



HR Mythbusters

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ARTICLES:

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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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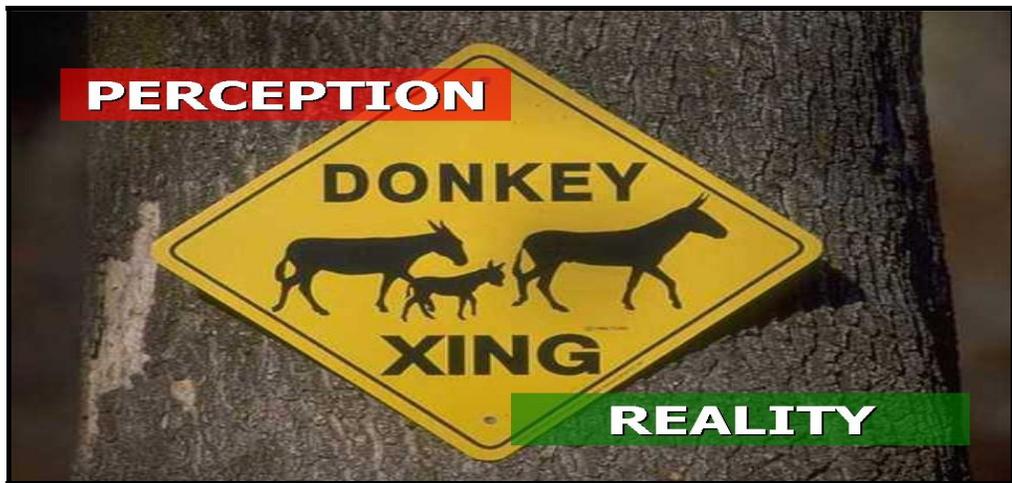
APPENDIX 1

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 2

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 angiography 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.

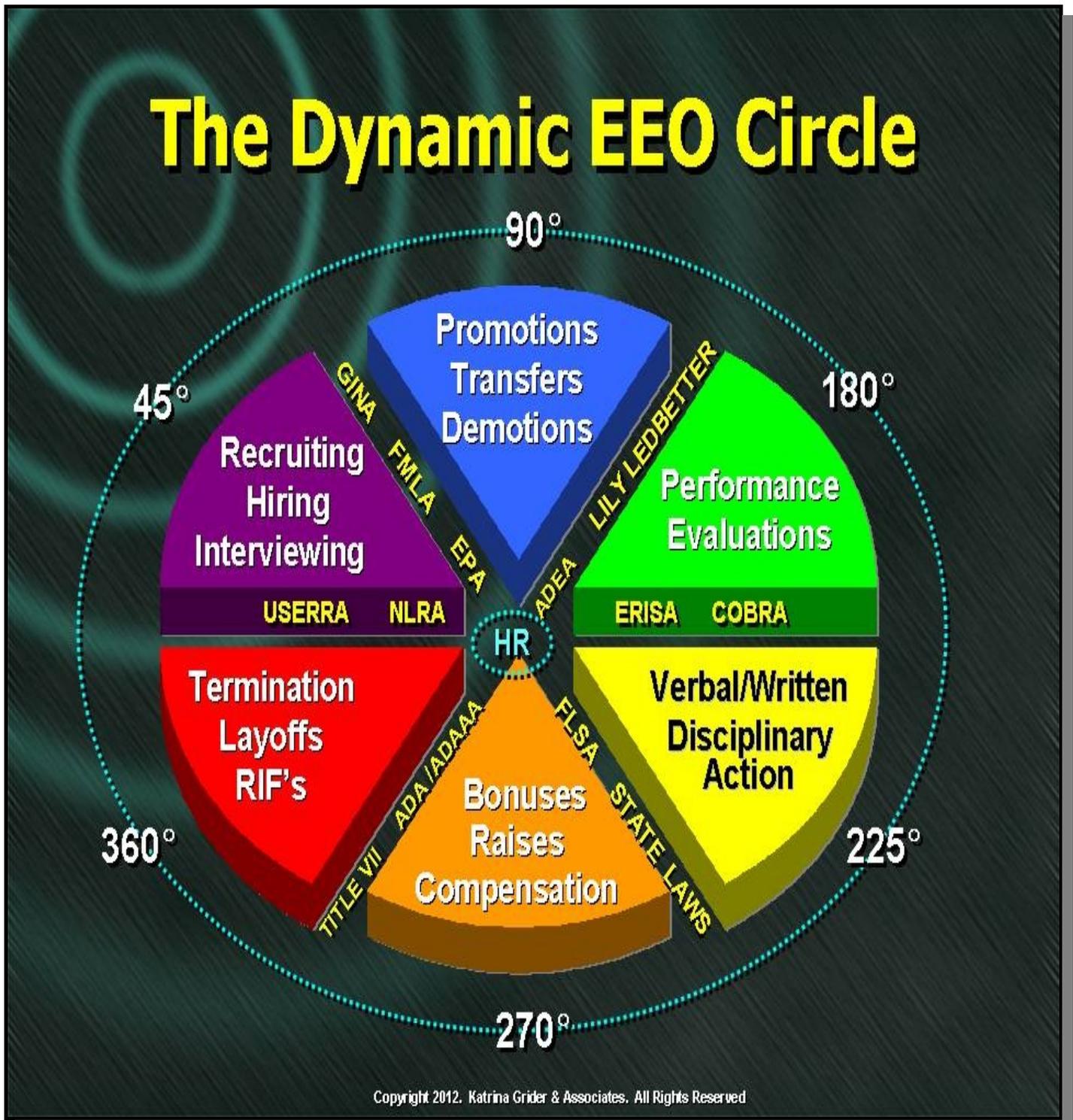
C. *Practical Implications for Employers*

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 3

THE DYNAMIC EEO CIRCLE



APPENDIX 4: COMMON SUPERVISOR HABITS

THE GOOD, THE BAD AND THE UGLY SUPERVISOR: THE 25 BEST AND WORST HABITS[†]			
☺	25 <u>BEST</u> SUPERVISOR HABITS	☹	25 <u>WORST</u> SUPERVISOR HABITS
1	Has set goals	1	Is close-minded
2	Is fair	2	Is two-faced
3	Gives positive reinforcement	3	Doesn't set a good example
4	Respects employees	4	Over-manages
5	Is interested in employees	5	Under-manages
6	Is honest	6	Is insensitive to employees' needs
7	Sets an example	7	Doesn't show respect
8	Has common sense	8	Is inconsistent
9	Is decisive	9	Doesn't accept responsibility
10	Is a teacher	10	Is arrogant
11	Backs employees' decisions	11	Lacks experience
12	Is a good listener	12	Takes credit for other's work
13	Delegates work	13	Publicly criticizes employees
14	Doesn't back-seat drive	14	Shows favoritism
15	Is available	15	Fails to recognize good work
16	Communicates well	16	Is indecisive
17	Is responsible for their own actions	17	Holds grudges
18	Is consistent	18	Communicates poorly
19	Is willing to help	19	Is overly critical
20	Takes command	20	Is lazy
21	Doesn't hold grudges	21	Uses power to intimidate others
22	Shows enthusiasm for their job	22	Is insecure
23	Doesn't micro-manage	23	Is dishonest
24	Is knowledgeable	24	Fails to teach employees
25	Gives constructive feedback	25	Fails to back-up employees

[†] Roger V. Fulton, "Common Sense Supervision--A Handbook for Success as a Supervisor," at pp. 78-79 (Ten Speed Press, Berkeley, CA)(1988).

APPENDIX 5

FEDERAL EMPLOYMENT LAWS AND REGULATIONS			
FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
1	Age Discrimination in Employment Act (ADEA)	Equal Employment Opportunity Commission (EEOC)	20 > employees Prohibits discrimination in all terms, conditions and privileges of employment on the basis of age. Applies to individuals age 40 and older.
2	Americans with Disabilities Act of 1990 (ADA)	EEOC	15 > employees Prohibits discrimination in all terms, conditions and privileges of employment on the basis of an individual's physical or mental disability.
3	ADA Amendments Act of 2008 (ADAAA)	EEOC	15 > employees Liberalizes the interpretation of the ADA and instructs employers to adopt a broad standard when determining whether or not an individual is considered to be disabled.
4	Civil Rights Act of 1991	EEOC	15 > employees Amends Title VII and the ADA to give parties complaining of intentional discrimination the right to a jury trial. Also authorizes the award of <u>punitive</u> and <u>compensatory</u> damages.
5	Consolidated Omnibus Reconciliation Act (COBRA)	Internal Revenue Service	20 > employees Employers must extend the option of continued health insurance to employee, spouse and dependants who otherwise would lose such coverage as a consequence of the employee's termination or some other qualifying event.
6	Consumer Credit Protection Act, Title III	Department of Labor (DOL) (Wage and Hour Division)	All employers (regardless of size) Protects employees from being discharged by their employers because their wages have been garnished for any one debt and limits the amount of employees' earnings which may be garnished in any one week. Restricts garnishment withholding to 25% of disposable income. Limits employer actions with respect to discharge.
7	Davis Bacon Act	DOL (Wage and Hour Division)	Employers with contracts in federally financed construction in excess of \$2,000 Employer must pay specified minimum hourly rates.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS				
	FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
8	Driver's Privacy Protection Act of 1994	Department of Justice (DOJ)	All employers	Regulates third-party access to individual driving record information.
9	Employee Polygraph Protection Act of 1988 (EPPA)	DOL (Wage and Hour Division)	All employers except those in security of pharmaceutical industries	Prohibits employers from using lie detector tests either for preemployment screening or during the course of employment. Testing is permitted only in extremely limited circumstances.
10	Employee Retirement Income Security Act of 1974 (ERISA)	DOL (Office of Labor-Management & Welfare Pension Reports)	All employers	Requires extensive pension and welfare plan information, plus disclosure of information to plan participants. Gives protection and guarantees to employees covered by private pension and welfare plans. Sets standards for employee participation, funding methods and establishes fiduciary responsibilities.
11	Equal Pay Act of 1963	EEOC	All employers subject to the FLSA	Prohibits pay differentials on the basis of sex. This means that employers must pay equal wages for work that requires equal skill, effort, and responsibility and is performed under similar working conditions.
12	Executive Order 11246	DOL (Office of Federal Contract Compliance Programs)	Employers with governments contracts in excess of \$50,000 and over 50 employees	Prohibits discrimination in all terms, conditions and privileges of employment against applicants and employees. Requires affirmative action to ensure equal employment opportunities without regard to race, sex, color, religion or national origin. ¹
13	Fair Credit Reporting Act	Federal Trade Commission	All employers	Employer must comply with all of the notice, disclosure and consent requirements in order to obtain and use investigative consumer credit reports in making an employment decision.
14	Fair Labor Standards Act (FLSA)	DOL(Wage and Hour Division)	All employers	Employer must pay prevailing minimum wage and overtime

¹ Revised Order No. 4 requires affirmative action to eliminate present/future effects of past discrimination against women and minorities.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS				
	FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
15	<p>Family and Medical Leave Act (FMLA)</p> <p>PLUS: FMLA Military Leave Amendments of 2008</p>	DOL (Wage and Hour Division)	50 > employees	<p>Eligible employees are entitled to take up to 12 weeks of unpaid leave. Employers must continue health benefits during the leave and restore employee to same or equivalent position upon return from leave.</p> <p>Eligible employees are entitled to take up to 12 weeks of leave for a “qualifying exigency”; and up to 26 weeks of leave for serious injury incurred during active military duty.</p>
16	Federal Insurance Contributions Act (FICA)	Internal Revenue Service (IRS); Social Security Administration (SSA)	All employers	Requires that taxes be collected from both employers and employees to fund the Social Security program.
17	Federal Mine Safety and Health Act of 1977 (Mine Act)	DOL (Mine Safety and Health Administration (MSHA)	All employees who work on mine property	Holds mine operators responsible for the safety and health of miners; provides for the setting of mandatory safety and health standards, mandates miners' training requirements; prescribes penalties for violations; and enables inspectors to close dangerous mines. The safety and health standards address numerous hazards including roof falls, flammable and explosive gases, fire, electricity, equipment rollovers and maintenance, airborne contaminants, noise, and respirable dust.
18	Federal Protection of Juror’s Employment Act	U.S. District Court	All employers	Prohibits employers from discharging employees from taking time off from work to serve on a jury.
19	Genetic Information Nondiscrimination Act of 2008	EEOC	15 > employers, health insurers and group health plans	Restricts the collection, use or disclosure of genetic information.
20	Health Insurance Portability and Accountability Act (HIPAA)	Health and Human Services (HHS) Office for Civil Rights	Most health plans, clearinghouses, and providers that conduct certain transactions electronically	Creates national standards to protect individuals' medical records and other personal health information and gives patients more control over their health information.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS				
FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW	
21	Immigration Reform and Control Act of 1986 (IRCA)	Department of Justice (Office of Special Counsel)	Verification requirements apply to employers of 1 or more employees.	Employer must verify the employment authorization of newly hired employees. Two types of documentation are required: 1) proof of eligibility to work in the U.S.; and 2) proof of identity
			Anti-discrimination provisions apply to employers of more than 3 employees.	Prohibits discrimination in on the basis of national origin or citizenship status.
22	Labor Management Relations Act (LMRA)	National Labor Relations Board (NLRB)	All employers engaged in interstate commerce	Forbids jurisdictional strikes, wildcat strikes, solidarity strikes, secondary boycotts, picketing, closed and union shops, and donations by unions to federal political campaigns.
23	Lily Ledbetter Fair Pay Act of 2009	EEOC	15 > employees	Restarts the statute of limitations for claims of discrimination in compensation each time wages or benefits are paid, when an individual is affected by a previous discriminatory decision or practice. Retroactive to May 28, 2007.
24	Mental Health Parity Act (MHPA)	Department of Labor (DOL), Health and Human Services (HHS), and Department of Treasury	50 > employees	Prohibits most group health plans with more than 50 workers from imposing annual or lifetime dollar limits on mental health benefits that are lower--less favorable--than the annual or lifetime dollar limits for medical and surgical benefits offered under the plan.
25	National Labor Relations Act (NLRA)	National Labor Relations Board (NLRB)	All employers	Employer is required to recognize and deal with union desired by a majority of employees in bargaining unit. Unfair labor practices prohibited.
26	Newborn's and Mother's Health Protection Act	Department of Labor (DOL), Health and Human Services (HHS), and Department of Treasury	Group health plans, insurance companies and health maintenance organizations (HMO's)	Requires health-insurance plans to cover post delivery hospitalization for at least 48 hours following a normal delivery and 96 hours following a cesarean section.
27	Older Workers Benefit Protection Act of 1990	Equal Employment Opportunity Commission (EEOC)	20 > more employees	Ensures that age-based reductions in employee benefit plans are justified by significant cost considerations; also sets stringent standards for all releases and settlement of ADEA claims.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS				
	FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
28	Occupational Safety and Health Act (OSHA)	DOL (Occupational Safety and Health Review Commission)	All employers engaged in interstate commerce	Establishes duty of employer to furnish place of employment free from recognized hazards likely to cause death or serious physical harm; requires compliance with applicable standards promulgated by the Secretary of Labor; prohibits retaliation for exercising rights under OSHA.
29	Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996	Department of Health and Human Services (HHS)	All employers	Requires every state to operate a child support enforcement program. Employers must report each newly hired worker to a state "directory of new hires" within 20 days of hiring by submitting the employee's W-4 form or equivalent document containing the worker's name, address, and Social Security number
30	Pregnancy Discrimination Act	Equal Employment Opportunity Commission (EEOC)	15 > employees	Women affected by pregnancy, childbirth, or related medical conditions must be treated the same for all employment-related purposes, including receipt of fringe benefits, as other persons not similarly affected.
31	Rehabilitation Act of 1973, Section 503	DOL (Office of Federal Contract Compliance Programs)	Employers with government contracts in excess of \$2,500	Prohibits discrimination against individuals with disabilities. Employers with 50 or more employees and contracts of \$50,000 or more must have a written affirmative action program.
32	Title VII of the Civil Rights Act of 1964	EEOC	15 > employees	Prohibits discrimination in all terms, conditions and privileges of employment on the basis of race, color, national origin, religion and sex.
33	Uniformed Services Employment and Reemployment Rights Act	DOL (Veterans' Employment and Training Service (VETS))	All employers	Ensures that certain persons who serve in the armed forces have a right to reemployment with the employer they were with when they entered service. This includes those called up from the reserves or National Guard.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS				
	FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
34	Vietnam Era Veteran's Readjustment Assistance Act of 1974 (VEVRAA)	DOL(Office of Federal Contract Compliance Programs)	Employers with government contracts in excess of \$10,000	Requires employers to undertake affirmative action to employ and advance in employment qualified veterans and veterans of the Vietnam era. Employers with 50 or more employees and contracts of \$50,000 or more must have a written affirmative action program.
35	Walsh-Healey Public Contracts Act	DOL(Wage and Hour Division)	Employers with government contracts in excess of \$10,000	Employer must pay prevailing minimum wage and overtime
36	Worker Adjustment and Retraining Notification Act (WARN)	Private action in U.S. District Court	100 or more (excluding part-time) OR 100 or more (including part-timers) working at least 4000+ hours (nonovertime) per week.	Offers protection to workers, their families and communities by requiring employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (e.g., a labor union); to the State dislocated worker unit; and to the appropriate unit of local government.
37	Sarbanes-Oxley Act of 2002 (SOX)	Securities and Exchange Commission (SEC)	Entities covered under Sarbanes-Oxley include not only those companies whose stocks trade publicly, but also all registered foreign companies and all non-public companies whose debt securities are publicly traded, whose equity or debt securities are registered under the Securities Exchange Act, who are required to file reports under that Act, or who have filed a statement for a public offering under that Act.	Requires notices of 401(k) blackout periods, bars directors and executives from trading employer stock during blackout periods, and increases the criminal penalties for ERISA violations.

FEDERAL EMPLOYMENT LAWS AND REGULATIONS			
FEDERAL LAW	ENFORCEMENT AGENCY	COVERED EMPLOYERS	SUMMARY OF LAW
37	Sarbanes-Oxley Act of 2002 (SOX) (Con't).	Securities and Exchange Commission (SEC)	Coverage also extends to any officer, employee, contractor, subcontractor or agent of a covered entity. As a result, non-public companies who are contractors or subcontractors of a public company, are "covered entities" subject to SOX obligations and proceedings.

APPENDIX 6
INDEX OF FREE EEOC POLICY GUIDANCES FOUND ON THE INTERNET
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#	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-practices.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 <i>Desert Palace, Inc. v. Costa</i> , 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
15	Q&A: Promoting Employment of Individuals with Disabilities in the Federal Workforce	09/30/08	http://www.eeoc.gov/policy/guidance.html

#	POLICY GUIDANCE	DATE	LOCATION
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
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

#	POLICY GUIDANCE	DATE	LOCATION
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
50	Enforcement Guidance on <i>O'Connor v. Consolidated Coin Caterers Corp.</i>	12/96	http://www.eeoc.gov/policy/docs/oconnor.html
51	Enforcement Guidance on After-acquired Evidence and <i>McKennon v. Nashville Banner Publishing Co.</i> , 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

#	POLICY GUIDANCE	DATE	LOCATION
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 7
INDEX OF DOL FMLA OPINION LETTERS:**

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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 good 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

DOL FMLA OPINION LETTERS 1993 - 2002			
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

DOL FMLA OPINION LETTERS 1993 - 2002			
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 Superseded by FMLA-86	04/07/95	Serious Health Condition and Attendance Bonus	

DOL FMLA OPINION LETTERS 1993 - 2002			
OPINION	DATE	SUBJECT	CITATION
FMLA-58	04/28/95	Return to Work Certification	http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-58.htm
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

DOL FMLA OPINION LETTERS 1993 - 2002			
OPINION	DATE	SUBJECT	CITATION
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
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 Superseded 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

DOL FMLA OPINION LETTERS 1993 - 2002			
OPINION	DATE	SUBJECT	CITATION
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
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
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 2 nd or 3 rd 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 8
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. Employee’s Serious Health Condition (DOL Form WH-380E):

- 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. Serious Health Condition of Employee's Family Member (DOL Form WH-380F):

- 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 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 9
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 10
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 11
EEOC AND OFCCP MOU
(COORDINATION OF FUNCTIONS AND MEMORANDUM OF UNDERSTANDING)



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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

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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,

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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 12
JOB DESCRIPTIONS: "OTHER DUTIES AS ASSIGNED DOESN'T CUT IT ANYMORE"
Katrina Grider

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. Simple Approach to Job Descriptions

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.

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.
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
	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

MENTAL FUNCTION	DESCRIPTION
	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?
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.

APPENDIX 13
CHECKLIST: COUNSELING, DISCIPLINARY ISSUES
Katrina Grider

On occasion, an employee's performance may be impacted by absenteeism, a single incident (such as reported workplace harassment) or poor interpersonal relationships on the job. Corrective actions may range from simply counseling the employee to formal disciplinary procedures.

CONSIDERATIONS:

1. What are the facts surrounding the episode?
2. How serious is the infraction?
3. Have you compared the infraction with other similarly situated employees?
4. Have you reviewed past policies, procedures and practices regarding the infraction?
5. Was the employee informed of the work rules in advance?
6. Has there been adequate warning about the inappropriate behavior?
7. Have there been similar discipline problems in the past by this employee?
8. Has the employee been made aware of the consequences of this behavior?
9. Does the employee's behavior hamper the day-to-day operation of the organization?
10. What has the history of the employee been with your organization? Has he/she been an otherwise satisfactory employee, or have there been previous documented problems or infractions of company rules?
11. Have you allowed the employee to tell his or her account of the infraction? (Take clear notes).
12. Have you determined if there were any other witnesses to the incident (if applicable). If so, did you get their side of the story?
13. Has the employee been provoked in any manner?
14. Have you **thoroughly investigated** the issue or infraction?
15. Have you obtained enough **independent** evidence (apart from the what the supervisor(s) have said) to prove that the employee displayed inappropriate behavior or violated the company's policies or rules?
16. Has the investigation been fair and objective? Have you had other(s) review the results?
17. Has the investigation been timely?
18. Has your organization enforced rules and production standards consistently?
19. Have you remained uninvolved emotionally during this process?
20. Has the employee been referred to an Employee Assistance Program, if appropriate?
21. Does the discipline under consideration fit the infraction?
22. Is the employee aware of appeal procedures?
23. **Has there been any retaliation of any kind?**
24. **Have you checked the timing of the disciplinary action relevant to other events?**
25. Have you verified the supervisor's side of the story?
26. Does the supervisor's documentation make sense?
27. Has the supervisor "created" a paper trail rather than engage in honest documentation?

28. **Does the supervisor have any discriminatory motive regarding the employee?**

29. **Check for Cat's Paw motives!!!**

COUNSELING THE EMPLOYEE - DO'S AND DON'TS

1. Don't reprimand employees in the presence of others or in a public place.

2. Do determine the appropriate time and place for a disciplinary meeting.

3. Do thoroughly and promptly investigate an incident or infraction thoroughly regardless of how the situation appears at first glance.

4. Do Allow the employee a chance to respond and explain the infraction.

5. Don't tolerate retaliation of any kind by anyone (supervisor, employee or co-worker).

6. Disciplinary actions should always be documented in detail. The documentation should include:

- who, what, when, where, and how
- the effect of the conduct as it relates to performance, job related behavior or company interest
- what action will be taken because of the incident
- what action will be taken in the future if another infraction occurs
- the employee's recourse (if any) if he/she is in disagreement with the action

7. Do evaluate the objectiveness of the disciplinary action.

8. Do evaluate the legal issues surrounding the disciplinary action.

9. Do allow a third person to review the facts and proposed discipline.

10. Do present the disciplinary action in a slow calm manner.

11. Do listen critically and take notes.

12. Do conclude the discussion and determine what will happen from that point.

13. Do ensure that progressive discipline has in fact been followed.

14. Do advise the employee regarding retaliation.

15. Do monitor the employee's future performance and progress.

APPENDIX 14
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 complaint?
- 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 complaint. 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 complaint from the employee alleging illegal discrimination or other unlawful employer activity.

APPENDIX 15

BEST PRACTICES FOR BACKGROUND CHECKS AND PREEMPLOYMENT INQUIRIES

Katrina Grider

BEST PRACTICE #1: COMPLY WITH THE FAIR CREDIT REPORTING ACT (FCRA)

Strict enforcement of the FCRA is the only way to accomplish its directives. Consequently, the Federal Trade Commission ("FTC") enforces the FCRA and employers found guilty of noncompliance may face fines or imprisonment. The FTC, certain federal agencies and states may sue employers for noncompliance resulting in potential civil penalties. Likewise, individuals can sue employers for damages for deliberate violation of the FCRA.

Both consumer reporting agencies and employers are held responsible for complying with FCRA regulations. However, using a reputable background screening provider is one way employers can reduce their liability. Premier vendors should provide employers with the means to be compliant with the FCRA as well as ensure their own compliance. Below are comprehensive best practices employers can easily implement to facilitate FCRA compliance.

A. Give Applicants the Notice and Disclosure Document

Before ordering a background check on applicants, employers must inform them in writing that a consumer report may be obtained for employment purposes. As previously mentioned, the notice and disclosure must be a separate and distinct document. As a best practice reminder, it is a good idea to have applicants sign the notice and disclosure document as documented proof they are aware of an employer's pre-employment screening practices.

B. Obtain Applicants' Written Authorization Prior to Obtaining Background Checks

Another FCRA requirement before employers can obtain a consumer report is to get the applicant's written authorization (*i.e.*, signature) to do so. As previously mentioned, reputable background screening providers may advise you to use an additional release authorization form that is a separate, distinct document. While this

practice is not required under the FCRA, it may add a level of legal protection for employers.

C. Provide a Copy of the FTC's "Summary of Applicant Rights Under the FCRA" to All Applicants

For most types of background checks, the FCRA requires employers to give applicants a copy of the FTC's "Summary of Your Rights Under the FCRA" document along with the notice and disclosure. As a best practice, employers should consider giving applicants the summary of rights whenever they apply for a position.

D. Comply with the FCRA's Adverse Action Notification Requirements

Prior to taking adverse action based in whole or in part on a Consumer Report, employers must provide applicants with copies of the report and a Summary of Rights.

- Employers must give the consumer (applicant) the same report the employer receives, whether written or oral.
- FCRA is silent on how long the employer must wait to raise an objection, but the best practice is to give the applicant a meaningful opportunity to review, reflect and object.

Employers cannot "just say no," on the basis of the report because of the many possibilities of mistakes. For example:

- Stolen identity;
- Mistaken identity;
- The applicant did not know about the negative record and thus no chance to correct it;
- The record is wrong; or
- There is confusion about the record

If the adverse action becomes final, a second letter is required under FCRA § 615; This letter must provide, orally, in writing, or electronically, the following:

- Notice of the adverse action;
- The name, address, and telephone number of the consumer reporting agency that provided the consumer report;
- A statement that the consumer reporting agency did not make the adverse decision and cannot provide the individual with the specific reasons supporting the action;
- Notice of the individual's right to obtain a free copy of the consumer report (if the report is requested within 60 days of receiving notice of an adverse action, a consumer reporting agency must provide the report free of charge); and
- Notice of the individual's right to dispute the accuracy or completeness of the information contained in the report.

E. Follow State Rules

There are many state laws that have FCRA implications, and some are quite detailed. For example, in Massachusetts, the final adverse action letter must be in 10-point type minimum, be issued within 10 days, and use specified language. (And, of course, California has numerous "only in California rules.") Here are the 20 states with their own FCRA-type rules:

Arizona , California, Colorado, Georgia, Kansas, Kentucky, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Louisiana, Maine, Maryland, Massachusetts, Oklahoma, Rhode Island, Texas, and Washington.

In addition, other various states have special rules concerning:

- Disclosure form for consumer
- Rules for Investigative Consumer Reports
- Nature and Scope letter
- Disputed Accuracy procedures
- Timing and notice of reports

- Notification periods
- 7-year limit on criminal records

Some states limit employers from using **arrest records**, such as: California, Hawaii, Illinois, Massachusetts, Michigan, Nevada, New York, Pennsylvania, Rhode Island, Utah, Virginia, Washington, and Wisconsin.

Some states limit **misdemeanors**, such as: California, Hawaii, and Massachusetts.

Some states limit **first offense records**, records based upon a certain age (other than a seven year limit) or diversion/nonadjudication programs, such as: Georgia, Massachusetts, Hawaii, Illinois, and California.

Some states limit **expunged or sealed records**, such as: California, Colorado, Hawaii, Illinois, Ohio, Oklahoma, Oregon, Rhode Island, Texas, Virginia, Louisiana, Maryland, New Jersey, South Dakota, Utah, and Virginia.

Many states have rules reflecting EEOC guidelines-that arrest or conviction must have rational relationship to job given nature and gravity of the offense, nature of the job and age of offense.

BEST PRACTICE #2: DO NOT BELIEVE THE BACKGROUND CHECK MYTHS

Myth No. 1: There is a national database available to private employers for checking criminal records or false credentials, such as education or employment.

Contrary to popular belief, there is no such national database, despite some advertisers claims to the contrary. Furthermore, FBI fingerprint checks are only available when mandated by law (e.g., for teachers and child care workers).

Unfortunately, the primary method for obtaining criminal records is to physically look at each relevant courthouse! And there are about 10,000 courthouses in America with court records in over 3,200 jurisdictions.

Beware of using commercial databases as a primary tool for records checks. There are substantial issues with accuracy, completeness, and timeliness, and false positives and false negatives are possible. Commercial databases

can be useful as a back-up or secondary tool. In some states, use is very limited (*e.g.*, CA, NY & TX).

If you do get "hits" with such a system, the hit should be re-verified at the courthouse for accuracy and current status.

Finally, be leery of web sites claiming that they will provide instant access to information after opening and activating an account using a credit card number. Web sites that do not provide contact information allowing for the ability to converse with a representative should be considered suspect.

Myth No. 2: Due diligence means perfection.

Unless set by a statute for the employer's particular industry, due diligence is a moving target that is determined by a jury, based on evidence in the trial concerning injury, foreseeable risk, duty of care, and causation.

Nevertheless, to pass due diligence scrutiny, you just need to show that you did the best that you could be expected to do, not that you did a perfect investigation. Naturally, high risk employers, such as firms that send workers into homes, will have a higher duty of care.

Workers in uniform have the "color of authority." If you haven't done due diligence, typical defenses won't help you. For example, don't try to claim that:

- A background check would not have revealed any red flags or lack of causation;
- Conducting a check would have been too costly;
- The applicant lied; or
- Others firms in the company's industry do not conduct background checks.

Myth No. 3: You can automatically disqualify an applicant based on a criminal conviction without a business justification.

You may not automatically deny employment based on a criminal conviction. The EEOC requires that you take into account the nature and gravity of the offense, nature of the job, and time elapsed.

However, if the person lied on the application, then the falsehood can be the grounds to deny employment.

BEST PRACTICE NO. 3: FOLLOW STATE LAW AND PENDING LEGISLATION REGARDING THE USE OF CREDIT CHECKS FOR EMPLOYMENT

A. Maryland

A Maryland legislator introduced a bill on Jan. 21, 2011, that would prohibit Maryland employers, with a few exceptions, from using a person's credit history as a screening tool for hiring and retention decisions. Maryland House Bill 87, called the Job Applicant Fairness Act, exempts financial institutions, including banks and credit unions, and law enforcement agencies that are required to perform credit checks. The measure would allow individuals to bring lawsuits seeking damages for violations of the law.

B. Colorado

A new Colorado bill (H.B. 1127) introduced Jan. 27, 2011, would prohibit employers in most instances from using an individual's consumer credit report data to deny employment to an applicant, or to make decisions regarding employee reassignment, denial of promotion and termination.

Employers could use credit report data under the legislation if the information is "substantially job-related" to a position involving the handling of money, other assets, trade secrets or confidential information, or management. The state department of law as well as law enforcement agencies would be exempt from the measure's requirements.

C. Pennsylvania

A Pennsylvania bill (S.B. 128) would restrict employers from using consumer credit report data to make decisions regarding job applicants and employees. The measure, which was introduced Jan. 18, would amend the state Human Relations Act to include the improper use of credit report information in the workplace as an "unlawful discriminatory practice."

S.B. 128 would allow employers to use credit report data only if the information were substantially job-related and the employer's or potential employer's reasons for using

the information were disclosed to the employee or potential employee in writing

D. Connecticut

The Connecticut Legislature, which already has two credit use restriction bills before it—H.B. 5284 and S.B. 361—has gained another legislative proposal to restrict the use of credit report data by employers. Introduced Jan. 25, the new proposal (H.B. 6220) would “prevent the usage of credit reports as a basis for denial of employment by potential employers.” Unlike the previous two bills, H.B. 6220 does not specifically propose to amend the state's anti-discrimination statute.

E. Other States

Legislatures in 10 other states—California, Indiana, Kentucky, Missouri, Nebraska, New Jersey, New Mexico, New York, Texas and Vermont—are considering credit check proposals.

Only four states—Hawaii, Illinois, Oregon and Washington—already have laws on the books limiting the use of credit report data for employment purposes.

F. Federal Efforts

At the federal level, the 112th Congress is considering legislation (H.R. 321) that would amend the Fair Credit Reporting Act to limit employer use of consumer credit reports.

In 2010, Congressman Steve Cohen (D-Tenn) introduced H.R. 3149, the Equal Employment for All Act, a nationwide bill that proposes to amend the FCRA to ban employers from using credit reports entirely in making hiring or promotion decisions.

“This bill would give some of our most vulnerable, ‘credit-challenged’ citizens—students, recent college graduates, low-income families, senior citizens and minorities—the opportunity to begin rebuilding their credit history by obtaining a job,” Cohen said on his web site. “Far too often, employers turn down ‘credit-challenged’ applicants because they have erroneously linked credit scores to potential job performance,” he said.

The new law would prohibit employers from checking credit reports, even if the employee signs a consent form. There would be some exceptions to the new law, keeping it legal for employers to use credit reports in certain situations. Credit reports would continue to be used for positions that require national security or Federal Deposit Insurance Corp. clearance, jobs with state and local government agencies that already use credit reports, and certain positions at financial institutions.

BEST PRACTICE NO. 4: USE CRIMINAL RECORDS CAREFULLY AND CONSISTENTLY

Employers increasingly are being challenged in court for their use of criminal background checks, according to a March 23, 2011, report by the National Employment Law Project.

A. EEOC Policy Guidances on Conviction Records

The report noted that the EEOC has stated that “an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.” Yet it also observed that Title VII does not wholly bar the use of criminal records in employment decisions.

Instead, the EEOC has provided a framework for assessing criminal records when making an employment decision. An employer’s consideration of criminal records may pass muster under Title VII if an individualized assessment is made taking into account:

- The nature and gravity of the offense or offenses.
- The time that has passed since the conviction and/or completion of the sentence.
- The nature of the job held or sought.

See EEOC’s 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII (04/25/12); see also EEOC Policy Guidance Statement on the Issue of Conviction Records under Title VII (02/04/87); EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment(07/29/87); EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII (09/07/90); and EEOC Fact Sheet on Employment Tests and Selection Procedures (12/03/07).

B. EEOC Has Credit Checks on Its Enforcement Radar

In the summer of 2009, the EEOC said it was contemplating issuing new guidance on when credit history checks can be used as part of the hiring process and planned to revisit longstanding guidance that explains when employers can use arrest and conviction records in pre-employment screening.

On Sept. 30, 2009, the EEOC filed a lawsuit, *EEOC v. Freeman Cos.*, D. Md., No. 09-CV-02573, in Maryland federal district court against Freeman Companies, a Dallas-based corporate event-planning company. The EEOC claims that Freeman has used credit histories and criminal background checks to unlawfully “deprive a class of black, Hispanic and male job applicants of equal employment opportunities and otherwise adversely affect their status as applicants because of their race, national origin and sex.”

The EEOC asked the court to prohibit Freeman from using credit histories and criminal background checks. It’s also requesting that the court order the company to hire applicants who were rejected on the basis of the reports and compensate them with back pay from the time they were rejected.

The EEOC’s position in Freeman is consistent with informal guidance the EEOC issued on Dec. 1, 2005. In this informal discussion letter, the EEOC said that an employer who uses a “blanket” policy of not hiring any applicant who has a history of arrest or convictions violates Title VII of the Civil Rights Act because such a policy “disproportionately excludes members of certain racial and ethnic groups, unless the employer can demonstrate a business need for use of this criteria.”

C. Sometimes the EEOC is Wrong....

On March 31, 2011, the EEOC was ordered to pay \$751,942.48 in fees to Peoplemark, a temporary staffing company that prevailed in a discrimination claim brought against the company.

The EEOC maintained that Peoplemark had a policy that denied the hiring or employment of any person with a criminal record and that this policy unlawfully discriminated against black people in violation of Title VII. But the U.S. District Court for the Western District of

Michigan determined that “this is one of those cases where the complaint turned out to be without foundation from the beginning.”

The court noted that Peoplemark’s expert produced a report showing that 22 percent of the 286 so-called victims of the company’s purported policy had in fact been hired despite having felony records. The question the court next considered was when the EEOC should have realized that its claim of a blanket policy by Peoplemark had no foundation.

The defendant’s expert report was not available to the EEOC until February 2010. But the court held that the EEOC should have realized that its claim of a blanket policy had no foundation well before a joint motion to dismiss was filed on March 29, 2010.

The commission argued that it could not have determined that black applicants with felony convictions had been placed by Peoplemark until September 2009 when it had received all of Peoplemark’s records. That does not address though why the EEOC was not doing an independent investigation from the middle of 2005 until September 2009, the court found. Arguably, the EEOC should have dismissed its action much sooner than September 2009.

The court noted that on Feb. 4, 2009, Peoplemark asked the EEOC in a single interrogatory to identify every individual based on its previous investigation who had been injured by Peoplemark’s allegedly discriminatory practice. The only answer the EEOC provided was to identify Sherri Scott, who had already been named in the complaint. Scott had applied to Peoplemark a month after her release from prison.

Peoplemark then filed a motion to compel a response to its interrogatory. On April 21, 2009, the court ordered the EEOC to answer it fully. Within 10 days, the EEOC filed an amended response identifying by name and address 286 individuals it maintained had been discriminated against. Peoplemark’s expert then was able to determine Peoplemark had in fact hired 22 percent of these individuals with felony convictions. This was, the court stated, “a fact the EEOC must have been, or should have been, aware of prior to bringing this action and certainly prior to furnishing the names in response to an interrogatory.” The court went on to state that “it is difficult to understand how the EEOC could continue to

maintain for the next 11 months that its claim against Peplemark in its complaint was valid.”

Regardless of the merits of the case, it was unreasonable for the EEOC to continue to litigate and drive up Peplemark’s costs once it knew that it could not produce an expert and thus could not prove its case. The EEOC did not identify its key expert until July 31, 2009, and it did not hire the expert until September 2009, which was the date originally scheduled by the court for the expert’s report to have been completed. The agency was forced to dismiss its case when it was not in a position to file a response to Peplemark’s motion for summary judgment because it did not have an expert.

The EEOC had virtually all of Peplemark’s personnel documents by Aug. 24, 2009. After reviewing these documents, it should have become clear to the EEOC within a month that it could not prevail on its claim of a blanket policy. Accordingly, the court determined that Peplemark was entitled to an award of its fees and costs incurred from Oct. 1, 2009, until the action was dismissed on March 29, 2010.

Peplemark sought \$258,620.50 in fees for its attorneys, paralegals and litigation support specialist, and the court awarded \$219,350.70 in attorneys’ fees. Peplemark sought and was awarded \$526,172 in expert witness fees. The court noted that Peplemark’s report required its expert to analyze more than 200,000 pages of documents from Peplemark related to job applicants from 2004 through 2009, as well as Peplemark’s payroll records and six depositions. Moreover, because the EEOC did not provide an expert report related to the Peplemark documents, Peplemark’s expert had to anticipate various theories that the EEOC’s expert might raise. The court also awarded \$6,419.78 in other expenses (*EEOC v. Peplemark Inc.*, C.A. No. 1:08-cv-907 (W.D. Mich. 2011)).

D. Potential Litigation for Violations

The Society for Human Resource Management (“SHRM”) has conducted national research that shows that a majority of employers are thoughtful in the hiring process and do not take a one-size-fits-all approach to criminal background checks, as required by Title VII. While the report claims that there has been an upsurge in criminal background checks, SHRM research in 2006 and 2010 has not found an increase in the use of criminal background checks.

The National Employment Law Project report asserted that “after years of dormancy, the basic civil rights and consumer protection laws restricting the use of criminal records are catching a second wind.” At least five major civil rights lawsuits against large employers were filed in 2010 challenging the use of criminal background checks, the report noted.

In *Arroyo v. Accenture*, Accenture has been challenged for rejecting job applicants and terminating employees with criminal records, even where the criminal history has no bearing on the fitness or ability to perform the job, according to the report.

In *Hudson v. First Transit Inc.*, First Transit has been challenged for allegedly having a blanket policy prohibiting individuals from working for the company if they have been convicted of a felony or served a day in jail.

In *Mays v. Burlington Northern Santa Fe Railroad Co. (BNSF)*, BNSF was sued for allegedly having a blanket policy prohibiting any person with a felony conviction in the previous seven years from being employed at its facilities.

In the class-action lawsuit *Johnson v. Locke*, the U.S. Census Bureau was sued under Title VII for discriminating against people with criminal records by excluding them from consideration for temporary positions with the Census.

The EEOC also has a Title VII criminal records suit pending against the Freeman Cos. for its rejection of job applicants based on criminal background checks and credit histories.

In addition, the report noted that some states restrict the use of criminal background checks. In 2009, New York Attorney General Andrew Cuomo (now governor) enforced state protections that regulate criminal background checks for employment. The Office of Attorney General reached a settlement with RadioShack, which according to the report automatically rejected any individual who answered “yes” to the question, “Have you been convicted of a felony in the past seven years?” by not allowing the individual to complete the job application.

E. EEOC Guidelines Followed by Most Employers

However, a SHRM poll released in January 2010 showed that most organizations follow EEOC guidelines on

avoiding discrimination when conducting criminal background checks. The poll showed that:

- Organizations conduct criminal background checks on job candidates primarily to ensure a safe work environment for employees (61% of respondents), to reduce legal liability for negligent hiring (55%), and to reduce or prevent theft or other criminal activity (39%).
- 20% of organizations conduct criminal background checks on job candidates because they are required to do so by law.
- Checks are conducted commonly for job candidates with fiduciary and financial responsibility (78% of organizations), candidates who will have access to highly confidential employee information (68%) and candidates for senior executive positions (55%).
- When making a hiring decision, HR professionals take into consideration the severity of the criminal activity (97% of respondents), number of convictions (95%), relevance to the position (93%) and length of time since the criminal activity (95%).
- Criminal background checks are used on all job candidates by 73% of organizations. Another 19% of organizations conduct criminal background checks on select job candidates.
- When adverse information is found, 63% of organizations offer the candidate an opportunity to explain the circumstances before a hiring decision is made.

BEST PRACTICE #5: AVOID BLANKET APPLICATIONS OF CREDIT CHECKS FOR ALL POSITIONS

It is extremely risky for employers to use a 'one-size-fits-all' policy of using blanket credit checks. A blanket application of credit checks provides employers with less of an ability to argue that the credit check is job related. Employers should do the following:

- Be selective on which positions to subject to a credit check.
- Be able to articulate a rational reason on why a credit check is needed for predicting job performance and related to the business functions.

- Ensure that your managers use only the information relevant to the job in question that is needed to make an employment decision. If possible, avoid making decisions based on extraneous issues.
- Allow candidates to explain the reasons for negative credit information. This places employers in a better position to assert that the credit information really was job related and consistent with business necessity.

Given the myriad of state law requirements, the pending federal legislation and the EEOC's renewed interest in pre-employment screening and hiring practices, it is important that employers review their pre-employment screening processes to ensure that they are seeking credit and criminal information from applicants in appropriate circumstances and in a lawful manner.

A. EEOC v. Kaplan Higher Ed. Corp. (Dec. 21, 2010)

On December 21, 2010, the EEOC filed suit against Kaplan Higher Education Corp., charging that the provider of postsecondary education engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of black job applicants nationwide. Kaplan Higher Education has rejected job applicants based on their credit history, since at least 2008. This practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity, the EEOC charged.

In a complaint filed by the EEOC's Cleveland Field Office in the U.S. District Court for the Northern District of Ohio (C.A. No. 1:10-cv-02882), the agency alleged that, as a result of its practices, Kaplan violated Title VII of the Civil Rights Act of 1964. It is a violation of Title VII to use hiring practices that have a discriminatory impact because of race and that are not job-related and justified by business necessity.

"Title VII of the Civil Rights Act of 1964 was intended to eliminate practices that serve as arbitrary barriers to employment because of a job applicant's race," said Regional Attorney Debra Lawrence of the EEOC's Philadelphia District Office, which oversees Pennsylvania, Delaware, West Virginia, Maryland and portions of New Jersey and Ohio. "Employers need to be mindful that any

hiring practice be job-related and not screen out groups of people, even if it does so unintentionally.”

The EEOC attempted to reach a voluntary settlement before filing suit. The EEOC seeks injunctive relief in its lawsuit, as well as lost wages and benefits and offers of employment for people who were not hired because of Kaplan Higher Education’s use of job applicants’ credit history.

BEST PRACTICE #6: BE SURE TO VERIFY ELIGIBILITY TO WORK IN THE UNITED STATES

Eligibility for employment in the United States. While not a background check in the commonly understood sense, the process of verifying an individual’s eligibility to work in the United States is a type of employee screening that should be addressed in this context. Employers must complete a Form I-9 for all newly hired employees to verify their identity and authorization to work in the United States.

The types of acceptable identity and employment authorization documents employers can accept from new hires change periodically. Be sure you are using the most current Form I-9, Employment Eligibility Verification.

Employers have several electronic options for verifying their workers’ names and Social Security numbers (SSN) and validating work eligibility. While use of E-verify—the U.S. government’s online system for verifying employment eligibility—is voluntary for most employers, an executive order requires all federal contractors to use the system to confirm the legal status of their employees or risk losing their government contracts. Some state governments have also passed laws requiring employers to use E-verify.

APPENDIX 16
CURRENT DEVELOPMENTS UNDER THE FAIR CREDIT REPORTING ACT (FCRA)
Katrina Grider

I. NEW FCRA FORMS FOR 2013

Effective January 1, 2013, employers must use updated federal forms as part of their background check process, as responsibility for interpreting the federal Fair Credit Reporting Act (FCRA) transfers from the Federal Trade Commission (FTC) to the newly-created Consumer Financial Protection Bureau (CFPB). Specifically, the regulations require employers and others to use the following three modified forms:

- *Summary of Rights under the FCRA.*

Employers must provide this form to applicants and employees in a wide variety of situations, such as when an employer decides not to hire an applicant or to terminate or discipline an employee based in whole or in part on information in a consumer report and/or investigative consumer report.

- *Notice to Users of Consumer Reports of their obligations under the FCRA.*

Background check companies (also known as consumer reporting agencies (CRAs)) must provide each user, including their employer clients, with a copy of this form.

- *Notice to Furnishers of Information of their Obligations under the FCRA.*

CRAs must provide this notice to certain furnishers of information in certain situations.

The three new forms are Appendices K, M and N to 12 CFR part 1022). The new forms direct consumers to contact the CFPB instead of the FTC for more information about their rights. Except for these technical changes, there are no new substantive obligations affecting those subject to the existing FCRA regulations.

II. FTC GUIDELINES

A. Using Consumer Reports: What Employers Need to Know

The information in Section II was obtained from the website of the Bureau of Consumer Protection Business Center, Federal Trade Commission (FTC): <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>.

- Your advertisement for cashiers nets 100 applications. You want credit reports on each applicant. You plan to eliminate those with poor credit histories. What are your obligations?
- You are considering a number of your long-term employees for major promotions. Can you check their credit reports to ensure that only financially responsible individuals are considered?
- A job candidate has authorized you to obtain a credit report. The applicant has a poor credit history. Although the credit history is considered a negative factor, it's the applicant's lack of relevant experience that's more important to you. You turn down the application. What procedures must you follow?

As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention — as long as you comply with the Fair Credit Reporting Act (FCRA). Sections 604, 606, and 615 of the FCRA spell out your responsibilities when using consumer reports for employment purposes.

B. The Fair Credit Reporting Act (FCRA)

The FCRA is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. Amendments to the FCRA — which went into effect September 30, 1997 — significantly increase the legal obligations of employers who use consumer reports. Congress expanded employer responsibilities because of concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The amendments ensure (1) that individuals are aware that consumer reports may be used for employment purposes and agree to such use, and (2) that individuals are notified promptly if information in a

consumer report may result in a negative employment decision.

C. What is a Consumer Report?

A consumer report contains information about your personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) — a business that assembles such reports for other businesses.

Employers often do background checks on applicants and get consumer reports during their employment. Some employers only want an applicant's or employee's credit payment records; others want driving records and criminal histories. For sensitive positions, it's not unusual for employers to order investigative consumer reports — reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA.

Applicants are often asked to give references. Whether verifying such references is covered by the FCRA depends on who does the verification. A reference verified by the employer is not covered by the Act; a reference verified by an employment or reference checking agency (or other CRA) is covered. Section 603(o) provides special procedures for reference checking; otherwise, checking references may constitute an investigative consumer report subject to additional FCRA requirements.

D. Key Provisions of the FCRA Amendments

1. Written Notice and Authorization

Before you can get a consumer report for employment purposes, you must notify the individual in writing — in a document consisting solely of this notice — that a report may be used. You also must get the person's written authorization before you ask a CRA for the report. (Special procedures apply to the trucking industry.)

2. Adverse Action Procedures

If you rely on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion — be aware that:

STEP 1: Before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.

STEP 2: After you've taken an adverse action, you must give the individual notice — orally, in writing, or electronically — that the action has been taken in an adverse action notice. It must include:

- The name, address, and phone number of the CRA that supplied the report;
- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

3. Certifications to Consumer Reporting Agencies

Before giving you an individual's consumer report, the CRA will require you to certify that you are in compliance with the FCRA and that you will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

In 1998, Congress amended the FCRA to provide special procedures for mail, telephone, or electronic employment applications in the trucking industry. Employers do not need to make written disclosures and obtain written permission in the case of applicants who will be subject to state or federal regulation as truckers. Finally, no pre-adverse action disclosure or Section 615(a) disclosure is required. Instead, the employer must, within three days of the decision, provide an oral, written, or electronic adverse action disclosure consisting of: (1) a statement

that an adverse action has been taken based on a consumer report; (2) the name, address, and telephone number of the CRA; (3) a statement that the CRA did not make the decision; and (4) a statement that the consumer may obtain a copy of the actual report from the employer if he or she provides identification.

4. Applying the FCRA Requirements

EXAMPLE #1:

You advertise vacancies for cashiers and receive 100 applications. You want just credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

You can get credit reports — one type of consumer report — if you notify each applicant in writing that a credit report may be requested and if you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre-adverse action disclosure that includes a copy of the credit report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

EXAMPLE #2:

You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave you written permission in the past, you need only make sure that the employees receive or have received a "separate document" notice that reports may be obtained during the course of their employment — no more notice or permission is required. If your employees have not received notice and given you permission, you must notify the employees and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre-adverse action disclosure. The

employee also must receive an adverse action notice once you have selected another individual for the job.

EXAMPLE #3:

A job applicant gives you the okay to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

In any case where information in a consumer report is a factor in your decision — even if the report information is not a major consideration — you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you would be required to provide an adverse action notice.

The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant, whose credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another, whose credit report shows only one credit account, because you want someone who has shown more financial responsibility. Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices — even when the information isn't negative.

E. Penalties for Noncompliance

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the FTC, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

F. Additional Information and Assistance

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and avoid them. To file a complaint or to get free information on consumer issues, visit www.ftc.gov or call toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. The FTC's website provides free information on a variety of consumer topics. The FTC enters consumer complaints into the Consumer Sentinel Network, a secure online database and investigative tool used by hundreds of civil and criminal law enforcement agencies in the U.S. and abroad.

III. FACT ACT AMENDMENT TO THE FCRA

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACT Act or FACTA) to help combat identity theft, enhance consumer reporting accuracy and establish uniform credit reporting standards. Consequently, the FACT Act amended the FCRA in several significant ways.

A. FACT Act Background Screening Regulations

- Requires employers to give applicants the FTC's version of the "Summary of Your Rights Under the FCRA" document.
- Created summary of rights for identity theft victims.
- Requires employers to properly dispose of background screening results.
- Enables individuals to dispute their background screening results with the original furnisher of the information.

B. New Summary of Rights Document

For the greatest legal protection, employers generally give applicants a copy of the "Summary of Your Rights Under the FCRA" before ordering background checks on them. The summary of rights document explains what course of action individuals can take if they wish to dispute the findings of background screening reports. See APPENDIX 5.

In conjunction with the FACT Act, the FTC created a uniform summary of rights document. According to the

FTC, employers are permitted to distribute summary of rights documents that are "substantially similar" to the FTC's version. Meaning, employers can change the formatting or layout of the document (*i.e.*, making it two columns or changing fonts), but cannot alter text. Reputable background screening providers should be able to provide you with the most recent version of the summary of rights document.

C. New Summary of Rights for Identity Theft Victims

Under the FACT Act, consumer reporting agencies must provide a copy of the FTC's summary of rights for identity theft victims document whenever applicants indicate they have reason to believe they were victims of fraud or identity theft relating to credit, electronic fund transfers or other account transactions. This document bears the official title "Remedying the Effects of Identity Theft" and entitles consumers to the following:

1. The right to ask any one of the three nationwide credit bureaus (*i.e.*, TransUnion, Experian, Equifax) to place "fraud alerts" on their files. That agency will then notify the other two agencies, which must then also place fraud alerts in your file.
2. The right to obtain free copies of the information in their files from all three of the nationwide credit bureaus.
3. The right to obtain documents relating to fraudulent transactions made or accounts opened using personal information.
4. The right to obtain information from a debt collector.
5. If consumers believe the information in their file is a reflection of identity theft, they can request consumer reporting agencies to block that information from their file.
6. The right to prevent businesses from reporting information to consumer reporting agencies if consumers have reason to believe the information is a result of identity theft.

D. Disposal of Background Screening Records

Because identity thieves often acquire people's personal information from trash containers or "dumpster diving," the FACT Act enacted disposal standards to help prevent identity theft. As of June 1, 2005, all employers with one or more employees must properly dispose of sensitive financial and personal information contained in background screening reports. Personal information includes an individual's name, telephone number, address, Social Security Number (SSN), *etc.*

FACT Act rules do not address when employers need to get rid of the information, but rather how the information should be destroyed. FTC guidelines state shredding, pulverizing or burning paper records so consumer information is unreadable as acceptable examples of disposal methods. When considering which disposal method is best for your organization, the FTC advises employers to consider the sensitivity of the information, the nature and size of operations, the cost and benefits associated with different disposal methods and relevant technology changes.

This rule also applies to electronically stored data. Information stored electronically, such as computer discs or hard drives, must be overwritten, deleted or physically destroyed such that electronic files cannot be read or reconstructed.

E. Disputing Background Screening Results

The FACT Act revised section §623 (8) of the FCRA granting applicants the right to dispute their background screening results with the original furnisher of the information. Applicants who wish to dispute the accuracy of consumer report information will need to: 1) identify the specific information being disputed, 2) explain the basis for the dispute, and 3) include all supporting documentation requested by the furnisher to substantiate his/her claim.

In turn, furnishers of consumer report information must conduct a reasonable investigation, review relevant information provided by the applicant and complete the investigation within 30 days. If the furnisher confirms the information in the applicant's consumer report was inaccurate, it must promptly notify each consumer reporting agency who obtained the original erroneous

consumer report and provide each consumer reporting agency with any applicable corrections.

IV. RECENT FTC CASES

The FTC files a complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. A complaint is not a finding or ruling that defendants have actually violated the law. Stipulated court orders are for settlement purposes only and do not necessarily constitute an admission by the defendants of a law violation. Stipulated orders have the force of law when signed by the judge.

- A. ***FTC v. Quality Terminal Services, L.L.C., C.A. No. 09-CV-01853 (D. Colo. Aug. 11, 2009).***
- B. ***FTC v. Rail Terminal Services, L.L.C., C.A. No. 09-CV-1111 (W.D. Wash. Aug. 11, 2009).***

Two Companies Pay Civil Penalties to Settle FTC Charges; Failed to Give Required Notices to Fired Workers and Rejected Job Applicants

Two companies that fired workers and rejected job applicants based on background checks without informing them of their rights under the FCRA have agreed to settle Federal Trade Commission charges that they violated federal law. The settlements require the defendants to pay \$77,000 in civil penalties and bar future FCRA violations.

Employers often conduct background checks and seek employees' and job applicants' credit records, criminal histories, and other background information from a consumer reporting agency (CRA) such as a credit bureau or background screening company. The FCRA requires that before taking adverse employment actions based on these consumer reports – for example, firing employees or denying job applications – employers must provide the employees or applicants with a copy of the report, identify the CRA that provided it, notify them that the CRA did not make the adverse action decision, and inform them that they have the right to obtain a free copy of the report from the CRA and dispute its accuracy.

According to the FTC's two complaints, both defendants contracted with a CRA to conduct background checks including criminal record reviews for employees and job

applicants, and made hiring and firing decisions based on those background checks. The companies allegedly failed to provide the employees and applicants with pre-adverse action notices and adverse action notices as required by the FCRA.

The settlements require Quality Terminal Services, LLC and Rail Terminal Services, LLC to pay \$53,000 and \$24,000 in civil penalties, respectively, and to provide the FCRA-required notices in the future. The settlements also contain record-keeping and reporting provisions to allow the FTC to monitor compliance.

**C. *FTC v. TALX Corp.*, C.A. No. 4:09-cv-01071
(E.D. Mo. July 9, 2009).**

Consumer Reporting Agency Agrees to Pay \$350,000 To Settle FTC Charges That It Failed to Provide Required Notices to Users of Consumer Reports and to Furnishers of Information Used in Consumer Reports

TALX Corporation, a subsidiary of Equifax Inc., has agreed to settle Federal Trade Commission charges that it violated federal law by failing to provide certain disclosures to users of their consumer reports and to entities that provide information for consumer reports. The proposed settlement requires TALX to pay a \$350,000 civil penalty and bars future violations.

TALX sells income and employment history information about consumers to lenders, pre-employment screeners, and others for use in determining their eligibility for credit, employment, or other purposes, which makes it a consumer reporting agency subject to the FCRA. The company allegedly violated the FCRA by not providing the “Notice to Users of Consumer Reports: Obligations of Users Under the FCRA,” which notifies users of consumer reports of their statutory obligations, including notifying individuals if the user takes adverse action against them based on their consumer report.

The company also failed to provide the “Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA,” which notifies furnishers – entities that furnish information for consumer reports – of their obligations to provide accurate information, correct and update inaccurate information, and reinvestigate consumer disputes.

The proposed settlement requires TALX to provide the required notices to users and furnishers. If TALX provides the notices electronically, it must follow certain specifications to make the notices “clear and prominent.” Specifically, the notices must be unavoidable, of a size and shade and on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, easily printable, and presented on the principal screen or landing page where the disclosure is relevant. These requirements are designed to ensure that the notices will be effective in communicating the information online. The proposed settlement also contains record-keeping and reporting provisions to allow the FTC to monitor compliance with the order.

APPENDIX 17
[Company Name]
FAIR CREDIT REPORTING ACT DISCLOSURE & AUTHORIZATION

[Company Name]:

- when considering your application for employment;
- when making a decision whether to offer you employment;
- when deciding whether to continue your employment (if you are hired); and
- when making other employment related decisions directly affecting you,

may wish to obtain and use a “consumer report” from a “consumer reporting agency.” These terms are defined in the Fair Credit Reporting Act (“FCRA”), which applies to you. As an applicant for employment or employee of [Company Name], you are a “consumer” with rights under the FCRA.

A “consumer reporting agency” is a person or business that, for monetary fees, dues or on a cooperative nonprofit basis, regularly assembles or evaluates consumer credit information or other information on consumers for the purpose of furnishing “consumer reports” to others, such as [Company Name].

A “consumer report” is any written, oral, other communication of any information by a “consumer reporting agency” bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or collected for the purpose of serving as a factor in establishing the consumer’s eligibility for employment purposes.

An “investigative consumer report” is a consumer report in which the information about your character, general reputation, personal characteristics and mode of living is obtained in whole or in part through personal interviews with persons who may have knowledge concerning such information.

If [Company Name] obtains a “consumer report” about you, and if [Company Name] considers any information in the “consumer report” when making an employment related decision that directly and adversely affects you, you will be provided with a copy of the “consumer report” before the decision is finalized. You also may contact the Federal Trade Commission about your rights under the FCRA as “consumer” with regard to “consumer reports” and “consumer reporting agencies.”

AUTHORIZATION AND RELEASE

I hereby certify that the information provided by me for the purpose of employment is true and complete to the best of my knowledge. I understand that if I am employed, any false statements I have given will be considered as cause for dismissal. As part of my request for employment, I voluntarily authorize all persons, businesses, current and former employers and supervisors, credit reporting agencies, educational institutions, law enforcement agencies, motor vehicle departments and city, state, county and federal courts to release information they may have about me to [Company Name] and/or [Name of Background Check Company]. If I am employed by [Company Name], this permission shall remain in effect as long as I am an employee.

I voluntarily waive all recourse, and release all parties from liability for complying with or responding to this Authorization. *Also, I request that a photocopy or facsimile of this Authorization be treated as though it were the original.*

In accordance with the Fair Credit Reporting Act, if my employment is denied, based either wholly or partly on information contained in a consumer report or investigative consumer report from a consumer reporting agency, [Company Name] shall so advise me, and supply the name and address of the consumer reporting agency making the report.

I hereby authorize [Company Name] and/or [Name of Background Check Company] to obtain a consumer report and/or investigative consumer report regarding me in connection with: (1) my application for employment; and/or (2) if I am hired, my continued employment.

I ACKNOWLEDGE THAT I HAVE RECEIVED AND READ THIS "FAIR CREDIT REPORTING ACT DISCLOSURE, AUTHORIZATION AND RELEASE FORM."

I HAVE ALSO RECEIVED A COPY OF THE ATTACHED "A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT."

Signature _____ Printed Name _____

Date _____

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

A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT

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

- You must be told if information in your file has been used against you. Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse action against you – must tell you, and must give you the name, address and phone number of the agency that provided the information.

- You have the right to know what is in your file. You may request and obtain all the information about you in the files of a consumer reporting agency (your "file disclosure"). You will be required to provide proper identification, which may include your Social Security number. In many cases, the disclosure will be free. You are entitled to a free file disclosure if:

- o A person has taken adverse action against you because of information in your credit report;
- o You are the victim of identify theft and place a fraud alert in your file;
- o Your file contains inaccurate information as a result of fraud;
- o You are on public assistance;
- o You are unemployed but expect to apply for employment within 60 days.

In addition, by September 2005 all consumers will be entitled to one free disclosure every 12 months upon request from each nationwide credit bureau and from nationwide specialty consumer reporting agencies. See www.ftc.gov/credit for additional information.

- **You have the right to ask for a credit score.** Credit scores are numerical summaries of your credit worthiness based on information from credit bureaus. You may request a credit score from consumer reporting agencies that create scores or distribute scores used in residential real property loans, but you will have to pay for it. In some mortgage transactions, you will receive credit score information for free from the mortgage lender.

- **You have the right to dispute incomplete or inaccurate information.** If you identify information in your file that is incomplete or inaccurate and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous. See www.ftc.gov/credit for an explanation of dispute procedures.

- **Consumer reporting agencies must correct or delete inaccurate, incomplete or unverifiable information.** Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. However, a consumer reporting agency may continue to report information it has verified as accurate.

- **Consumer reporting agencies may not report outdated negative information.** In most cases, a consumer reporting agency may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

- **Access to your file is limited.** A consumer reporting agency may provide information about you only to people with a valid need - usually to consider an application with a creditor, insurer, employer, landlord, or other business. The FCRA specifies those with a valid need for access.

- **You must give your consent for reports to be provided to employers.** A consumer reporting agency may not give out information about you to your employer, or a potential employer, without your written consent given to the employer. Written consent generally is not required in the trucking industry. For more information, go to www.ftc.gov/credit.

- **You may limit "prescreened" offers of credit and insurance you get based on information in your credit report.** Unsolicited "prescreened" offers for credit and insurance must include a toll-free phone number you can call if you choose to remove your name and address from the lists these offers are based on. You may opt-out with the nationwide credit bureaus at 1-888-567-8688.

- **You may seek damages from violators.** If a consumer reporting agency, or, in some cases, a user of consumer reports or a furnisher of information to a consumer reporting agency violates the FCRA, you may be able to sue in state or federal court.

- **Identify theft victims and active duty military personnel have additional rights.** For more information, visit www.ftc.gov/credit.

States may enforce the FCRA, and many states have their own consumer reporting laws. In some cases, you may have more rights under state law. For more information, contact your state or local consumer protection agency or your state Attorney General. Federal enforcers are:

TYPE OF BUSINESS:	CONTACT:
Consumer reporting agencies, creditors and others not listed below	Federal Trade Commission: Consumer Response Center - FCRA Washington, DC 20580 1-877-382-4357
National banks, federal branches/agencies of foreign banks (word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance Management Mail Stop 6-6 Washington, DC 20219 1-800-613-6743
Federal Reserve System member banks (except national banks and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 202-452-3693
Savings associations and federally chartered savings banks (word "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Complaints Washington, DC 20552 800-842-6929
Federal credit unions (words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 703-519-4600
State-chartered banks that are not members of the Federal Reserve System	Federal Deposit Insurance Corporation Consumer Response Center 2345 Grand Avenue, Suite 100 Kansas City, Missouri 64108-2638 1-877-275-3342
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission	Department of Transportation Office of Financial Management Washington, DC 20590 202-366-1306
Activities subject to the Packers and Stockyards Act of 1921	Department of Agriculture Office of Deputy Administrator - GIPSA Washington, DC 20250 202-720-7051

**APPENDIX 18
FCRA PRE-ADVERSE ACTION SAMPLE LETTER**

[NOTE: PLACE THIS LETTER ON YOUR COMPANY LETTERHEAD. THIS LETTER SHOULD BE USED PRIOR TO TAKING ADVERSE ACTION]

CONFIDENTIAL -- TO BE OPENED BY ADDRESSEE ONLY

Today's Date

[Insert Your Company Name]

Address

Address

Dear [Insert Recipient's Name]:

As part of its employment process, [Insert Your Company Name] obtains, or asks others acting on its behalf to obtain, consumer reports regarding Candidates. These reports assist them in evaluating individuals for employment as (Insert Your Company Name) team members.

We are enclosing a copy of the consumer report obtained in conjunction with your consideration for employment. The information in the report was obtained from:

[Insert Name and Address of Background Check Company or Source here]

Address

Address

We are also enclosing a copy of an information sheet summarizing your rights under the Fair Credit Reporting Act (FCRA) and a Disclosure Request form that can be completed by you to dispute the findings. Please return the completed form to [Insert Background Check Company or Source here] at the above address within (5) five business days from the date of this letter.

[Insert Your Company Name] has or will be completing their review of your application within the next few days, and may take action based on the enclosed report.

You have the right to dispute the accuracy or completeness of any information contained in the report by contacting [Insert Background Check Company or Source here] directly.

Thank you again for considering employment with [Insert Your Company Name].

Sincerely,

[Insert Your Company Name]

Enc.: Copy of investigation report
Summary of Rights under FCRA
Disclosure Request Form

**APPENDIX 19
FCRA ADVERSE ACTION SAMPLE LETTER**

[NOTE: PLACE THIS LETTER ON YOUR COMPANY LETTERHEAD. THIS LETTER SHOULD BE USED WHEN TAKING ADVERSE ACTION REGARDING APPLICANTS]

CONFIDENTIAL -- TO BE OPENED BY ADDRESSEE ONLY

Today's Date

[Insert Your Company Name]

Address

Address

Dear [Insert Recipient's Name]:

Based on information contained in a recently obtained consumer report on you, [Insert Your Company Name] has elected not to extend you an offer of employment or continue your employment. The information in the report that was previously sent to you was obtained from:

[Insert Name and Address of Background Check Company or Source here]

Address

Address

[Insert Background Check Company or Source here] did not make the decision not to hire you, and is unable to provide you with specific reasons why you were not hired.

Please note that you have already received a copy of your report, a Summary of Your Rights under the Fair Credit Reporting Act and had the opportunity to dispute the accuracy or completeness of any information contained in the report with [Insert Background Check Company or Source here] before the adverse action was taken.

Thank you for considering employment with [Insert Your Company Name].

Sincerely,

[Insert Your Company Name]

APPENDIX 20

AVOID FAKE-DEGREE BURNS BY RESEARCHING ACADEMIC CREDENTIALS

The information in this section was obtained from the website of the Bureau of Consumer Protection Business Center, Federal Trade Commission (FTC): <http://business.ftc.gov/documents/bus65-avoid-fake-degree-burns-researching-academic-credentials>.

I. BACKGROUND CHECK 101: FAKE DEGREES

If you're a hiring manager or human resources professional, chances are you review applications and resumes from people who want to work for your organization or who want to be promoted. Some applicants may list credentials — like a bachelor's, master's, or doctoral degree, or a professional certification — that sound credible, but in fact, were not earned through a legitimate course of study at an accredited institution.

Federal officials caution that some people are buying phony credentials from “diploma mills” — companies that sell “degrees” or certificates on the Internet without requiring the buyer to do anything more than pay a fee. Most diploma mills charge a flat fee, require little course work, if any, and award a degree based solely on “work or life experience.”

According to officials from the Federal Trade Commission (FTC), the Department of Education, and the Office of Personnel Management (OPM) bogus credentials can compromise your credibility — and your organization's. You could place an unqualified person in a position of responsibility, leaving your organization liable if the employee's actions harm someone. You could hire a person who is dishonest in other ways, exposing your organization and colleagues to potential damage. And if the bogus degrees are brought to light, you risk embarrassment.

The agencies have teamed up, putting new tools in place to help you weed out bogus academic credentials and insure the integrity of your hiring process.

II. TELL-TALE SIGNS OF A BOGUS DEGREE

Although it's not always easy to tell if academic credentials are from an accredited institution, the federal officials say there are clues to help you spot questionable credentials on a resume or application. Look for:

A. Strange Degrees

1. Out of Sequence Degrees

When you review education claims, you expect to see degrees earned in a traditional progression — high school, followed by bachelor's, master's, and doctoral or other advanced degrees. If an applicant claims a master's or doctoral degree, but no bachelor's degree — or if the applicant claims a college degree, but no high school diploma or General Educational Development (GED) diploma, consider it a red flag, and a likely sign of a diploma mill.

2. Quickie Degrees

It generally takes time to earn a college or advanced degree — three to four years for an undergraduate degree, one or two years for a master's degree, and even longer to earn a doctorate. A degree earned in a very short time, or several degrees listed for the same year, are warning signs for the hiring official or the person doing the preliminary screening.

3. Degrees From Schools in Locations Different From the Applicant's Job or Home

If the applicant worked full-time while attending school, check the locations of the job and the educational institution. If the applicant didn't live where he went to school, check to see if the degree is from an accredited distance learning institution, using the steps described under 'Checking Out Academic Credentials.' If the degree is not from a legitimate, accredited distance learning institution, it may be from a diploma mill.

4. Sound-Alike Names

Some diploma mills use names that sound or look like those of well-known colleges or universities. If the institution has a name similar to a well-known school, but is located in a different state, check on it. Should you come across a degree from an institution with a prestigious-sounding foreign name, that calls for some homework, too. Researching the legitimacy of foreign schools can be a challenge, but consider it a warning sign if an applicant claims a degree from a country where she never lived.

B. **Checking Out Academic Credentials**

Federal officials recommend that you always check academic credentials, even when the school they're from is well-known. Some applicants may falsify information about their academic backgrounds rather than about their work history, possibly because employers are less likely to check with schools for verification or to require academic transcripts. Here's how to verify academic credentials:

1. Contact the School

Most college registrars will confirm dates of attendance and graduation, as well as degrees awarded and majors, upon request. If the applicant gives permission, they may provide a certified academic transcript. If you aren't familiar with the school, don't stop your research just because someone answers your questions on the phone or responds with a letter. Some diploma mills offer a "verification service" that will send a phony transcript to a prospective employer who calls.

2. Research the School on the Internet

Check to see if the school is accredited by a recognized agency. Colleges and universities accredited by legitimate agencies generally undergo a rigorous review of the quality of their educational programs. If a school has been accredited by a nationally recognized accrediting agency, it's probably legitimate. Many diploma mills claim to be "accredited," but the accreditation is from a bogus, but official-sounding, agency they invented.

You can use the Internet to check if a school is accredited by a legitimate organization at a new database of

accredited academic institutions, posted by the U.S. Department of Education at www.ope.ed.gov/accreditation. (There are a few legitimate institutions that have not pursued accreditation.)

To find out if an accrediting agency is legitimate, check the list of recognized national and regional accrediting agencies maintained by the Council for Higher Education Accreditation at www.chea.org.

Look at the school's website. Although it is prudent to check out the school on the Internet, it's not always easy to pick out a diploma mill based on a quick scan of its site. Some diploma mills have slick websites, and a "dot-edu" Web address doesn't guarantee legitimacy. Nevertheless, the website can be a source of information. Indeed, federal officials say it's probably a diploma mill if:

- tuition is charged on a per-degree basis, rather than per credit, course, or semester;
- there are few or unspecified degree requirements, or none at all;
- the emphasis is on degrees for work or life experience, and
- the school is relatively new, or has recently changed its name.

Check other resources. There is no comprehensive list of diploma mills on the Web because new phony credentialing sources arise all the time.

NOTE: *the Oregon Student Assistance Commission's Office of Degree Authorization maintains a list of organizations it has identified as diploma mills at www.osac.state.or.us/oda.*

Another way to check up on a school is to call the registrar of a local college or university and ask if it would accept transfer credits from the school you are researching.

3. Ask the Applicant for Proof of the Degree and the School's Accreditation

If you don't get satisfactory answers from the school itself and the accreditation sites on the Web, ask the applicant

for proof of the degree, including a certified transcript, and the school's accreditation. Ultimately, it's up to the applicant to show that he earned his credentials from a legitimate institution.

APPENDIX 21

**Questions and Answers About the EEOC's 2012 Enforcement Guidance on
the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII**

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII ("disparate treatment discrimination"). First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin.

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some

state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969, and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pa. Trans. Auth.*, 479 F.3d 232 (3d Cir. 2007), decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and

therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
 - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
 - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
 - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Mo. Pac. R.R.*, 549 F.2d 1158 (8th

Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

APPENDIX 22
EEOC RECENT RULING:
TRANSGENDER DISCRIMINATION IS SEX DISCRIMINATION

***Macy v. Holder*, Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 23, 2012)**

On April 23, 2012, the Equal Employment Opportunity Commission (“EEOC”) held in a landmark decision, that transgender individuals who are discriminated against may now have recourse under Title VII of the Civil Rights Act of 1964, which generally prohibits employment discrimination “based on race, color, religion, sex and national origin.” The opinion was issued in *Macy v. Holder*, Appeal No. 0120120821, Agency No. ATF-2011-00751 (April 23, 2012), and it is the first time the EEOC has ruled that transgender discrimination is a form of sex discrimination.

The EEOC’s opinion arose after the Plaintiff, a police detective in Phoenix, Arizona, applied for a job with the Department of Alcohol, Tobacco, Firearms and Explosives (“ATF”). During the interview with the office’s director the Plaintiff was known as a man, and the director offered her the position provided she passed a background check. When the Plaintiff was contacted by a civilian contractor who would officially hire her for the ATF position, she informed the contractor that she was in the process of transitioning from male to female. Five days later, the Plaintiff was told that the position was no longer available due to budget cuts. She later discovered, however, that the position had instead been filled by someone else, who was allegedly further along in the background check process.

Title VII mandates that, except as otherwise specifically provided, “[a]ll personnel actions affecting [federal] employees or applicants for employment ... shall be made free from any discrimination based on...sex...” 42 U.S.C. § 2000e-16(a). In analyzing whether the “term ‘sex’ ‘encompasses both sex—that is, the biological differences between man and woman—and gender,” the EEOC relied on precedent from the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). That is, Title VII bars “not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.” Similarly, the terms “gender” and “sex” are often used interchangeably to describe the discrimination prohibited

by Title VII. Accordingly, Title VII’s ban on sex discrimination prohibits discrimination on the basis of both biological sex and gender, where a person’s “‘gender’ encompasses not only a [their] biological sex but also the cultural and social aspects associated with masculinity and femininity.”

After examining the relevant law involved in sex discrimination claims, the Commission then clarified that there are also policy reasons for not discriminating against a person based on their biological sex:

That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a person’s biological sex but also the cultural and social aspects associated with masculinity and femininity.

Ultimately, in reinstating the Plaintiff’s Title VII claim, the EEOC concluded, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.

Although this opinion is not binding on courts, employers cannot deny the significance of the EEOC’s decision, and failure to properly implement equal employment practices can be very costly for companies.

APPENDIX 23 IDENTIFYING APPLICANT SKILLS: 50 GREAT INTERVIEW QUESTIONS

Katrina Grider

In addition to giving job-specific tests, the best way to tell if applicants carry the skills to perform specific tasks is to ask very direct questions about how they have used each skill in the past. Here are some sample questions hiring managers can use to spot whether these 10 important “soft” skills are present:

A. INITIATIVE

1. Give me an example of a time you did more than was required in your job.
2. What have you done to make your job easier or more rewarding?
3. Describe a situation where you found you had a serious problem. What did you do to solve it?
4. What do you do differently than other people in your occupation?
5. Tell me about an idea you generated. How did it work out?

B. DECISION-MAKING

6. What was the toughest decision you made recently? Why?
7. Describe a work-related problem you had to face recently. What procedures did you use to deal with it?

C. COMMUNICATION SKILLS

8. Describe when you had to pitch a proposal. How did you do ... and why do you think it went that way?
9. Have you ever given instructions and then learned he or she did it wrong? Why did that happen?
10. Have you ever done any public speaking? How did it work out?

D. INTEGRITY

11. Do you feel some rules should be obeyed more stringently than others?
12. Did you ever have to deal with a co-worker who wasn't pulling his/her weight? What did you do about it?

E. LEADERSHIP

13. Have you ever had to introduce a new idea or process at work? What approach did you take to gain cooperation?
14. Tell me about a time you had to gain the cooperation of a group over which you had little authority. How effective were you?
15. Describe how you helped someone solve a problem. What did you do?

F. PERSUASIVENESS

16. What was the best idea you've ever sold to a superior? How did you do it?
17. What was the best idea you ever failed to sell? What was the problem?
18. What strategies have you found work best when trying to sway someone to your point of view?

G. PLANNING/TIME MANAGEMENT

19. Describe a typical workweek. How did you plan the week's activities?
20. How do you determine which activities have top priorities on your time?
21. How do you develop short-range plans for your organization? Long-range?

22. How many hours a week do you find it critical to get your job done?

H. SALES SKILLS

23. Describe the primary types of people to whom you sell. What approach do you use for each group?

24. What's the best method you've found to obtain new prospects?

25. How do your selling techniques differ from those of others you know?

26. Describe your toughest sales experiences. Did you make the sale?

27. Describe a typical sales encounter. Exactly what would you say to convince a customer to buy?

28. Define your closing style.

I. SUPERVISION

29. What have you done to make your group work more efficiently?

30. What is the No. 1 thing that distinguishes a superior employee from a typical one?

31. How do you stay in the information loop and monitor your staff's performance?

32. How do you confront subordinates when results are unacceptable?

33. Give me an example of your ability to facilitate progressive change within your organization.

J. TECHNICAL SKILLS

34. How did you gain the technical knowledge you need to do your job?

35. Give me an example of an especially difficult assignment or project. What was your role? What did you do?

36. Have you received any commendations for your performance?

37. What is the most important development in your field today? What impact do you think it will have?

38. How do you keep informed about what's happening in your field?

39. To what job-related organizations do you belong? What seminars have you attended?

40. What job-related publications do you normally read?

K. OTHER GOOD GENERAL QUESTIONS

41. What skills do you enjoy using?

42. What is your greatest strength?

43. What's the greatest asset you currently bring to your company?

44. What is your greatest weakness, and what have you done to overcome it?

45. Why should I hire you?

46. What makes you stand out?

47. If you started tomorrow, how could you contribute right away?

48. Are you familiar with our corporate culture? How would you fit in?

49. How would you spend day #1?

50. What do you feel an employer owes its employees ... and vice versa?

APPENDIX 24

Interview Myths and Mayhem: 50 Off-Limits Interview Questions

Katrina Grider

Job interviews present a minefield of legal problems. One wrong question could spark a discrimination lawsuit. That is why you should never "wing it" during interviews. Instead, create a list of interview questions and make sure every question asks for job-related information that will help in the selection process.

Federal and state laws prohibit discrimination on the basis of an applicant's race, color, national origin, religion, sex, age or disability. Some state laws also prohibit discrimination based on factors such as marital status or sexual orientation. If you ask a job applicant a question specifically relating to one of those characteristics, you're subject to being sued.

Every question you ask should somehow relate to this central theme: "How are you qualified to perform the job you are applying for?" Managers usually land in trouble when they ask for information that's irrelevant to a candidate's ability to do the job.

The hiring process is time-consuming, exhausting and distracting. Yet if you make a mistake, the consequences could be damaging ... professionally and financially.

To avoid the appearance of discrimination during interviews, do not ask the following questions:

1. Are you married? Divorced?
2. What is your maiden name?
3. If you're single, are you living with anyone?
4. How old are you? What is your birthday?
5. Could you work for someone who is younger than you?
6. When did you graduate from high school? College? Graduate school?
7. Do you have children? If so, how many and how old are they?

8. Do you own or rent your home?
9. What church do you attend?
10. Do you have any debts?
11. Do you belong to any social or political groups?
12. How much and what kinds of insurance do you have?
13. Where you born? Where were your parent's born?
14. What is your native language?
15. What is your race or ethnicity? Are you biracial or mixed?
16. Does your religion prevent you from working weekends or holidays?
17. Do you attend church regularly?
18. Have you ever been arrested?
19. Have you ever filed for bankruptcy?
20. I need a list of all the organizations, clubs, societies, and lodges to which you belong.

The following questions could result in a post employment retaliation claim:

21. Have you ever been fired because you filed a Title VII claim?
22. Have you ever filed a Title VII discrimination charge?
23. Have you ever filed a discrimination lawsuit?
24. Have you ever filed a worker's compensation claim?
25. Have you ever filed a claim with the Department of Labor?

26. Have you ever filed a grievance? Filed a union grievance?

27. Have you ever been a union member?

The following questions could result in an ADA, ADAAMA, FMLA or GINA lawsuit:

28. Do you suffer from an illness or disability?

29. Have you ever had or been treated for any of these conditions or diseases? (followed by a checklist)

30. Have you been hospitalized? What for?

31. Have you ever been treated by a psychiatrist or psychologist?

32. Have you had a major illness recently?

33. How many days of work did you miss last year because of illness?

34. Do you have any disabilities or impairments that might affect your performance in this job?

35. Are you taking any prescribed drugs?

36. Have you ever been treated for drug addiction or alcoholism?

37. Has anyone in your family ever been diagnosed with cancer? Or any other serious diseases?

38. Do have any sick children or parents to take care of?

39. Do you suffer from or have ever been diagnosed with any mental illnesses?

40. Do you drink? How much and how often?

41. Have you taken any FMLA in the last year? How much?

Many companies ask female applicants questions they don't ask males. Not smart. Here are some questions to avoid with female applicants:

42. Do you plan to get married?

43. Do you intend to start a family?

44. What are your day care plans?

45. Are you comfortable supervising men?

46. What would you do if your husband were transferred?

47. Do you think you could perform the job as well as a man?

48. Are you likely to take time off under the Family and Medical Leave Act?

49. Are you planning on getting pregnant anytime soon?

50. Are you pregnant?

Final point: If a job candidate reveals information that you're not allowed to ask, don't pursue the topic further. The "she brought it up" excuse won't fly in court, so change the subject right away.

APPENDIX 25
Can I Google Applicants?
Katrina Grider

The Short and Practical Answer is NO.

Why? The liability risks far outweigh the minimal benefits of obtaining any particularly relevant, accurate or job-related information. *A good best practice to follow is this: if you cannot ask about it an interview, then you cannot find out about it via social media or online search engines.*

In the context of pre-employment inquiries, an “internet applicant search” is defined as the use of such social media and online search engines as: Google, Bing, Safari, Facebook, LinkedIn, MySpace, Friendster, Twitter, YouTube, blogs, weblogs, texts, instant messaging, email, Skype, online commentary, and chat rooms to conduct background checks and references. There are several compelling reasons why employers should be wary of internet applicant searches.

Discrimination Concerns

First, internet searches often reveal information about an applicant’s protected status, *e.g.* race, sex, national origin, age, disability or handicap, sexual orientation or preference, veteran status, religion, and pregnancy simply because many people leave their social media profiles public and do not restrict access to photos and other self-identifying information. Title VII, ADA, ADAAA, ADEA, and many states (including Texas) prohibit employers from making pre-employment inquiries that are designed to reveal or disclose such protected status or information.²

Furthermore, FMLA, GINA, and HIPAA prohibit employers from unlawfully obtaining information about an applicant’s medical history or condition, sick leave use or other confidential health information via an internet search.³

²Title VII: Title VII of the Civil Rights Act of 1964; ADA: Americans with Disabilities Act; ADAAA: Americans with Disabilities Act Amendments; ADEA: Age Discrimination in Employment Act.

³FMLA: Family and Medical Leave Act; GINA: Genetic Information and Nondiscrimination Act; HIPAA: Health Insurance Portability and Accountability Act.

Finally, the NLRA prohibits employers from finding out about an applicant’s union membership, organizing activities or other concerted and protected activities. The bottom line is that employers may obtain information during an internet search that applicants might later assume is the basis for harassment, discrimination, retaliation or another adverse employment action.

Everybody Else is NOT Doing It

The critical problem is this: once the employer knows the personal information, it cannot “unring the bell.” This potential liability is why HR professionals are very concerned about these issues.

In 2011, the Society for Human Resource Management (SHRM) conducted a study finding that, contrary to popular belief, only 26% of companies used online search engines to screen applicants; and only 18% of companies used social networking sites for that purpose.⁴ The study also indicated that employers listed the following reasons (among others) for not screening applicants on the internet:

- Legal risks due to concerns about discovering protected status information (66%)
- Information found is unreliable (48%)
- Information is not job-related (45%)

The study further stated that of the small percentage of companies that use information from online search engines (26%) or social networking websites (18%) to screen candidates, few have actually used this information to disqualify job candidates. Only 15% of this group indicated that they used online search engine information to disqualify

⁴SHRM, *SHRM Survey Findings: The Use of Social Networking Websites and Online Search Engines in Screening Job Candidates* (Aug. 25, 2011), at <http://www.shrm.org/Research/SurveyFindings/Articles/Pages/TheUseofSocialNetworkingWebsitesandOnlineSearchEnginesinScreeningJobCandidates.aspx>.

job candidates, while 30% used social networking website information to disqualify job candidates.

Inaccurate and Misleading Information

Second, while it appears that employers have unlimited access to internet information, employers must understand that these alleged internet “treasure troves” often contain information that is inaccurate, misleading, out of context, and flat-out wrong.

For example, Facebook recently reported that approximately 83 million (8.7%) out of its 955 million user accounts are duplicate, misclassified and “undesirable” account profiles.⁵ In addition, most people today have “computer twins”, *i.e.*, people online with the same name and date of birth. Employers cannot always be sure that what they see online actually refers to the applicant in question or is even close to being true.

FCRA Issues

Third, social media online searches and inquiries clearly meet the definition of “third party investigative consumer reports” under the Fair Credit Reporting Act (FCRA) which is enforced by the Federal Trade Commission (FTC). In a recent blog, the FTC stated that background checks using information obtained through either online search engines or social media sites must follow the same FCRA rules that apply to the more traditional information that employers have used in the past.⁶ This means that employers must have the applicant’s written consent, and must provide express FCRA disclosures before such online inquiries are initiated.

Privacy Laws Governing Social Media

⁵Heather Kelly, *83 million Facebook accounts are fakes and dupes*, CNNTech (2012), at <http://www.cnn.com/2012/08/02/tech/social-media/facebook-fake-accounts/index.html>.

⁶FTC Business Center Blog, *The Fair Credit Reporting Act & Social Media: What Businesses Should Know* (June 23, 2011), at <http://business.ftc.gov/blog/2011/06/fair-credit-reporting-act-social-media-what-businesses-should-know>.

The laws that may impact on workplace use of social media include the Stored Communications Act (“SCA”), and the Genetic Information Nondiscrimination Act (“GINA”).

The SCA protects the privacy of electronic communications while they are being transmitted. So, for example, you cannot listen in on an employee's phone calls or access unopened e-mail. However, the law allows interception of communications with the employee's consent, either actual or implied. Furthermore, the SCA is not violated if someone intentionally accesses an electronic communication that is readily accessible to the general public. This means that if something comes up during a Google search, it is not protected by the SCA.

As to GINA, the regulations prohibit any questions that can get at someone's genetic information. GINA can be implicated, therefore, if on someone's Facebook page, he or she begins talking about health information.

Common Law Privacy Principles

At common law, “privacy” is the legal right to be left alone. There are various forms of this right, but the one most implicated by use of social media is the “intrusion upon seclusion.” One who intentionally intrudes physically or otherwise upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of privacy if the intrusion would be highly offensive to a reasonable person.

Is use of social media a protected privacy interest? It's only a matter of time before a court says it is not private, because of how many people can access most postings. Common-law privacy is “context-specific.” Employees have as much privacy as you let them think they have. Privacy is a contractual right, which an employee can bargain away.

Best Practices for Employers

Selective enforcement dooms even the best social media policies. Accordingly, employers should:

- Enforce social media policies consistently and fairly
- Understand the discrimination, harassment and retaliation issues regarding the use of social media
- Document all disciplinary actions

- Justify exceptions to the rules
- Abide by company rules regarding post-employment references; and
- Train all managers and employees on the policy.

Don't Ask for Facebook Passwords

Finally, employers should not, under any circumstances, ask applicants for their Facebook passwords. Such requests violate privacy laws as well as the SCA and Computer Fraud Abuse Act (CFAA). The SCA prohibits unauthorized intentional access to electronic information, and the CFAA prohibits unauthorized intentional access to a computer to obtain information. Congress currently is considering legislation that would prohibit employers from soliciting social media account passwords. Maryland recently banned the practice.

APPENDIX 26
SAMPLE SOCIAL MEDIA POLICY

[COMPANY NAME] recognizes that Social Networking (such as personal web sites, blogs, Facebook, MySpace, Twitter, online group discussions, text messaging, message boards, chat rooms, etc.) can be used by employees for personal as well as business purposes. The Company also understands how the use of Internet social network sites and blogs can shape the way the public views our products, employees, vendors, partners and customers. The Company respects the right of any employee to maintain a blog or post a comment on social networking sites. However, the Company is also committed to ensuring that the use of such communications serves the needs of our business by maintaining the Company's identity, integrity, and reputation in a manner consistent with our values and policies. Therefore, [COMPANY NAME] has established the following rules and guidelines for communicating Company-related information via social networking forums whether used in or outside the workplace:

a. Personal Blogging or Social Networking on Company Time

Employees may not post on a personal blog or web page or participate in a personal social networking site during working time or at any time with Company equipment or property. Working time is your scheduled time of work, not including lunch hour, breaks or time prior to or after your shift. [OR] [Company allows limited and occasional use of social networking sites during working time as long as such use is not excessive or does not interfere with work responsibilities or otherwise violate the Company's Code of Conduct].

b. Authorization

Employees must get written authorization before commenting about the Company's services or products on blogs or social networking sites. If authorization is given, the employee must clearly and conspicuously disclose his or her employment relationship with the Company when posting a comment regarding our services or products.

c. Legitimate Business Purposes

Any employee engaging in Social Networking or Blogging for legitimate business purposes (an employer-sponsored blog or media site) must get express approval of all content with the appropriate supervisor before posting. Employees engaged in blogging or networking for legitimate business purposes are responsible for complying with all Company policies.

d. Disclaimer

Any employee who mentions the Company on a personal blog or social networking account must include a disclaimer that specifically states that the opinions and attitudes expressed are those of the employee alone and may not be aligned with those of the Company. The employee must make it clear that he or she is speaking for himself or herself and not on behalf of the organization.

e. Restriction on Customers, Clients, Vendors, Products and Services

Employees are prohibited from soliciting Company customers, vendors, or clients to be "friends" or contacts on any social or professional networking site except when the contact has also been divulged to the company or in cases where there is a pre-established relationship outside the company, which has been disclosed to and approved by the [JOB TITLE] at the time of employment or institution of this policy. Employees are not to advertise or sell any of Company's products or services on any website or social network.

f. Proprietary and Confidential Information

All other Company rules and policies regarding disclosure of sensitive, proprietary, financial or confidential information apply in full to blogs and social networking sites. This includes, but is not limited to, information about trademarks, upcoming product releases, finances, products sold, company strategies and any other information not previously publicly released by the Company. Company logos and trademarks may not be used without express written permission from the Company. To ensure that [COMPANY NAME], its customers,

vendors and employees are not defamed or injured through use of blogs and Social Networking sites, [COMPANY NAME] takes a strong stance against employee blogs or social network sites containing false information or false accusations.

g. Discrimination and Harassment

All other Company rules and policies regarding discrimination, harassment, and retaliation apply in full force to logs and social networking sites. The Company is firmly committed to its equal employment opportunity policies and does not condone or tolerate discrimination. The Company also prohibits all forms of unlawful discrimination, harassment, and retaliation. Employees are prohibited from engaging in any conduct, activities, communication or postings which violate Company policies regarding discrimination, harassment, and retaliation. No messages with derogatory or inflammatory remarks about any legally protected characteristic (including but not limited to: race, color, national origin, sex, disability, age, religion, veteran status, sexual orientation or preference, shall be transmitted or retrieved. Any conduct which is impermissible under the law if expressed in any other form or forum is also impermissible if expressed through blogs, social networks, text messages or other electronic means.

h. Media Contacts

Media contacts made through blogs or social networking sites regarding the Company, its products, employees, partners, vendors, customers or competitors should be referred for coordination and guidance to the [JOB TITLE].

i. Right to Monitor

The Company reserves the right to monitor all public blogs and social networking forums for the purpose of protecting its interests and monitoring compliance with Company policies. If activity is found to be compromising or insubordinate, the Company may require cessation and removal of any detrimental commentary or postings. The Company reserves the right to access any Company computers and electronic communication devices to monitor blogs and online websites. Employees should not maintain any expectation of privacy with respect to information transmitted over, received by, or posted on such sites.

j. Reporting

If an employee believes that a blog or other online communication violates any Company policy, the employee should immediately report the blog or online communication to the [Job Title]. The Company [will] [may] investigate the matter, determine whether such blog, posting, website, or communication violates Company policies, and take appropriate action.

k. Violations of Policy

Any employee who violates this policy may be subject to disciplinary action, up to and including termination. Additionally, violations of this policy may result in criminal prosecution, reimbursement of expenses incurred as a result of the violation, and additional legal action.

l. Employee Rights

This policy is not intended to restrict an employee's right to discuss wages, hours and working conditions with coworkers, or in any way to limit an employee's exercise of rights under the National Labor Relations Act ("NLRA"). A summary of employees' rights under the NLRA is posted in [INSERT ALL LOCATIONS] and is available on the Company's website. Employees will not be disciplined or retaliated against for engaging in activities protected under the NLRA. Employees who have concerns or questions regarding their rights under the NLRA should contact [INSERT NAME AND JOB TITLE].

APPENDIX 27
WAGE AND HOUR--RAGING SOUR:
FACT, FICTION AND COLD HARSH REALITY
Katrina Grider

FICTIONS

1. FICTION: "The FLSA doesn't apply to my small business – I have less than 15 employees."
2. FICTION: "If I pay all my employees on salary then I can avoid having to pay them overtime."
3. FICTION: "The U.S. Constitution guarantees me a right to a break (ANY BREAK)."
4. FICTION: "I have a bi-weekly pay period, and as long as my employees only work 80 hours in that pay period, I don't have to pay overtime."
5. FICTION: "If an employee is not authorized to work overtime and does so anyway, I don't have to pay them for the unauthorized time."
6. FICTION: "You have to pay me double, triple or quadruple time if I work on holidays or weekends."
7. FICTION: "You can't fire me--it's not in writing."
8. FICTION: "How much leave can I get to go to the rodeo?"
9. FICTION: "So, like, how many days till my raise?"
10. FICTION: "Okay, I worked 10 hours today--so I need my 2 hours overtime so I can go to the movies tonight."
11. FICTION: "I'm not working overtime tonight because I have to floss."
12. FICTION: "I'm exempt--I don't have to fill timesheets. Timesheets are for those *other* people."
13. FICTION: "I only accept Southwest Airlines drink coupons as compensation."
14. FICTION: "My doctor says that I can only work during leap years."
15. FICTION: "I'm entitled to overtime for doing your Christmas shopping."
16. FICTION: "I have nightmares so if you want me to work at night, you're gonna have to pay extra for it."
17. FICTION: "My pet flea-circus ran off with my dog, and I need to be off today."
18. FICTION: "Vinnie the Shark says I have to be paid every Friday."

**WAGE AND HOUR--RAGING SOUR
FACT, FICTION AND COLD HARSH REALITY**

Katrina Grider

1. FICTION:

“The FLSA doesn’t apply to my small business – I have less than 15 employees.”

a. FACT:

While many employment laws have threshold limits regarding the number of employees an employer must have before the law applies, the FLSA does not. Even if a company only has one employee, the FLSA applies.

b. WHY:

The FLSA casts a wide net. In general, its provisions apply to all employers and cover all employees who are not specifically exempt and who are either: (a) engaged in interstate commerce or the in the production of goods for interstate commerce; (b) employed by an “enterprise” engaged in such activities; or (c) employed as a private household domestic servant.

2. FICTION:

“If I pay all my employees on salary then I can avoid having to pay them overtime.”

a. FACT:

This is perhaps the biggest misconception of employers.. How ***The manner in which employees are paid absolutely has nothing to do with whether they are exempt or non-exempt for purposes of the FLSA.*** How an employer classifies an employee for purposes of the FLSA is based on the employee's job duties.

b. WHY:

The three most common categories of exempt employees are executive employees, administrative employees, and professional employees. The Department of Labor “(DOL)” website provides fact sheets guiding employers in the requirements of these particular exemptions. While those fact sheets are helpful, they are no substitute for

developing accurate job descriptions and seeking legal counsel to help you determine whether employees should be classified as exempt or non-exempt. The DOL’s website is: www.dol.gov.

Many employees, although non-exempt, still prefer to be paid by salary and that is permissible. But if those employees work overtime, the employer must divide that weekly salary by 40 hours to create an hourly rate and pay 1.5 times the hourly rate for overtime. So, if an employer has a non-exempt employee who strongly favors being paid on a salary, they would be wise to start the salary at a lower level than normal.

3. FICTION:

“The U.S. Constitution guarantees me a right to a break (ANY BREAK).”

a. FACT:

The FLSA does not require that employers give their employees meal or rest periods, regardless of the number of consecutive hours they work.

b. WHY:

Many employers worry that giving an employee a meal period after five hours rather than four hours of work, for example, would violate the Act. Under the FLSA, this is not a concern. However, giving employees some sort of meal break during the work day typically is part of an employer’s standard practice.

Meal times — and timing of such breaks — may also be covered in employee collective bargaining agreements. Federal agencies — such as the DOT or OSHA— may require break periods for industries like the trucking or nuclear industries.

Although the FLSA does not mandate meal or break time, it does address the compensability of such time. The FLSA’s implementing regulations provide that an employee’s meal time must generally be counted as

compensable hours worked unless the break is at least 30 minutes long and the employee is relieved of all duties (29 C.F.R. §785.19). The worker must also be able to leave his or her post (although consent to leave the premises is not required). The regulations add that generally, break periods of five to 20 minutes in duration should be counted as hours worked (29 C.F.R. §785.18).

4. FICTION:

“I have a bi-weekly pay period, and as long as my employees only work 80 hours in that pay period, I don't have to pay overtime.”

a. FACT:

The FLSA does not measure overtime by pay period, whatever that company pay period may be. The FLSA measures entitlement to overtime by hours worked in a 7 day consecutive period. So if an employer's assistant helps with a big project and has logged in 60 hours by Friday, the employer may not tell her to work only 20 hours the second week of the pay period to avoid paying overtime.

b. WHY:

A **workweek** is a period of 168 hours during 7 consecutive 24-hour periods. It may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of minimum wage and overtime payment, each workweek stands alone; there can be no averaging of 2 or more workweeks. Employee coverage, compliance with wage payment requirements, and the application of most exemptions are determined on a workweek basis.

Hours Worked - Covered employees must be paid for all hours worked in a workweek. In general, "hours worked" includes all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the work day to the end of the last principal work activity of the workday. Also included is any additional time the employee is allowed (*i.e.*, suffered or permitted) to work.

5. FICTION:

“If an employee is not authorized to work overtime and does so anyway, I don't have to pay them for the unauthorized time.”

a. FACT:

Being required to pay an employee overtime wages for hours he was expressly told not to work can make employers crazy. But generally, the FLSA does not let employers off the hook for those kinds of wages. To discourage such conduct by employees, make sure employee handbooks strictly prohibit unauthorized overtime and enforce the policy when it is broken, either through disciplinary action or termination.

b. WHY:

Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of the maximum allowable in a given type of employment. Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (except for certain statutory exclusions). The following examples are based on a maximum 40-hour workweek applicable to most covered nonexempt employees.

1. **Hourly rate** (regular pay rate for an employee paid by the hour) - If more than 40 hours are worked, at least one and one-half times the regular rate for each hour over 40 is due.

Example: An employee paid \$8.00 an hour works 44 hours in a workweek. The employee is entitled to at least one and one-half times \$8.00, or \$12.00, for each hour over 40. Pay for the week would be \$320 for the first 40 hours, plus \$48.00 for the four hours of overtime - a total of \$368.00.

2. **Piece rate** - The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings.

Example: An employee paid on a piecework basis works 45 hours in a week and earns \$405. The regular rate of pay for that week is \$405 divided by 45, or \$9.00 an hour. In addition to the straight-time pay, the employee is also entitled to \$4.50 (half the regular rate) for each hour over 40 - an additional \$22.50 for the 5 overtime hours - for a total of \$427.50.

Another way to compensate pieceworkers for overtime, if agreed to before the work is performed, is to pay one and one-half times the piece rate for each piece produced during the overtime hours. The piece rate must be the one actually paid during nonovertime hours and must be enough to yield at least the minimum wage per hour.

3. **Salary** - The regular rate for an employee paid a salary for a regular or specified number of hours a week is obtained by dividing the salary by the number of hours for which the salary is intended to compensate. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the salary.

6. FICTION:

“You have to pay me double, triple or quadruple time if I work on holidays or weekends.”

a. FACT:

The FLSA does not require that employers pay their employees a premium rate for working on holidays or weekends.

b. WHY:

The act requires only that employers pay nonexempt employees at time and one-half their regular rate of pay for hours worked over 40 per workweek. However, such premium payments may be required by CBAs or state law, especially for work on Sundays.

7. FICTION:

“You can’t fire me--it’s not in writing.”

a. FACT:

The FLSA does not require that employers provide their employees with discharge notices.

b. WHY:

The act requires neither that an employee be notified in advance of employment termination or that an employee receive written notice of termination. However, the Texas Payday Law requires employers to provide an employee’s final paycheck no later than the 6th day after discharge, and no later than the next regularly scheduled payday for an employee who resigns.

8. FICTION:

“How much leave can I get to go to the rodeo?”

a. FACT:

The FLSA contains no requirement to provide either paid or unpaid leave for sickness, holidays, vacations, jury duty, personal time or military service, nor does it require severance pay.

b. WHY:

Employers are required to pay nonexempt employees only for hours they work. Several states, however, have laws requiring some unpaid leave, as do other federal laws. Furthermore, the FMLA requires that covered employers give employees up to 12 weeks of unpaid leave in a 12-month period for their own serious health conditions and those of their spouses, parents or children, as well as for other causes.

Also, the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”) provides re-employment rights for employees upon completion of military leave, although it does not require payment for such leave time. At the same time, some state laws have leave provisions that apply only to state employees or to employees selected for jury duty.

9. FICTION:

“So, like, how many days till my raise?”

a. FACT:

The FLSA does not mandate pay raises or fringe benefits.

b. WHY:

The act requires only that employees be paid no less than the minimum wage for each hour worked (currently \$7.25 per hour). Regarding fringe benefits, the DOL stated in a Dec. 20, 1990, opinion letter that:

[t]here are no provisions in this law that would require employers to give employees, whether full-time or part-time, insurance or other fringe benefits. Whether an employer provides such benefits, generally, is a matter for private agreement between employers and employees or their authorized representatives.

The FLSA does not require that retirement, health or life insurance, dental or disability benefits be provided, nor does it mandate leave time. However, other federal laws come into play on this issue. The Davis-Bacon Act and Service Contract Act require certain fringe benefits — such as health and welfare, vacation and holiday pay — for federal contractors, for instance. Other federal laws provide tax penalties for discrimination in offering retirement plans.

10. FICTION:

“Okay, I worked 10 hours today—so I need my 2 hours overtime so I can go to the movies tonight.”

a. FACT:

The FLSA does not require that overtime payments be based on daily — as opposed to weekly — hours worked. In other words, the FLSA does not mandate daily overtime, but rather requires overtime payments, in general, only for hours worked over 40 in a workweek.

b. WHY:

Because of the lack of a daily overtime requirement, the FLSA does not preclude employers from placing an employee on a “10/4” work schedule — where an employee would work four 10-hour days in a week — without paying the employee overtime. Also, since the workweek is generally defined as seven consecutive 24-hour periods, nothing prevents an employer from declaring a work period that splits a workday into parts (starting a new workweek at noon, for example).

11. FICTION:

“I’m not working overtime tonight because I have to floss.”

a. FACT:

The FLSA does not require notice to or consent from employees when scheduling overtime hours.

b. WHY:

Employers have the discretion to establish employee work schedules as they desire, as long as workers are compensated properly and wage and overtime requirements are observed. If these conditions are met, employers may, under the FLSA, schedule employees for as many days or hours as they wish (as long as the worker is at least 16 years old. Employers are not required to pay nonexempt employees who do not report to work.

12. FICTION:

“I’m exempt—I don’t have to fill timesheets. Timesheets are for those other people.”

a. FACT:

The FLSA does not require that records on employees covered by the act be kept in any certain format —for instance, electronically as opposed to on paper. ***But, from a practical standpoint, it can be troublesome to the employer. The FLSA puts the burden on the employer to keep accurate time records of its employees.*** If an employer is faced with a situation in which an employee has been misclassified and you must go back and pay overtime wages, it will not have an accurate record of the

employee's time worked if it has not required exempt employees to keep track of their hours. Second, keeping track of hour worked for exempt employees make it easier for employers to track and monitor use of FMLA intermittent leave.

b. WHY:

The regulations state that employee records may be maintained on any "source document" that allows clear reproductions of records to be produced upon request and achieves adequate organization of records. 29 C.F.R. §516.1. In a March 10, 1995, opinion letter, DOL stated that an employer's proposed computer records storage system would "not violate the requirements of the FLSA as long as it is an accurate representation of time worked and provided the employer is able to convert the data, or any part of it, into a form which is suitable for inspection."

The act also does not require that records be kept for employees not covered by the act, such as independent contractors, elected officials and their personal staff members, although records must be kept for exempt employees.

13. FICTION:

"I only accept Southwest Airlines drink coupons as compensation."

a. FACT:

The FLSA does not require that nonexempt employees be paid on an hourly basis, even though the minimum wage is stated in those terms, or be paid strictly with cash or checks.

b. WHY:

Nonexempt employees can be paid on a salary, commission, piece rate or any other basis, as long as they receive the equivalent of the minimum hourly wage. 29 C.F.R. §776.5. Nor does payment have to be solely in cash or check form; it can also include the "reasonable cost" or "fair value" of furnishing an employee with board, lodging or other facilities, and, in some instances, it can be comprised partially of tips. 29 U.S.C. §203(m); 29 C.F.R. §531.3.

14. FICTION:

"My doctor says that I can only work during leap years."

a. FACT:

The FLSA does not require that an employee's weekly work period coincide with a calendar week.

b. WHY:

The regulations define a workweek as any seven consecutive 24-hour periods. 29 C.F.R. §778.105. Thus, an employer may declare a workweek that departs from the traditional week of Sunday through Saturday, starting it on any hour of any day. A workweek is presumed to be Sunday through Saturday, however, unless an employer declares a different workweek. 29 C.F.R. §778.105.

The regulations also provide that each workweek stands alone; an employee's hours worked may not be averaged over two weeks to avoid overtime liability, for instance if an employee works 50 hours in one week and 30 in the next. 29 C.F.R. §778.104.

15. FICTION:

"I'm entitled to overtime for doing your Christmas shopping."

a. FACT:

The FLSA does not require employers to pay overtime to employees who work fewer than 40 hours in a week.

b. WHY:

For example, if an employee who usually works 35 hours per week works 37 hours one week, an employer does not have to pay the employee at a time and one-half rate for the extra hours. However, depending on the agreement or understanding with the employee, it may have to pay straight time for the extra hours. If the employee in question is paid per hour, he or she is likely owed straight-time pay for the extra work. If the employee is paid a fixed salary for hours worked up to 40 in a week, extra payment is probably not due. 29 C.F.R. §§778.113 and 778.114.

16. FICTION:

“I have nightmares so if you want me to work at night, you’re gonna have to pay extra for it.”

a. FACT:

The FLSA does not require shift premiums for night or weekend work.

b. WHY:

The act does not require that an employer pay an increased rate to a night worker who performs the same duties as a day worker. But if an employer chooses to provide, for instance, a 25 cents per hour incentive for such workers (as many employers do), this premium must be included in the employee’s regular rate of pay when computing overtime (Wage and Hour Division Opinion Letter, Feb. 25, 1994).

17. FICTION:

“My pet flea-circus ran off with my dog, and I need to be off today.”

a. FACT:

The FLSA contains no requirements to provide employee snow days or liberal leave.

b. WHY:

Even the FLSA recognizes stupid excuses for being absent.

18. FICTION:

“Vinnie the Shark says I have to be paid every Friday.”

a. FACT:

The FLSA does not mandate frequency of pay. Paydays may occur weekly, every two weeks, twice a month, monthly, etc., as the employer sees fit.

b. WHY:

Regarding payment of overtime, the regulations provide that there is no requirement in the FLSA that overtime compensation be paid weekly. Rather, the rules state that generally, overtime pay earned “in a particular workweek must be paid on the regular pay day for the period in which such workweek ends.” Although payment of overtime may be delayed if circumstances require it, “in no event may payment be delayed beyond the next payday after [overtime] computation can be made” 29 C.F.R. §778.106.