

- The outcome in *McKenna* may be explained, in part, by the record's lack of clarity as to whether the manager, the PBI, or the Commissioner was the driving force behind the decision to terminate.

- One lesson from *McKenna* is that, in the absence of such clarity, the employer loses.

- The record must also be clear about what that decisionmaker saw, heard, or relied upon in making the decision. To prove that the decisionmaker was, indeed, independent, and based his decision on untainted information, the employer must be able to point to what information informed the decision.

- The record must establish that the employee was not subject to an unfair process. The McKenna panel's focus on procedural protections, or lack thereof, afforded to the plaintiff suggests that employers need to examine their fact-finding methods in conducting investigations into complaints of discrimination and retaliation.

  - ☐ Such methods include taking statements from not only the employee and the allegedly biased supervisor, but also any other witnesses identified by the complainant and supervisor with unbiased knowledge of the facts prior to making any final employment decisions.

- Finally, employers should always have a clear record of the grounds on which any termination or other adverse action is based. Part of what doomed the City's position in *McKenna* was that it was unclear what formed the basis of the ultimate decision to terminate the plaintiff.

- If the record reflected a non-retaliatory rationale independent of the manager's bias, the outcome might have been different. For example, there was some evidence in the record that the plaintiff had been diagnosed as having "homicidal tendencies" toward his superior(s). Had this been appropriately investigated and later documented as a basis for the PBI's recommendation and the Commissioner's decision, this may have severed the causal connection with the manager's bias and justified the decision to terminate the plaintiff's employment.

- Where an employer is considering an adverse action against an employee without a clear record of the legitimate, non-discriminatory and non-retaliatory reasons for the decision, or the decision does not include the involvement of an independent, unbiased decisionmaker, employers should seek legal advice before proceeding with any adverse action.

APPENDIX 12

Personal Liability for HR Managers
(SHRM 07/2012 Article)

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Welcome Katrina Grider

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Don’t Take It Personally!

Vol. 57 No. 7

Under some state and federal laws, HR professionals can be held individually liable.

7/1/2012 By Joanne Deschenaux

Keeping the company out of court by ensuring that managers comply with the law remains an important part of any HR professional's job. But more and more, HR professionals may be defending themselves in suits brought against them in their individual capacities.

Why? A number of laws hold managers, including HR managers, personally liable for conduct "in the scope of employment" that violates employment laws. These include:

- The federal Fair Labor Standards Act (FLSA).
- The federal Family and Medical Leave Act (FMLA).
- State tort laws penalizing negligent referral or hiring, defamation, and false imprisonment or false arrest.
- Some state nondiscrimination laws.

Fortunately for HR decision-makers, they are not liable under every employment law. They generally have not been held liable for decisions under federal discrimination laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA). Every federal appellate court that has addressed this issue has ruled that individual supervisors are not personally liable under those statutes, says attorney Christine Walters, SPHR, a consultant with FiveL Co. in Westminster, Md.

HR professionals sued individually under those three laws can generally get the claims against them dismissed. But for the other federal and state laws mentioned above, "It can cost as much as $150,000 just to get a case dismissed," according to attorney Denise Kay, SPHR, a senior consultant with Employment Practices Solutions in Lakewood, Colo. And there have been instances of HR professionals being found liable after trial and assessed large sums in damages payable to the employee or employees who brought the lawsuits.

Anyone who commits an act that gives rise to an employment complaint, or anyone even tangentially involved, can be at risk of losing personal assets, Kay says. And, the conduct doesn't have to be intentional. Here are some specific examples.

FLSA

The FLSA specifically allows individuals to be sued, notes Eddie Isler, an attorney with Isler Dare Ray Radcliffe & Connolly in Virginia. "Usually, plaintiffs go after the business owner. But the person who is setting the pay and policies can also be individually sued," Isler says, and this is often an HR person.

The more control you have of the employment relationship, the more likely you can be deemed an "employer" under the FLSA and held liable, says Jason Storipan, an attorney in the New Jersey office of Fisher & Phillips LLP. If you control the terms of employment or have a big role in making personnel decisions and establishing pay policies, you could be held personally responsible for any damages or other remedies under the law, he notes.

Consider the common scenario of an HR director responsible for identifying exempt and nonexempt positions. Some groups of employees who should be classified as nonexempt are misclassified as exempt and not entitled to overtime. A group of these employees sue for unpaid overtime and name the HR director as a defendant. Although the director made an honest mistake, he or she may be found personally liable,

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- **SHRM article:** Courts Imposing Personal Liability on Company Execs in Employment Cases (Legal Issues)

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according to Isler.

FMLA

A recent case involved a mix-up with FMLA paperwork.

Maria was expecting a baby. In her seventh month of pregnancy, she began experiencing medical complications. Her doctor placed her on medical leave, and she presented this notice to her employer. While on leave, she stayed in touch with her employer. She was later released to "light, part-time duty" but continued to experience problems and was out intermittently. During this time, Maria consulted with her supervisor and the HR manager. She requested and submitted medical certification about her condition. Managers said the documentation provided by Maria's doctor was incomplete and insufficient, and they requested additional certification.

Maria was notified of the need to submit additional medical certification. She took the paperwork to her doctor's office and believed that the staff had completed it and that her employer had received it on that same day. Nevertheless, the company terminated her for job abandonment after she delivered her baby, claiming it did not receive proper medical certification to allow for the continued leave.

Maria sued her direct supervisor, the district manager, the HR manager and the company for violations of the FMLA. The court ruled that all individual defendants were properly included in the lawsuit, Kay says, noting that under the FMLA, the term "employer" includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer."

State Tort Actions

For HR professionals, individual liability is probably most likely in cases of negligent referral or negligent hiring. Both actions arise under state laws, Walters notes. HR professionals also may be held individually liable in defamation and false imprisonment or false arrest cases.

Negligent referral. Walters describes an example of such a claim: Mary, an HR manager with company A, calls you, an HR manager with company B, for references about Betty Sue, who used to work for company B and has applied for a job with company A. Neither company has a reference policy. Betty Sue was fired for punching someone in the face, but you say that Betty Sue "was OK" and don't mention what happened because you don't want to make it harder for Betty Sue to get a job.

Betty Sue is hired by company A and, again, punches another employee. The punched employee sues you for negligent referral.

You may also be liable, Walters says, "when you say something rather than nothing but the something doesn't totally disclose what you have knowledge of."

Negligent hiring. Claims often allege that the employer failed to do a background check on an applicant who, once hired, committed an act of violence against another employee or a customer. If you are an HR professional responsible for hiring, "Make sure you are acting within the scope of your responsibilities," Walters says. "If you don't follow company procedures, that is when you can be held liable." In other words, if you have taken all the steps management requires when checking the background of an applicant, you should not be subject to liability. But if, for example, you omit a required background check because you are in a rush to fill a job, that omission may cost you in the future.

Defamation. To raise a defamation claim, the employee must prove that the employer or individual defendant made a written or oral statement to one or more people concerning the plaintiff-employee, that the statement is false, and that it injured the reputation of the employee. Examples include e-mail circulation or comments made concerning a negative evaluation, Kay notes. Truth is a defense in a defamation claim, but individuals sharing information inappropriately or generating false or misleading information may face legal challenges, she adds.

There has been an "explosion of defamation cases arising out of the workplace over the last 10 to 15 years," Isler says.

These cases are dangerous because plaintiffs' attorneys think they can probably get to the jury rather than being dismissed at an early stage in the proceedings, he explains. Whether something is true or false—the question at the heart of a defamation claim—is for a jury to decide. So, plaintiffs' attorneys in these cases know they will "get their day in court."

How do HR professionals get involved in these messes? "They have loose lips and broadcast to other people in other organizations the grounds for someone's resignation—or they misstate the reasons" why the employee no longer works at the company, Isler says.

An example would be telling someone that a former employee was fired for using drugs, when the HR professional actually was confusing that employee with someone with a similar name.

Although qualified privilege attaches to most HR communications, "You can lose the privilege by talking to someone who doesn't need to know," Isler says. "Don't talk about people after they leave" the company.

State claims may be brought for several causes of action not specifically related to employment, such as assault and battery.

False imprisonment and false arrest. False imprisonment is broadly defined as the restraint of one's liberty without sufficient cause. In essence, it is the illegal detention of a person without lawful process.

Imagine this scenario: An HR manager meets with an employee for investigation of alleged workplace misconduct. The employee gets agitated, stands up and starts to leave the office. The manager says, "Sit back down. You are not leaving the office before I say it's OK." The employee claims false imprisonment.

During investigations, do not "tell people not to leave the office," Walters says.

A related claim would be false arrest, Isler notes. For example, an HR professional, based on scant information, calls the police, thinking that someone is stealing from the company. That person is arrested and later sues the company for false arrest, naming the HR professional as an individual defendant.

What You Can Do to Avoid Lawsuits

There are steps HR professionals can take to avoid personal liability:

Know the law. Ignorance is no defense, says attorney Denise Kay, SPHR, a senior consultant with Employment Practices Solutions. Keep up with federal and state laws to minimize legal exposure.

Follow the law and not necessarily your supervisor's orders. Question the orders or suggestions of a superior that do not seem quite right, Kay suggests. Ask questions and seek clarification before engaging in possibly questionable behavior involving employees.

Keep your policies up-to-date, and follow them. Conduct regular HR audits to ensure that your policies comply with the law, Kay says. Further, it is not good enough to simply have a policy; the policy must be communicated, supported and used appropriately.

"Make sure you are acting within the scope of your responsibilities. If you don't follow company procedure, that is when you can be held liable," says attorney Christine Walters, SPHR, a FiveL Co. consultant.

Engage in due diligence. When conducting investigations or considering corrective actions, don't send a message to managers that you don't trust them, Walters notes, but make sure you have the same facts they do.

Document all actions. Make sure managers are documenting their employment decisions and document what you are doing as well, Walters says.

Communicate with employees. Speak truthfully and in a dignified manner. Act professionally, honestly and confidentially in every interaction with employees, Kay says. Do not act in anger or in a retaliatory manner.

Respond properly to authorities. Do not obstruct justice or otherwise interfere with or provide false information to an authority, Kay says.

Consider employment practices liability insurance. Do you have coverage? If not, consider obtaining it. Although it is not inexpensive, it will cost less than litigation—the costs of which can be astronomical, Walters says. Carriers provide coverage for individuals, she explains, as long as the individual is acting within the scope of professional responsibility.

KG COMMENTS:
The points here are extremely critical in the light of the Supreme Court's "Cat's Paw" case decided in 2011.
Here's the jist: the cat’s paw theory of liability refers to one used by another to accomplish his purposes. All HR managers should understand that if they make a decision to fire someone based upon the facts provided to them from another manager, if that manager had a discriminatory bias, the employer can be liable for an employment discrimination case even though the HR managers had no such biases.

Therefore, if HR managers take those statements at face value without doing their own investigation, and as a result fire an employee, the fired employee may have valid employment discrimination claims against the company.
This theory also applies to hiring, discipline, promotion, and the whole gamut of everyday employment decisions made by HR managers.

State Equality Laws

Although federal nondiscrimination laws, including Title VII, the ADEA and the ADA, do not permit suits against individual supervisors, a vast number of state equal employment opportunity statutes "don't specify that individuals can't be sued, and courts have allowed them to be sued," Isler explains.

According to Kay, the Colorado Anti-Discrimination Act expressly states that individuals may be sued for certain discriminatory or unfair employment practices, and judges in

Colorado courts have not hesitated to permit plaintiffs to proceed on claims against individual employees under the law.

Other states, such as Virginia, expressly limit personal liability by defining the employer as "any employer employing more than five but less than 15 employees." Since a supervisor does not "employ" anyone, he or she may not be held personally liable under this definition.

Claims Under Other Laws

This article contains an incomplete list of the federal and state employment-related claims that may be brought against HR professionals. It may be possible for an employee or former employee to maintain a suit against an HR manager for violation of other federal laws, including the Employee Retirement Income Security Act, the Equal Pay Act, COBRA and federal immigration laws.

State claims may be brought for several causes of action not specifically related to employment, such as assault and battery, negligent or intentional infliction of emotional distress, invasion of privacy, and interference with contract. Claims may also be brought for violation of state wage and hour or leave laws.

Why Sue HR?

HR professionals may be sued in their individual capacities for several reasons, Kay says, based on the employment actions and the litigation strategy.

The first and most obvious reason is when the HR professional is accused of intentionally engaging in unlawful conduct. For example, consider the behavior of the HR manager who denied FMLA leave to an eligible employee who requested it in an effort to force her to resign. In this case, it is easier to point a finger at the HR professional as the one responsible for the employment decision. Because of the clearly illegal nature of the action, the employee may be more motivated to try to hold the responsible party liable.

Other violations may occur unintentionally but are illegal nonetheless, such as misclassifying nonexempt employees as exempt, thereby making them ineligible for overtime.

Beyond the actual events that transpire in the work environment, plaintiffs' lawyers may have strategic and tactical reasons for including HR employees in lawsuits, Kay says.

Plaintiffs' attorneys may want to:

- Create conflict between the employer and HR professional to complicate the defense, possibly making it necessary for separate attorneys to represent these parties.
- Obtain as much information as possible during the discovery process.
- Maximize negative publicity.

While the clear trend indicates that individual HR managers are being sued along with their employers for participation in employment decisions, awareness, preparedness and education can minimize individual exposure, Kay concludes.

The author is SHRM’s senior legal editor.

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Society for Human Resource Management

1800 Duke Street
Alexandria, Virginia 22314 USA

Phone US Only: (800) 283-SHRM (7476)
Phone International: +1 (703) 548-3440

TTY/TDD (703) 548-6999
Fax (703) 535-6490

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