

SURVEY OF FEDERAL AND ILLINOIS EMPLOYMENT  
LAW STATUTES

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FEDERAL STATUTES, REGULATIONS AND ORDERS

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### FEDERAL STATUTES, REGULATIONS AND ORDERS

**Age Discrimination in Employment Act (ADEA)** -- *Prohibits employment discrimination on the basis of age against employees and applicants who are age 40 and older.*

#### Who is subject to the Act?

All private employers, state and local governments, employment agencies, and labor organizations that employ 20 or more employees are subject to the provisions of ADEA. The Equal Employment Opportunity Commission (EEOC) enforces the Act.

#### Discrimination based on age

ADEA prohibits employers from:

- Depriving or tending to deprive an employee of employment opportunities.
- Discriminating with respect to compensation, terms, conditions, and privileges of employment.
- Making employment decisions including refusing to hire, discharging, promoting, or classifying workers based on age.
- Advertising age limitations or indicating preferences based on age.
- Denying benefits to older workers unless the costs of providing the reduced benefits to older workers is the same as the cost of providing full benefits to younger workers.
- Retaliating against any person that seeks to enforce the provisions of the ADEA.

#### Who can make a claim under the Act?

All employees, former employees, and applicants (but not certain highly-paid executives) subject to the ADEA, who are at least 40 years of age and have experienced an adverse employment action based on age, may make a claim under the ADEA. The EEOC may also enforce the ADEA.

#### What are the available remedies?

Backpay, front pay, employment, promotion, reinstatement, reasonable accommodation, or any other remedy that will make an individual “whole,” plus attorney fees and costs. For willful violations, liquidated damages may be awarded. In cases of intentional age discrimination, a court may award compensatory and punitive damages.

#### What are the defenses available to employers?

- ✓ Good Cause – An employer may discharge or otherwise discipline an individual for good cause without incurring liability under the ADEA.
- ✓ Bona Fide Occupational Qualification (BFOQ) – An employer may defend itself against an age discrimination claim by proving that age is a BFOQ for a specific job (such as pilots, police officers, or jobs that are physically demanding) that is reasonably necessary

for normal operation of the business, and the employer's decision was not based on customer preference or perception.

- ✓ Reasonable Factors Other Than Age – An employer may escape liability by showing that an employment decision with respect to an older worker was based on “reasonable factors other than age.” Economic hardship or the need to cut costs may be considered a reasonable factor other than age, provided that such hardship is not based upon the belief that the cost of employing older workers is higher than employing younger workers.
- ✓ *Bona Fide Seniority System* – An employer may escape ADEA liability by showing that it acted in observance of the terms of a bona fide seniority system; however, a bona fide seniority system may not require or permit involuntary retirement because of age. Same Actor Interference – If the employee was hired and fired by the same person within a relatively short period of time, a court may infer that age was not a factor in the termination. *Rand v. CF Indus., Inc.*, 42 F.3d 1139 (7th Cir. 1994); *Lindsey v. Pate Foods Corp.*, 1999 WL 325047 (N.D.Ill. 1999).

### New Regulations Anticipated

According to the EEOC, a new final rule to address disparate impact claims involving the “reasonable factors other than age” defense is expected by July 2011. The rule will revise the regulations in conformity with the Supreme Court's decisions in *Smith v. Jackson*, 544 U.S. 228 (2005) and *Meacham v. Knolls Atomic Laboratory*, 128 S.Ct. 2395 (2008).

**Americans With Disabilities Act, Title 1 (ADA) as amended by the Americans With Disabilities Amendment Act of 2008 (ADAAA) -- Prohibits discrimination against and requires reasonable accommodation for qualified individuals with a disability.**

### New Regulations

In late March 2011, the EEOC released the much anticipated ADAAA final regulations. They will take effect on May 24, 2011. The regulations shift the emphasis away from the coverage issue of whether an individual meets the definition of “disabled” to the merits of the case and whether employers have complied with their obligations of reasonable accommodation and whether discrimination has occurred. This is a change that requires employers to rethink how they manage the ADA process.

### Who is subject to the Act?

All private employers, state and local governments, employment agencies, and labor organizations that employ 15 or more employees are subject to the provisions of the ADA. The EEOC enforces the Act.

### Discrimination based on disability

- The ADA prohibits employers from discriminating against qualified individuals or applicants on the basis of a disability or a perceived disability with respect to all terms, conditions, and privileges of employment, including the making of employment decisions such as hiring, discharging, promoting, or classifying workers.
- The term “disability” means a physical or mental impairment that substantially limits one or more of the major life activities (such as walking, breathing, hearing, seeing, etc. and

the newly added activities of sitting, reaching, bending, lifting and interacting with others) of an individual, a record of such an impairment, or being regarded as having such an impairment, or any impairment that is episodic or in remission if it would substantially limit a major life activity when it is active.

- The new regulations clarify that “substantially limits” will be broadly construed, and while still requiring an individualized assessment, it is *not* intended to be a demanding standard. Employers should consider whether the impairment makes it more difficult for an employee to perform a major life activity than someone in the general population.
- They also provide that certain impairments “virtually always” will be found to be disabilities, such as: deafness, blindness, an intellectual disability (formerly mental retardation), partially or completely missing limbs, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.
- They include two non-exhaustive lists of “major life activities” – one that focuses on activities (e.g., caring for oneself, performing manual tasks, seeing, hearing, eating, etc. and new activities of sitting, reaching, bending, lifting and interacting with others) and the other focuses on major bodily functions (e.g., functions of the immune system, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, etc.).
- “Mitigating measures” (e.g., medications, prosthetics, corrective surgery, hearing aids, and mobility devices) are not to be considered in assessing whether an individual is covered under the ADA. Impairments are to be evaluated in their unmitigated state when determining whether the individual is substantially limited in a major life activity, except that ordinary eyeglasses and contact lenses may be considered. However, the effects of a mitigating measure (e.g., a medication’s side effects, refusing to take a prescribed medication) may be considered in determining whether a disability exists.
- Some temporary conditions, such as broken limbs, appendicitis or influenza; pregnancy; or physical characteristics such as height, weight, eye color or hair color that are within normal ranges; and, common personality traits such as poor judgment or a quick temper are not to be considered disabilities. However, a condition or the effects of a temporary impairment (even one lasting less than six months) can be “substantially limiting.”
- An individual is “perceived as disabled” when there is a record of impairment that substantially limits one or more major life activity.
  - A record of impairment includes the individual having a history of such impairment or being regarded as having such impairment, such as when the employer specifically recognizes the impairment or the impairment is a result of the attitude of others toward such impairment.
  - “Regarded as” protection also prohibits discrimination based upon the employer’s alleged perception of a mental or physical impairment, even if that impairment is not a perceived or actual disability under the ADA. The focus has shifted from whether the employer believed the impairment was an actual disability to how the employer treated the employee with regard to his or her impairment.

- *e.g.*, a 10-pound lifting restriction that might not rise to the level of an actual disability (under the major life activity of working or otherwise) can be the basis of a “regarded as” claim.
    - “Minor and transitory impairments” (impairments with an actual or expected duration of less than six months) are excluded from the “regarded as” prong.
  - Under the regulations, an employee must have an actual disability or a record of disability to qualify for reasonable accommodation. Employees who are only “regarded as” disabled are not entitled to reasonable accommodation.
- The ADA requires employers make a reasonable accommodation for qualified individuals or applicants who are disabled or perceived disabled, unless such accommodation would impose undue hardship on the operation of the business.
  - A “Reasonable accommodation” includes, but is not limited to, making existing facilities readily accessible, job restructuring, modifying work schedules, and acquiring or modifying equipment.
- Employers may not use methods of administration that have the effect of discrimination on the basis of disability, nor may employers participate in a contractual or other arrangement that has such an effect. Moreover, employers may not retaliate against any individual that seeks to enforce the provisions of the ADA.

#### Who can make a claim under the Act?

Qualified individuals who are disabled or perceived as disabled that have experienced discrimination because of their disability may make a claim under the ADA. A “qualified individual” is a person with a disability that, with or without reasonable accommodation, is able to perform the essential functions of a particular job. Both applicants and employees are protected.

#### What are the remedies?

Backpay, front pay, employment, promotion, reinstatement, reasonable accommodation, or any other remedy that will make an individual “whole,” plus attorney fees and costs. In cases of intentional discrimination, both compensatory and punitive damages may be awarded.

#### What are the defenses available to employers?

- ✓ Undue Hardship – Employers may assert a defense of undue hardship to the “reasonable accommodation” requirement of the ADA. Undue hardship is defined as action requiring significant difficulty or expense when considered in light of the nature and cost of accommodation, financial resources, the size of the business, and the nature and structure of the employer’s operation.
- ✓ Job Related Qualification Standards – If an application or qualification standard, test, or selection criteria is utilized by an employer and tends to screen out disabled individuals, the employer may avoid liability under the ADA if it is shown that the standard, test, or selection criteria are job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation.

### Trend to watch:

With 14 states allowing the use of medical marijuana for medicinal purposes – although Illinois is not such a state a bill narrowly missed passage in the Illinois House in January 2011 – this is an issue that some employers will have to confront over the next few years. Will courts consider marijuana use a reasonable accommodation for an employee with migraines or chronic pain? Where will this leave the employer with a zero-tolerance drug policy? What about employees who operate heavy industrial equipment or have job responsibilities dictated by workplace safety standards? While these questions do not yet have definitive answers, employers should be aware that these issues exist.

**Continuation of Medical Benefits Coverage (COBRA)** -- *Requires continuation of medical benefits coverage for qualified beneficiaries of group plans following a change in job status.*

### Who is subject to the Act?

Employers that maintain a group health plan for employees and normally employed 20 or more employees on a typical business day during the prior calendar year are subject to the provisions of COBRA.

### Required continuation of coverage

- An employer's group health plan must provide each qualified beneficiary (including employees, covered spouses, and dependents) that would lose health plan coverage as a result of a qualifying event the opportunity to elect continuation of coverage under the plan.
  - "Qualifying events" include death, termination (other than for misconduct), reduction in hours, divorce or legal separation, retirement, or cessation of child's dependency.
  - A "group health plan" is an employee welfare benefit plan providing medical care to participants or beneficiaries directly or through insurance, reimbursement, or otherwise.
  - In general, to satisfy the COBRA requirements, the type of continued coverage must be the same as the coverage provided under the group health plan prior to the qualifying event.
  - The required period of continued coverage varies from 18 to 36 months, but the required continued coverage period may be reduced if the qualified beneficiary becomes covered under another group health plan, reaches Medicare eligibility, or fails to pay the premium.
- A group health plan is required to give qualified beneficiaries written notice of their COBRA rights at the time initial coverage begins under the plan. Additionally, employers generally must notify the plan administrator within 30 days of the date of the occurrence of a qualifying event, and if the employer is the plan administrator then the employer/administrator has a total of 44 days to notify qualified beneficiaries of their COBRA rights.

### Who can make a claim under the Act?

Any qualified beneficiary that did not receive the statutory notice may make a claim under the provisions of COBRA.

### What are the remedies?

Qualified beneficiaries may sue to recover COBRA coverage or other relief, and prevailing parties may be awarded attorney fees and costs. Employers that fail to comply with COBRA's requirements may be subject to an excise tax penalty of \$100 per day for each day a plan fails to comply, and a statutory penalty of \$100 per day may be assessed on plan administrators for failure to provide COBRA notices under the Employee Retirement Income Security Act (ERISA). Moreover, if a group health plan fails to comply with COBRA requirements, the employer will be unable to deduct contributions made to any health plan and certain highly compensated individuals will be unable to exclude any employer-provided coverage from gross income.

**Drug-Free Workplace Act** -- *Requires federal contractors and grant recipients to certify and take actions ensuring that its workplace and workers are drug-free.*

### Who is subject to the Act?

All federal contractors and federal assistance recipients are subject to the Drug-Free Workplace Act.

### Drug-free workplace

As a condition to the awarding of a federal contract or grant, federal contractors and federal assistance recipients must provide a drug-free workplace by: publishing and distributing to each employee a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace; specifying what actions or sanctions will be taken or implemented against an employee for violations of the drug-free policy; notifying that employment on the contract or grant is conditioned on the employee abiding by the terms of the drug-free policy; and requiring an employee to notify the employer of any criminal drug statute conviction that is based on a violation occurring in the workplace. Additionally, the federal contractor or assistance recipient must establish a drug-free awareness program.

### What responsibilities do employers have?

Federal contract and federal assistance recipients must make a good faith effort to maintain a drug-free workplace. Employers must notify the contracting or granting federal agency of any covered employee drug convictions within 10 days of receiving notice of such conviction. If an employee has been convicted under any criminal drug statute that is based on a violation occurring in the workplace, the federal contractor or grantee must take appropriate action against employees or require the employee to participate in an approved drug rehabilitation program.

### What are the penalties?

When the federal contracting or granting agency determines that a contractor or assistance recipient has violated the Act or has failed to make a good faith effort to maintain a drug-free

workplace, the contractor or grantee may be subject to suspension of payments or termination of the contract or grant, or both. Additionally, the granting agency may suspend or prevent the contractor or assistance recipient from future opportunities to receive contracts or grants.

## **Equal Employment Opportunity Commission**

- EEOC received 99,922 charges in 2010, a notable increase from previous years. For its newest statute, GINA, it received 201 charges. As for lawsuits, EEOC resolved 315 suits. Of these, 250 were merits suits. These cases can be broken down as follows:
  - Title VII
    - 192 lawsuits
    - \$74 million recovered
  - ADA
    - 41 lawsuits
    - \$2.9 million recovered
  - ADEA
    - 29 lawsuits
    - \$5.3 million recovered
  - EPA
    - 2 lawsuits
    - \$0 recovered
  - Multi-Statute Claims
    - 14 lawsuits
    - \$2.9 million recovered
- Advisory Letter: In an informal advisory letter dated September 10, 2010, EEOC reminded employers regarding the proper use of criminal convictions in employment screening. Employers should not reject any applicant who has a conviction without considering the nature of the job, the nature of the offense, and how long ago the conviction occurred.
- Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities (2007). See also: Employer Best Practices for Workers with Caregiving Responsibilities *April, 2009*; Questions and Answers about EEOC's Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities *May, 2007*.

**Equal Pay Act** -- *Requires equal compensation for equal work performed by employees working under the same conditions, regardless of gender.*

### Who is subject to the Act?

All employers are covered by the provisions of the Equal Pay Act, including all state and local government employees unless specifically exempted.

### Equal pay for equal work

Employers may not discriminate between employees on the basis of gender by paying wages or providing other remuneration (including fringe benefits) to employees at lower rates than other employees of the opposite gender for equal work performed under similar working conditions for jobs requiring the same skills, effort, and responsibility. Wages withheld in violation of the Equal Pay Act are deemed unpaid wages.

### Who can make a claim under the Act?

Any employee who has received unequal pay for equal work performed may make a claim under the Equal Pay Act. The Equal Pay Act applies to all employees including executive, administrative, and professional employees. EEOC may also enforce the provisions of the Act.

### What are the remedies?

Backpay, front pay, liquidated damages, plus attorney fees and costs. Willful violations of the Equal Pay Act may be subject to criminal prosecution and fines up to \$10,000. When a gender-based compensation differential has been proved, the employer will be required to raise the compensation rate of the lower paid gender.

### What are the defenses available to employers?

- ✓ Factor Other Than Gender – Liability may be avoided in cases where the differential in compensation is based on any other factor other than gender. Such factors may include an employee’s job-related education, experience, training, ability, shift differentials, job classifications systems, or market factors.
- ✓ Bona Fide Seniority System – Employers may avoid liability under the Equal Pay Act where unequal compensation is paid pursuant to a bona fide seniority system, merit system, or a system that measures compensation by quantity and quality of work.
- ✓ Additional Duties – Employers may pay unequal compensation based on an employee’s assumption of additional duties, but additional duties will not be a defense where the higher compensation is not related to the additional duties assumed.
- ✓ Red Circle Rates – Certain unusual, higher than normal, wage rates that are maintained for reasons other than gender may be permissible under the Equal Pay Act. An example of a red circle rate is where the employer transfers a long-service employee that can no longer perform his/her regular job to different work, or temporary reassignment.

**Lilly Ledbetter Fair Pay Act of 2009** -- *Designates that a discriminatory compensation decision or other unlawful practice occurs each time compensation is paid pursuant to the original discriminatory compensation decision.*

### Who is subject to the Act?

Those covered by the EPA, ADEA and ADA.

### Time Limitations

This law amends Title VII of the Civil Rights Act of 1964 (Title VII), the ADEA, the ADA and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or other unlawful practice occurs each time compensation is paid pursuant to a discriminatory

compensation decision. This is significant because under this Act the charge-filing periods—300 days in most states and 180 days in the few states that do not have a state fair employment agency—are triggered each time compensation is paid pursuant to a discriminatory compensation decision or practice.

### Pension Checks

According to an EEOC ruling, the Lilly Ledbetter Act does not apply to pension checks and does not alter the current law of when a pension distribution is considered paid. *See Brakeall v. EPA* (EEOC, Appeal No. 0120093805, 11/30/10),

**Fair Labor Standards Act (FLSA)** -- *Governs employee wages and hours of employment and requires a minimum wage, overtime pay, and record keeping.*

### Who is subject to the Act?

All commercial employers are subject to the provisions of the FLSA.

### Fair labor standards

- All commercial employers are required to post a notice explaining provisions of the FLSA, which includes minimum wage and maximum hour requirements.
- Minimum Wage – All commercial employers must pay covered employees at a rate at least equivalent to the minimum wage rate specified by Congress. Some states have minimum wage rates that are higher than the federal rate.
- Maximum Hours – An employer may not employ any covered employee for a workweek longer than 40 hours, unless such employee receives compensation for excess employment at a rate of at least 1½ times the employee’s regular wage rate. Certain exceptions exist for employment pursuant to a collective bargaining agreement.
- Records – All employers must create and maintain employee records that include information on an employee’s wages, hours worked, and other conditions and practices of employment.

### Who can make a claim under the Act?

Any employee engaged in commerce or in the production of goods for commerce may make a claim under the FLSA, except for employees employed in bona fide executive, administrative, or professional capacities, certain highly compensated employees, and persons employed in the capacity of an outside salesman. The Secretary of Labor may also enforce the FLSA.

### What are the remedies?

Unpaid minimum and overtime compensation, liquidated damages, plus attorney fees and costs. Willful violations of the Act may be subject to a \$1,100 penalty for each violation, a fine in an amount up to \$10,000, and/or imprisonment.

### What are the defenses available to employers?

- ✓ Liquidated Damages – While an employer remains liable for actual damages, an employer may avoid liquidated damages when a refusal to pay wages is based on a bona fide belief that the employer is not obligated to pay the wages.

- ✓ Good Faith Reliance – If the employer acts in good faith reliance on a written regulation, order, ruling, approval, or interpretation, an employer may avoid liability for any violation under the FLSA.

### Nursing Mothers

The Patient Protection and Affordable Care Act enacted March 2010 amended §7 of the FLSA, to require employers provide reasonable break periods for nursing mothers to allow them to express breast milk for a nursing child for one year after the child's birth. Employers must provide a private place, other than a bathroom, which may be used by an employee to express breast milk. The number of breaks and the duration of each break will vary. Only employees who are not exempt from the FLSA's overtime pay requirements are entitled to the nursing mother breaks. Employers with fewer than 50 employees are not subject to the break time requirement if compliance would impose an undue hardship on the business. While employers are not required to compensate nursing mothers for breaks taken for expressing milk; where employers already provide compensated breaks, an employee who uses that break time to express milk must be compensated in the same way that other employees are compensated for break times.

### New Regulations

In a new rule effective May 5, 2011, employers using the "tip credit" under Section 3(m) of the FLSA must notify employees (though it is not required that it be in writing it is a better practice to do so) of the wage the employee will earn; the additional amount the employer will credit against tips received (its value may not exceed the actual tips received); that all tips must be kept by the employee (absent a valid tip pooling arrangement); and, that the tip credit shall only apply to employees receiving proper notice. In addition, the final rule provides that there is no cap on the percentage of an employee's tips that may be contributed to a valid tip pool, thus eliminating a long-standing agency policy capping tips. Although many had hoped the Department of Labor (DOL) would address issues regarding the fluctuating work week, the DOL did not cover this in its final rule.

Also, according to the DOL, it will issue new rules regarding child labor and employer recordkeeping. The agency anticipates releasing a final rule regarding child labor "very soon." In addition, the DOL intends to update employer recordkeeping regulations to increase transparency of wage computations and to modernize regulations to allow for electronic recordkeeping for those with flexiplace or telework arrangements. The recordkeeping regulation is expected by August 2011.

**Family and Medical Leave Act (FMLA) -- Requires at least 12 weeks of unpaid job-protected leave each year for qualifying family or medical reasons.**

### Who is subject to the Act?

Commercial employers that employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year are subject to the provisions of the FMLA, as well as all public sector employers.

### Minimum mandatory leave and reinstatement

- An employer must grant eligible employees (who work for employers who employ 50 or more employees within a 75-mile radius) up to a total of 12 workweeks of job-protected, unpaid leave during any 12-month period because:
  - The birth of a child of an employee and for care of such child.
  - The placement of a child with an employee for adoption or foster care.
  - An employee's need to care for a family member (spouse, child, or parent) with a serious health condition (of more than three full consecutive calendar days) – the DOL recently issued a letter clarifying the definition of “son or daughter” to include those in non-traditional families where there is no biological or legal relationship but the employee has assumed responsibility for the child (e.g. an unmarried partner’s biological child)(Administrator's Interpretation No. 2010-3).
  - The employee’s own serious health condition (of more than three full consecutive calendar days) that makes the employee unable to do his/her job duties.
  - A family member who is a member of the armed services was called up to active duty.
  - An employer must grant eligible employees up to six months of leave for family members caring for military veterans injured while on active duty in the U.S. Armed Forces.
- Employees are entitled to have their health benefits maintained during the period of leave as if the employee had continued working. The taking of leave under the FMLA cannot result in the loss of any employment benefit that accrued prior to the employee taking leave.
- Upon return from leave, an employee (other than certain highly compensated employees) must be restored to the position the employee held prior to taking leave, or to an equivalent position with equivalent employment benefits, pay, and other terms of employment. Employers must maintain records pertaining to the obligations imposed under the FMLA, and post a notice summarizing the provisions FMLA.

### Military Family Leave Law

- *Military Caregiver Leave* -- allows eligible employees who are family members of covered service personnel to take up to six months, or 26 workweeks, of leave in a single 12-month period to care for a service member who has a serious illness or injury incurred in the line of duty while the service member is on active leave.
- *Qualified Exigency Leave* -- this leave is restricted to the families of National Guard and Reserve members and allows their family members who are eligible employees to take up

to 12 weeks of leave to manage the service members' affairs while they are on active duty or are called to active duty status in support of a contingency operation.

- Congress did not expressly define "qualified exigency leave," instead they listed eight broad categories that include: short notice of deployment, military and related activities, making alternative child care arrangements, counseling sessions for the family member or service member, and post-deployment activities.

### Employer Notice Obligations

To satisfy their notice obligations, employers should use: 1) the FMLA poster; 2) the "Notice of Eligibility and Rights and Responsibilities" form, and 3) the "Designation Notice" form.

Employers must be familiar with the notice requirements, including the need to explain why (in writing) an employee is not eligible to take FMLA leave, state how much available FMLA leave an employee has to take and how much leave will be designated as FMLA leave, and notify employees, if applicable, that they will be required to submit a fitness-for-duty certification upon their return to work.

### Employee Notice Requirements

An employee must comply with an employer's usual and customary notice/procedural requirements for requesting leave, absent unusual circumstances (e.g., require written notice of need for leave or require notice be communicated to a specific individual). An employee seeking additional FMLA leave (for a previously certified condition) must specifically make reference to the need for FMLA leave or the previous condition for which FMLA leave was taken.

### Medical Certification

There are two DOL medical certification forms: one for employees seeking leave for their own serious health condition and one for employees seeking leave to care for a family member. An employer may directly contact an employee's health care provider for purposes of authenticating information provided on a medical certification form without first obtaining an employee's permission. However, the individual contacting the health care provider must be an HR professional, leave administrator, or management official, and not the employee's direct supervisor. Also, an employer may directly contact an employee's health care provider, in accordance with HIPAA, for purposes of clarifying (obtaining additional) information on the certification form.

### Who can make a claim under the Act?

Aggrieved employees who have been employed for at least 12 months, have at least 1,250 hours of service with the employer during the previous 12-month period, and who are employed at a worksite where 50 or more employees are employed within 75 miles of the worksite may make a claim under the FMLA. The 12 months of employment need not be consecutive.

### What are the remedies?

Damages in the amount of lost wages or employment benefits plus interest, liquidated damages plus interest, compensatory damages, attorney fees and costs, and other equitable relief including employment, reinstatement, and promotion may be awarded for violations of the FMLA.

### What are the defenses available to employers?

- ✓ Good Faith – An employer that has violated the FMLA may limit damages to actual monetary damages if the employer can show it acted in good faith and had reasonable grounds to believe the act or omission was not a violation of the FMLA.

## **Federal Contract Compliance**

The Office of Federal Contract Compliance Programs (OFCCP) of the DOL<sup>1</sup> is responsible for ensuring that federal contractors and subcontractors comply with the non-discrimination (equal employment opportunity (EEO)) and affirmative action laws and regulations. The OFCCP monitors compliance of the EEO and affirmative action laws through random compliance evaluations and it investigates individual complaints of misconduct.

- 1. Executive Order 11246 -- Prohibits federal contractors and assistance recipients from engaging in discrimination and requires affirmative action programs.**

### Who is subject to the Order?

The Order covers federal contractors, federally-assisted construction contractors (which includes contracts paid for in whole or in part from government funds or funds borrowed on government credit under a federal program) and subcontractors who do over \$10,000 in Government business in one year (can aggregate contracts).

### Prohibited discrimination and affirmative action

Executive Order 11246:

- Prohibits federal contractors, subcontractors and federal assistance recipients from engaging in job discrimination based on race, color, religion, gender, or national origin.
- Requires federal contracts include a clause pledging not to discriminate based on these factors.
- Requires all non-construction federal contractor with 50 or more employees and \$50,000 or more in government contracts to develop a written affirmative action program (AAP) for each of its establishments.
- Requires that certain records be maintained and annual compliance reports be filed. Federal Contractors must track the gender, race, and veteran status of each individual who applies for a particular job.

### Who can make a claim under the Act?

Generally, courts have held that Executive Order 11246 does not permit a private employment discrimination action. However, the government may enforce the provisions of the Executive Order.

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<sup>1</sup> The Employment Standards Administration (ESA) of the DOL was responsible for the OFCCP; however, the ESA was abolished in November 2009.

### What are the remedies?

Backpay, front pay, and injunction or other equitable relief may be awarded. Additionally, recommendations may be made to cancel, terminate, or suspend any contract or grant of the non-complying contractor or assistance recipient.

- 2. The Rehabilitation Act -- Prohibits federal contractors and grantees from discriminating in the workplace based on disability and requires contractors take affirmative action in the employment of qualified individuals with disabilities.**

### Who is subject to the Act?

All federal contractors with contracts in excess of \$10,000 and all federal assistance recipients are subject to the provisions of the Rehabilitation Act.

### Discrimination based on disability

- All federal contracts in excess of \$10,000 must contain a provision requiring the contracting party to take affirmative action to employ and advance in employment individuals with disabilities. This provision also applies to subcontracts in excess of \$10,000 for the procurement of personal property and nonpersonal services (including construction) for the United States.
- Federal assistance recipients are prohibited from discriminating, which includes denying benefits or excluding the individual from participation, against an otherwise qualified individual solely by reason of their disability with respect to any program or activity receiving federal assistance.

### Who can make a claim under the Act?

- The prevailing view is that an individual does not have a private right of action for the failure of a contracting party to comply with affirmative action provisions. However, an individual may file a complaint with the Department of Labor and the government may take enforcement action by judicial proceedings.
- On the other hand, disabled individuals that are aggrieved by the discriminatory conduct of any federal assistance recipient generally have a private right of action to enforce the provisions of the Rehabilitation Act.

### Online-Only Application Systems

Federal contractors may use an online-only application system, or another electronic form such as e-mail or facsimile, so long as applicants with disabilities are given an equal opportunity to apply for jobs. See the DOL's *Disability Issues Related to Online Application Systems: Frequently Asked Questions - For Employer* at <http://www.dol.gov/esa/ofccp/regs/compliance/faqs/dir281faqs.htm>.

### What are the remedies?

- Failure of federal contractors to comply may result in appropriate injunctive relief, withholding of payments due on the contract necessary to correct any violation, termination of the contract and/or debarment from receiving future contracts.

- Generally, an individual that has experienced discrimination by federal assistance recipients may be entitled to an award of equitable relief, but it is unsettled whether monetary damages such as compensatory and punitive damages are available.

### What are the defenses available to employers?

- ✓ Undue Hardship – Employers may assert a defense of undue hardship to the requirement of “reasonable accommodation.” Undue hardship is defined as action requiring significant difficulty or expense when considered in light of the nature and cost of accommodation, financial resources, the size of the business, and the nature and structure of the employer’s operation.
- ✓ Job Related Qualification Standards – If an application or qualification standard, test, or selection criteria is utilized by an employer and tends to screen out disabled individuals, the employer may avoid liability under the Rehabilitation Act if it is shown that the standard, test, or selection criteria are job-related and consistent with business necessity and such performance cannot be accomplished by reasonable accommodation.

**3. The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) --**  
*Requires government contracts and subcontracts (entered into by prime contractors) for personal property and non-personal services (including construction) include a provision requiring the contracting party take affirmative action to employ and promote qualified "Vietnam era veterans, special disabled veterans, and veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized."*

### Rulemaking to Watch

On April 25, 2011, the OFCCP issued a much-anticipated proposed rule under VEVRAA to help returning veterans. This would be the first change in 35 years. The OFCCP is proposing to amend the VEVRAA regulations to address the substantial difficulties returning veterans are having in finding employment. The large number of veterans who are returning from military duty has highlighted this issue. Through these amended regulations, the OFCCP hopes to increase employment opportunities for protected veterans by increasing the obligation of federal contractors to collect data and will require contractors to set "hiring benchmarks" against which their actual hiring practices of protected veterans will be measured.

### Who is subject to the Order?

Federal contractors or subcontractors with a federal contract or subcontract of \$100,000 or more entered into or modified on or after December 1, 2003, follow the regulations at 41 CFR Part 60-300, which prohibit discrimination and require covered contractors and subcontractors with 50 or more employees and a federal contract or subcontract of \$100,000 or more to develop and maintain a written VEVRAA AAP.

### Prohibited discrimination and affirmative action

The Executive Order prohibits federal contractors, subcontractors and federal assistance recipients from engaging in job discrimination based on race, color, religion, gender, or national origin. All covered federal contracts must include a clause pledging not to discriminate based on

these factors, and all federal contractors and assistance recipients are required to take affirmative action to ensure that applicants are employed and employees treated without regard to these factors during employment. The Executive Order requires that certain records be maintained, and prime contractors and certain subcontractors must file an annual compliance report if the contractor has more than 50 employees and the contract or subcontract amounts to \$50,000 or more. The Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) within the DOL enforce the affirmative action and mandatory job-listing provisions of VEVRAA. DOL's Veterans' Employment and Training Service (VETS) administers the veterans' employment reporting requirement.

#### Who can make a claim under the Act?

Generally, courts have held that Executive Order 11246 does not permit a private employment discrimination action. However, the government may enforce the provisions of the Executive Order.

#### What are the remedies?

Backpay, front pay, and injunction or other equitable relief may be awarded. Additionally, recommendations may be made to cancel, terminate, or suspend any contract or grant of the non-complying contractor or assistance recipient.

#### The Jobs for Veterans Act (JVA)

Requires contractors list job openings (except top management, those filled from within the organization or those lasting less than three days) with the appropriate local employment service delivery system.

#### The Good-Faith Initiative for Veterans Employment (G-FIVE)

Recognizes companies who make good faith efforts to employ and promote veterans. Recipients of the G-FIVE rating will be excluded from an OFCCP compliance evaluation for three years (unless during the three years there are allegations of misconduct warranting an evaluation). See *The Good-Faith Initiative for Veterans Employment (G-FIVE) Initiative at* <http://www.dol.gov/esa/ofccp/regs/compliance/faqs/dir282faqs.htm>.

#### OFCCP's Regulatory Agenda for 2011

The agency will continue to focus on systemic discrimination in hiring but will also look to other forms of unlawful discrimination in promotions and terminations. Compensation discrimination is considered a "key" priority. It is expected that the OFCCP will begin the process of revising regulations implementing Section 503 and VEVRAA. In addition, the agency will improve nationwide enforcement consistency by updating its Federal Contract Compliance Manual (FCCM).

**4. Recent Changes to the Investigatory Process** - *the OFCCP monitors Federal Contractor establishments' compliance with EO 11246, the Rehabilitation Act and VEVRAA mainly through compliance evaluations.*

**Changes to Compliance Investigations**

The OFCCP uses a Federal Contractor Scheduling System to randomly select contractors for periodic compliance audits. The OFCCP sends out Corporate Scheduling Announcement Letters (CSALs) to advise federal contractors of impending audits. The OFCCP has replaced its Active Case Management (ACM) protocol in favor of the new Active Case Enforcement (ACE) system for determining the scope of supply and service (non-construction) investigations. Under ACE, the OFCCP will require a larger number and greater scope of material during each compliance evaluation than it has in the past. By adopting ACE, the OFCCP did not change its investigatory procedures, but instead increased the *frequency* and *scope* of each investigation. There are still four types of investigative processes, and Federal contractors should expect to undergo some or all of them as part of a “compliance evaluation.”

- **Compliance Review:** This is the most common type of investigative procedure. A compliance review looks at a contractor’s hiring and employment practices, its written affirmative action program (AAP) and the results of its affirmative action efforts. A compliance review may proceed in three stages: desk audit, on-site review and off-site analysis. A “full compliance review” consists of all three stages.
- **Compliance Check:** This is a less intensive investigation which determines whether a Federal contractor has maintained appropriate records, as required by law.
- **Offsite Review of Records:** For an offsite review, a contractor produces its records of its AAPs and any supporting documentation and other documents related to personnel policies and employment actions that may be relevant to the contractor’s compliance.
- **Focused Review:** This is an on-site review that focuses on one or more aspects of the contractor’s organization or employment practices.

**Some specific changes to watch for**

- *Full Desk Audit with Every Evaluation* – What makes things more complicated now is that unlike ACM, which only required a full desk audit for every 25<sup>th</sup> contractor, **ACE requires the OFCCP to perform a full desk audit with every compliance evaluation**, no matter what form of investigation it uses to audit a contractor (compliance review, compliance check, etc.). A full desk audit is comprised of a comprehensive analysis of all of a contractor’s AAPs and supporting documentation, including but not limited to an impact ratio analysis, compensation analysis and assessment of the reasonableness and acceptability of the AAP.
- *Every 25<sup>th</sup> Audit Will Be a Full Review* –According to the OFCCP, under ACE, at a minimum, every 25<sup>th</sup> contractor selected for a compliance evaluation will be subject to a full compliance review, consisting of a full desk audit, on-site review and off-site review. This is being done for quality control. Unlike the previous ACM, such a review will be conducted regardless of whether there are indications of non-compliance or discrimination.

### Some additional changes on the horizon

In May 2011, the OFCCP requested approval from the Office of Management and Budget to make further changes to the documents to be submitted under the scheduling letter (for Supply and Service contractors). In addition to requesting to use two new CSALs: one for compliance checks and the other for full compliance reviews, the itemized listing of items to be submitted would change from 11 to 13 items and will include:

- Copies of employment leave policies (and handbooks where applicable);
- Collective bargaining agreements and supporting documents;
- Affirmative action goals and progress on the goals;
- Detailed data on employment activity (e.g. applicants, hires, promotions and terminations) and will require information be categorized by both job group and job title and with information broken down into racial categories.
- Detailed compensation information for each employee

Comments on the proposed rule will be accepted through July 11, 2011.

### What should federal contractors do now?

- The OFCCP's new procedure means that it is vitally important that contractors maintain accurate and easily reviewable records and other documentation for all affirmative action and employment decisions related to hiring and non-discrimination.
- It is not enough to simply practice non-discrimination and affirmative action and "cross your fingers" that the OFCCP will not ask for too much information about compliance. The ACE system requires the OFCCP take an in-depth look at *every* contractor it investigates.
- If you receive a scheduling letter, ask if you are a 25<sup>th</sup> compliance evaluation, which carries an automatic onsite review obligation.
- These four steps will help you be prepared:
  - Review all AAPs, or implement new AAPs, if needed.
  - Confirm you have retained all necessary records.
  - Conduct informal audits to uncover any indications of discrimination or potential discrimination.
  - Address and resolve any allegations or complaints of discrimination

**Genetic Information Non-Discrimination Act of 2008, Title II (GINA) -- Prohibits employers from using genetic information in making employment decisions and from retaliating for complaining about any alleged violations, from intentionally acquiring genetic information, and it requires confidentiality of the information.**

### Who is subject to the Act?

All private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs.

### Discrimination and Harassment based on genetics

- Prohibits employers from using genetic information in making any employment decisions (e.g. hiring, firing, compensation, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment).
- Prohibits employers from harassing employees based on their genetic information (e.g. making offensive or derogatory remarks about an applicant, employee or relative of an applicant or employee's genetic information).
- Limits employers from requesting, requiring or purchasing genetic information.
- Requires that genetic information be kept confidential with strict disclosure limitations (confidentiality rules are similar to rules governing general medical information).
- Prohibits retaliation for filing a charge of discrimination or harassment, participating in a proceeding, or otherwise opposing discrimination or harassment based on genetic information.

### Genetic Information

- What constitutes “genetic information” is construed broadly and includes information about an individual's or family member's genetic tests, information about family medical history (such as information about a disease or disorder of an individual's family members), an individual's or family member's request for or receipt of genetic services or participation in clinical research that includes genetic services, and the genetic information of a fetus carried by an individual or a pregnant woman who is a family member of the individual or the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.
- Genetic Information does not include information:
  - About the sex or age of an individual or the individual's family members
  - That an individual *currently has* a disease or disorder
  - From alcohol or drug tests.
- Genetic tests include tests such as: carrier screening to determine the risk of conditions such as cystic fibrosis, sickle cell anemia, spinal muscular atrophy or fragile X syndrome in future offspring; screening for BRCA1 or BRCA2 variant showing a predisposition to breast cancer; and DNA testing to determine family relationships (e.g. paternity tests). However, complete blood counts, cholesterol tests and liver function tests do not count as genetic tests.

### What are the remedies?

The remedies are the same as those available under Title VII and include backpay, front pay, employment, promotion, reasonable accommodation, and compensatory and punitive damages may be awarded for intentional violations. Additionally, the prevailing party may be entitled to reasonable attorney fees and costs

### What are the defenses available to employers?

There are 6 narrow exceptions to the prohibitions:

- The “water cooler” exception where the information is inadvertently learned (such as where a manager or supervisor overhears someone talking about a family member's illness).

- Information (including family medical history) obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, where certain protections are met.
- Family medical history information acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.
- Information (including family medical history) obtained through the public domain (e.g. newspapers) so long as the employer was not searching for genetic information or using sources that will likely reveal genetic information (e.g. websites and on-line discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).
- Genetic Information acquired through a genetic monitoring program of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.
- Genetic information of employees who undergo DNA testing for law enforcement purposes (e.g. a forensic lab or for identifying remains) but the information may only be used for analysis of DNA markers for quality control.

### The ADA

To avoid unwarranted discrimination claims, the regulations provide that an employer does not violate GINA by using, disclosing or acquiring medical information that is not genetic information about a manifested disease, disorder or pathological condition even if the disease, disorder or pathological condition has a genetic basis or component. Under those circumstances, the ADA governs the acquisition, disclosure and use of such medical information, not GINA.

**Health Insurance Portability and Accountability Act (HIPAA) -- Prohibits discrimination based on health status or history, and requires portability and renewability of group plan coverage.**

### Who is subject to the Act?

All private employers that have a group health plan which has 2 or more participants who are current employees on the first day of the plan year are subject to the provisions of HIPAA.

### Prohibited discrimination and portability of group plan coverage

- A group health plan may not establish enrollment eligibility rules or require greater premium payments in relation to an individual or his/her dependents' coverage based on health status, medical condition (both physical and medical), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability.
- Under certain circumstances, and after providing written notice, a group health plan may temporarily limit or exclude benefits relating to preexisting conditions (except for conditions related to pregnancy, certain newborns and adopted children, and conditions based solely on genetic information) provided that such exclusion relates to a condition for which medical advice, diagnosis, care or treatment was recommended or received

within the past 6 months prior to the enrollment date, the exclusion does not exceed 12 months, and the exclusion period is reduced by the length of the aggregate periods of credible coverage applicable to the participant or beneficiary as of the enrollment date.

- A group health plan which is a multiemployer plan or a multiple employer welfare arrangement may only be denied continued access to coverage for nonpayment of contributions, fraud, noncompliance with material plan provisions or collective bargaining agreement, or cessation of coverage in a geographic location.

#### Who can make a claim under the Act?

There is no private right of action under HIPAA, but the government may enforce the HIPAA provisions.

#### What are the penalties?

Civil monetary penalties may be assessed up to \$100 for each violation, but the total penalty for identical violations in a calendar year may not exceed \$25,000. Criminal monetary penalties and imprisonment may apply where a person “knowingly” violates the HIPAA provisions.

#### Stimulus Bill

The Stimulus Bill earmarked funds to create a national, computerized record-keeping system. This system will enhance the privacy and security safeguards of HIPAA. Changes to the law will include:

- "Business Associates" will be directly subject to certain HIPAA privacy and security regulations in the same way that the regulations apply to covered entities. Business associates will also be subject to the same civil and criminal penalties as covered entities.
- Breaches of unsecured personal health information will require notification.
- State Attorneys General may bring a civil action in federal court to enforce HIPAA's privacy and security regulations to seek damages on behalf of state residents.

<p><b>Occupational Safety and Health Act (OSHA)</b> -- <i>Requires compliance with federal safety and health standards in the workplace.</i></p>
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#### Who is subject to the Act?

All commercial employers are subject to the provisions of OSHA.

#### Health and safety standards in the workplace

- All commercial employers are required to provide employees with safe and healthful working conditions, free from recognized hazards that cause or are likely to cause death or serious physical harm, by complying with federal occupational safety and health standards.
- Unless exempted, all commercial employers with more than 10 employees during the last calendar year must keep records related to compliance with federal OSHA standards, including work-related injuries, illnesses, and fatalities.
- Employers are required to post a notice to inform employees of the protections and obligations provided by OSHA, and employers are prohibited from discriminating or

retaliating against any employee because of the employee's connection with any OSHA investigation or proceeding.

#### Who can make a claim under the Act?

OSHA does not create any private civil remedy in favor of an employee, but the government may enforce the provisions of OSHA against employers for violations of health or safety standards.

#### What are the penalties?

For serious violations, including a failure to post mandatory notices, a civil penalty may be assessed in an amount up to \$7,000, and such penalty may continue to be assessed for each day the violation continues. Willful or repeated violations may result in a civil penalty of \$5,000 up to \$70,000, and harsher penalties or imprisonment may apply in cases of willful violations resulting in death.

#### What are the defenses available to employers?

- ✓ Impossibility or Economic Unfeasibility – An employer may assert a defense of impossibility of compliance, which requires proof that compliance with the OSHA standard was impossible or would have precluded the performance of work and that alternative means of protection was pursued by the employer. Additionally, an employer may assert a defense that compliance with the OSHA standard was economically unfeasible.
- ✓ Reasonable Diligence – An employer may assert a defense of reasonable diligence if the employer did not and could not with the exercise of reasonable diligence have known of the presence of an OSHA violation.
- ✓ Employee Misconduct – In order for the employer to assert a defense of employee misconduct, the employee misconduct must have been unforeseeable and the employer must have established and enforced work rules to discover and prevent the violation.
- ✓ Greater Hazard – Employers may avoid OSHA liability when the hazards of compliance with OSHA standards would be greater than the hazards of noncompliance. However, the availability of this defense is subject to the employer having previously sought a variance from the OSHA standard.

#### OSHA Overhaul?

While there are those pushing for an overhaul of OSHA, the Republican-controlled House of Representatives does not favor it.

**Older Workers' Benefit Protection Act (OWBPA)** -- *Prohibits waiver by employees of rights under the ADEA unless statutory protections are satisfied.*

#### Who is subject to the Act?

All private employers, state and local governments, employment agencies, and labor organizations that employ 20 or more employees are subject to the provisions of the OWBPA.

#### Waiver of ADEA rights or claims

- The OWBPA was added as a new subsection to the ADEA to protect older workers from waiving employment rights and benefits without understanding what was being waived. The OWBPA provides that an individual may not waive any right or claim under the ADEA unless the waiver is knowing and voluntary. At a minimum, a waiver may be knowing and voluntary when: 1) the waiver is written so as to be understood by the employee and specifically refers to ADEA rights or claims, 2) the employee does not waive future rights or claims, 3) the individual receives consideration for his/her waiver, 4) the individual is advised in writing to consult with an attorney and is provided at least 21 days to consider the agreement, and 5) the waiver is revocable for 7 days and is not effective until thereafter.
- When a group of employees are being laid off, in addition to the above requirements (that the waiver be "knowing and voluntary") the employer must give the employees written notice of the layoff and at least 45 days to consider the waiver before signing it. The notice must identify the job titles and ages of the "decisional unit" (e.g. the class, unit or group of employees from which the employer selected the employees who were and were not laid off).
- EEOC issued a new guidance on group waivers in July 2009. A copy of the guidance is available at [http://www.eeoc.gov/policy/docs/qanda\\_severance-agreements.html#IV](http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html#IV).

#### Who can make a claim under the Act?

All employees, former employees, and applicants (but not certain highly-paid executives) of employers that are subject to OWBPA who are at least 40 years of age may make a claim under OWBPA.

#### What are the defenses available to employers?

- ✓ The OWBPA incorporates no exceptions or qualifications with regard to the effect of ADEA waivers.

**Section 1981 of Civil Rights Act of 1866 (Section 1981) -- Prohibits discrimination on basis of race in all aspects of contractual relationships.**

#### Who is subject to the Act?

All employers are subject to the provisions of Section 1981.

#### Racial discrimination in contracts

Section 1981 prohibits intentional discrimination based on race and guarantees all persons the same right in every state to make, enforce, perform, modify, and terminate contracts, and to enjoy the benefits, privileges, terms, and conditions of the contractual relationship. Section 1981 also guarantees the full and equal benefit of all laws and proceedings for the security of persons and property. Section 1981 covers both public and private entities' discriminatory actions, and applies to private actions in the context of employment.

#### Who can make a claim under the Act?

Any person that has experienced race-based employment discrimination may make a claim under Section 1981.

### What are the remedies?

Backpay with interest, front pay, compensatory damages, other equitable relief, and attorney fees and costs may be awarded to the prevailing party. Punitive damages may be available in cases of gross negligence, willful misconduct, or intentional discrimination.

### What are the defenses available to employers?

- ✓ Bona Fide Seniority System – A bona fide seniority system that does not violate Title VII also does not violate Section 1981. *See Waters v. Wis. Steel Works Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974); *Chance v. Bd. Educ. City of N.Y.*, 534 F.2d 993 (2nd Cir. 1976).
- ✓ In contrast, there is no bona fide occupational qualification defense available in racial discrimination cases.

**Title VII of Civil Rights Act of 1964 (Title VII) -- Prohibits employment discrimination against applicants and employees on basis of race, color, religion, gender (including pregnancy), and national origin.**

### Who is subject to Title VII?

All private employers, state and local governments, and education institutions that employ 15 or more employees are subject to the provisions of Title VII.

### Unlawful employment discrimination

Employers are prohibited from failing or refusing to hire or discharge any individual, or otherwise discriminating against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, gender, or national origin. It is an unlawful employment practice if race, color, religion, gender, or national origin is a motivating factor, regardless of other factors which may have been considered, in the making of an employment decision.

- Racial/Color Discrimination – Employers may not treat employees or applicants differently based on a condition that predominately affects one race, or because of immutable characteristics such as skin or eye color, hair texture, or certain facial features. Employers may not make pre-employment inquiries into an applicant's race. Additionally, employers may not limit, segregate, or classify employees or applicants for employment in any way which would deprive an individual of employment opportunities. Employers must take steps to prevent harassment or conduct that creates a hostile work environment or interferes with an individual's work performance such as racial jokes or offensive/derogatory comments based on race.
- Religious Discrimination – Employers may not treat employees or applicants more or less favorably because of religious beliefs or practices, and may not force employees to participate or not participate in religious activities. Additionally, employers may not place more restriction on religious expression than on other types of expression and, unless it would cause an employer undue hardship, the employer must accommodate the employee's religious beliefs and practices. Employers must also take steps to prevent religious harassment.

- Discrimination Based on National Origin – Employers must not make any employment decision based on national origin unless it materially interferes with job performance. Thus, employers can only require English fluency if required for effective job performance or the safe and efficient operation of the employer’s business.
- Gender Discrimination and Harassment
  - Gender Discrimination - Employers may not make employment decisions based upon the employee or applicant’s gender, and the employer may not have policies in place that disproportionately exclude one gender.
  - Pregnancy-based Discrimination -- Employers must treat pregnancy the same as all other disabilities or temporarily sickness. Health insurance provided by employers must provide benefits for pregnancy-related conditions the same as for other medical conditions, and such benefits may not be limited to married employees.
  - Sexual harassment -- Is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when the rejection or submission interferes with an individual’s work performance or creates and intimidating, hostile, or offensive work environment.

#### Who can make a claim under Title VII?

Employees that have been discriminated against on the basis of race, color, religion, gender, or national origin may bring claims against their employers under Title VII.

#### What are the remedies?

Backpay, front pay, employment, promotion, reasonable accommodation, and compensatory and punitive damages may be awarded for intentional violations. Additionally, the prevailing party may be entitled to reasonable attorney fees and costs.

#### What are the defenses available to employers?

- ✓ Bona Fide Occupational Qualification – An employer may avoid liability under Title VII where religion, gender, or national origin (but not race or color) is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business or enterprise.
- ✓ Bona Fide Seniority System – An employer may apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, a system that measures earnings by quantity or quality of production or by employees who work in different locations, or based upon the results of any professionally developed ability test, provided that such differences are not a result of an intent to discriminate.
- ✓ Mixed Motive Defense – After a plaintiff has demonstrated that an impermissible motive existed, the employer may assert a mixed motive defense showing that the employer would have taken the same action even absent the impermissible motive. The mixed motive defense may limit damages to forms of injunctive relief, declaratory relief, and attorney fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B); *Desert Palace Inc. v. Casino Costa*, 539 U.S. 90 (2003).

- ✓ *Faragher-Ellerth* Defense – Where “tangible employment action” (i.e., termination, constructive discharge, significant change in benefits, or reassignment) has not taken place, an employer may escape vicarious liability by proving that the employer used reasonable care to prevent and correct discrimination based on race, color, religion, national origin, and sexual harassment, and the employee unreasonably failed to take advantage of available antidiscrimination policies to bring the problem to the employer’s attention. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742 (1998). In the context of sexual harassment, “reasonable care” includes publishing employer policies against sexual harassment that include the procedures for reporting complaints and conducting investigations, as well as providing regular, mandatory training programs for all employees.

### Third-party retaliation

On January 24, 2011, the U.S. Supreme Court held in *Thompson v. North American Stainless LP*, 131 S.Ct. 863, 562 U.S. \_\_\_ (2011), that Title VII creates a cause of action for third-party retaliation even though the person did not him or herself engage in protected activity. In the case, Thompson claimed he was fired because his fiancée, a fellow employee, filed an EEOC charge.

Case to watch: On December 6, 2010, the U.S. Supreme Court granted *certiorari* in *Dukes v. Wal-Mart Stores*, 605 F.3d 571 (9th Cir. 2010), a nationwide class-action on behalf of hundreds of thousands of female Wal-Mart employees who claimed the company engaged in a pattern and practice of pay and promotion discrimination.

**The Uniformed Services Employment and Reemployment Rights Act (USERRA) --**  
*Protects service members' reemployment rights when returning from a period of service in the uniformed services (including the reserves or National Guard), and prohibits employer discrimination based on military service or obligation.*

### Who is subject to the Act?

USERRA applies to virtually all employers, including the Federal Government. DOL’s Veterans’ Employment and Training Service (VETS) administers USERRA.

### Notice Requirements

Employers must post notice of USERRA rights. Employees must provide advance written or verbal notice to their employers for all military duty unless giving notice is impossible, unreasonable, or precluded by military necessity. An employee should provide notice as far in advance as is reasonable under the circumstances. Additionally, service members are able (but are not required) to use accrued vacation or annual leave while performing military duty.

### Leave and reemployment

Under USERRA the cumulative length of time that an individual may be absent from work for military duty and retain reemployment rights is five years. Exceptions to the five-year limit include: initial enlistments lasting more than five years, periodic National Guard and Reserve training duty, and involuntary active duty extensions and recalls, especially during a time of

national emergency. USERRA clearly establishes that reemployment protection does not depend on the timing, frequency, duration, or nature of an individual's service as long as the basic eligibility criteria are met.

**Worker Adjustment and Retraining Notification Act (WARN) -- Requires 60-days notice before a plant closing or layoff affecting 50 or more employees.**

### Who is subject to the Act?

Employers that employ 100 or more employees, excluding part-time employees, are subject to the WARN notice provisions.

### Required notice

- An employer may not order a plant closing or mass layoff until the end of a 60-day period after the employer serves written notice to each affected employee or his/her representative, a designated State entity, and the chief elected official of the local government. The term “plant closing” means the permanent or temporary shutdown of one or more operating units within a site of employment resulting in an employment loss of 50 or more employees (excluding part-time employees) during any 30-day period. The term “mass layoff” means a reduction in force which results in an employment loss during any 30-day period at a single site of employment for: (1) at least 33% of employees and at least 50 employees (excluding part-time employees), or (2) at least 500 employees (excluding part-time employees).
- When less than the minimum number of employees are affected by a plant closing or layoff, but 2 or more groups of employees are affected within any 90-day period, which in the aggregate exceed the minimum number requirement, then such action will be considered to be a plant closing or mass layoff unless the employer can prove the employment loss was a result of separate and distinct actions and were not attempts to avoid the WARN requirements.

### Who can make a claim under the Act?

Any employee that suffers employment loss and does not receive timely notice of a plant closing or mass layoff may make a claim under WARN.

### What are the remedies?

Backpay and benefits which would have been covered under an employee benefit plan if the employment loss had not occurred, up to a maximum of 60 days, plus attorney fees. Civil penalties up to \$500 per day may also apply for violations of the WARN provisions.

### What are the defenses available to employers?

- ✓ Good Faith – The court may reduce the amount of penalties or liabilities if an employer proves that it acted in good faith and had reasonable grounds for believing that the act or omission was not a violation of the WARN provisions.
- ✓ Reduced Notification Period – An employer does not have to comply with the 60-day notice period if the business circumstances causing the plant closing or mass layoff were not reasonably foreseeable as of the time the notice was required. Likewise, the 60-day

notice period may be reduced if at the time notice was required the employer was actively seeking capital or business which would have enabled the employer to avoid the closing or layoff and the employer reasonably believed that giving the required notice would have precluded the employer obtaining the needed capital or business.

### ILLINOIS STATUTES AND REGULATIONS

**Illinois Drug-Free Workplace Act -- *Generally the same as federal law.***

#### Who is subject to the Act?

All state contractors and state assistance recipients with 25 or more employees and a contract or grant in the amount of \$5,000 or more are subject to the Illinois Drug-Free Workplace Act.

#### Drug-free workplace

As a condition to receiving an award of a state contract or receiving a grant, state contractors and assistance recipients must certify that a drug-free workplace will be provided by: publishing and distributing a copy to each employee a statement that notifies the employee of the employer's drug-free workplace policy that prohibit the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance; specifies actions that will be taken and/or sanctions that will be imposed for violations of the drug-free policy; notifies the employee that employment is conditioned on abiding by the drug-free policy; and requires an employee to report any criminal drug statute convictions for violations occurring in the workplace to the employer. Additionally, the employer must establish a drug-free awareness program.

#### What responsibilities do employers have?

State contractors and assistance recipients must make a good faith effort to maintain a drug-free workplace. Any violations of the Illinois Drug-Free Workplace Act must be reported by the state contractor or assistance recipient to the contracting or granting state agency. When an employee has been convicted under any criminal drug statute for violations occurring in the workplace the state contractor or grantee must take appropriate personnel action against employees or require the employee participate in an approved drug rehabilitation program.

#### What are the penalties?

Failure to comply with the provisions of the Illinois Drug-Free Workplace Act may result in suspension of payments or termination of the contract or grant. Additionally, the state contractor or assistance recipient may be subject to suspension or debarment from eligibility to receive an award of any future state contract or grant for a period of up to five years.

**Illinois Employee Classification Act -- *prohibits misclassification of employees as independent contractors in certain trades.***

#### Who is subject to the Act?

The Act applies to contractors and subcontractors in construction, trucking, landscaping and related trades.

### Classification

- This new law, which took effect January 1, 2008, requires that any individual performing services for a contractor or subcontractor must be classified as an employee, except under limited and explicit circumstances set forth in the statute.
- The law is intended to deal with contractors who misclassified workers as independent contractors rather than employees.

### Remedies

Violators will be subject to fines in increasing amounts per violation, starting at \$1,500 per violation (calculated based on each day that each worker is misclassified). Multiple violations could result in the contractor being ineligible to enter into state contractors for a period of four years. Willful violations are punishable by penalties up to double the statutory amount, punitive damages to the employee, as well as criminal penalties against the contractor. There is a private right of action for employers who retaliate under which the employee may recover wages and benefits and attorney's fees and costs.

<b>Illinois Employee Credit Privacy Act -- <i>prohibits discrimination based on an individual's credit history</i> – NEW LAW</b>
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### Who is subject to the Act?

The Act applies to employers with at least one employee but does not include employers in industries who deal with:

- banking or financial holding companies
- insurance or surety businesses
- state law enforcement or investigative units
- state or local agencies that require use of an employee or applicant's credit history
- debt collectors

### Effective Date

The law took effect January 1, 2011.

### Prohibits employment decisions based on credit history

Prohibits employers from:

- Failing or refusing to hire or recruit, discharging or otherwise discriminating against an individual with respect to employment, compensation or a term, condition or privilege of employment because of the individual's credit history or credit report.
- Asking about an applicant or employee's credit history unless the information is a *bona fide* occupational requirement.
- Running or obtaining an individual's credit report from a consumer credit agency.

### Credit History

Means an individual's previous borrowing and repaying behavior (e.g. paying bills on time and managing debt and other obligations).

### Bona Fide Occupational Requirement

A satisfactory credit history is a *bona fide* occupational requirement where:

1. State or federal law requires bonding or other security covering the individual who holds the position.
2. The duties of the position include custody or unsupervised access to cash or marketable assets of \$2,500 or more.
3. The duties of the position require signatory power over business assets of \$100 or more per transaction.
4. The position is a managerial position that requires setting the direction of or control of the business.
5. The position allows for access to personal or confidential information, financial information, trade secrets or state or national security information.
6. Under the DOL's administrative rules, the position meets the criteria for establishing that a credit history is a *bona fide* occupational requirement.
7. The employee's or applicant's credit history is required by or exempt under federal or state law.

### Remedies

Injunctive relief, monetary damages and reasonable attorney fees and costs.

<b>Illinois Equal Pay Act – Generally the same as federal law</b>
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### Who is subject to the Act?

Employers who have four or more employees and any unit of local government and any school district.

### Equal pay for equal work

Prohibits employers from paying unequal wages to men and women for performing the same or substantially similar work so long as the jobs require equal skill, effort, and responsibility and are done under similar working conditions for the same employer in the same county.

### Other prohibitions

Employers are prohibited from:

- Trying to remedy violations by reducing the wages of other employees
- Retaliating against an employee for exercising his or her rights under this Act

### Who can make a claim under the Act?

Any current or former employee who has received unequal pay for equal work performed may file a claim with the Illinois Department of Labor (IDOL) or an investigation can be launched by the IDOL. Under a recent amendment, the time period for filing of an equal pay complaint was increased to one year from the alleged underpayment (from 180 days). Another recent change is that a complainant's identity will be kept confidential during the administrative phase unless the alleged violation is retaliatory in nature.

### What are the remedies?

Violators will be required to make up the wage difference to the employee and may be required to pay legal costs and be subject to civil fines of up to \$2,500 per violation. Any employer who fails to pay ordered wages within 15 days after the order is entered is liable to pay a penalty of 1% per calendar for each day of delay in paying the wages to the employee, up to an amount equal to twice the sum of unpaid wages due the employee.

### What are the defenses available to employers?

Pay differentials are allowed where the differential is due to:

- ✓ A seniority system
- ✓ A merit system
- ✓ A system that measures earning by quantity or quality of production
- ✓ A factor other than gender

### Recordkeeping

Employers must keep records that show the name, address, and occupation of each employee, the wages paid to each employee, and any other information the Director of Labor deems necessary for enforcement of the Act. Employers must preserve these records for a period of not less than five (5) years.

### Notice

Employers must post a notice summarizing the requirements of the Act. A copy is available on the IDOL website at: <http://www.state.il.us/agency/idol/posters/Poster.htm>.

<b>Illinois Family Military Leave Act – <i>Generally the same as federal law.</i></b>
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### Who is subject to the Act?

Employers with at least 15 employees.

### Family military leave

Leave requested by an employee who is the spouse, parent, child, or grandparent of a person called to military service lasting longer than 30 days with the State or United States pursuant to the orders of the Governor or the President of the United States.

### Leave requirements

During the time that federal or state deployment orders are in effect:

- Employers with 15-50 employees: shall provide up to 15 days of unpaid family military leave to an employee.
- Employers with over 50 employees: shall provide up to 30 days of unpaid family military leave to an employee. This leave is to be offset by any leave taken under the FMLA.
- Employees must exhaust all vacation, personnel and compensatory leave but not all sick and disability leave before taking Family Military leave.

**Illinois Health Insurance Portability and Accountability Act (IL HIPAA) -- Generally the same as federal law.**

Who is subject to the Act?

Employers with group health plans that have 2 or more participants that are current employees on the first day of the plan year are subject to the provisions of IL HIPAA.

Prohibited discrimination and portability of group plan coverage

- A group health plan may not establish enrollment eligibility rules or require greater premium payments in relation to an individual or his/her dependents based on health status, medical condition (both physical and medical), claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or
- Under certain circumstances, a group health plan may temporary limit or exclude benefits relating to preexisting conditions (except for conditions related to pregnancy and certain newborns and adopted children) provided that such exclusion relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within the past 6 months prior to the enrollment date, the exclusion does not exceed 12 months, and the exclusion period is reduced by the length of the aggregate periods of credible coverage applicable to the participant or beneficiary as of the enrollment date.
- Each health insurance issuer that offers health insurance coverage to group health plans maintained by a small employers must accept every small employer, with some exceptions, in the State that applies for health insurance coverage. Moreover, if a health insurance issuer offers health insurance coverage, the issuer must generally renew or continue in force such coverage at the option of the plan sponsor unless the plan sponsor fails to pay premiums or contributions, engages in fraud, fails to comply with material plan provisions, there is a cessation of the membership of the employer in an association on the basis of which the coverage is provided, or if the issuer ceases to offer coverage in the market.

Who can make a claim under the Act?

The Illinois Department of Insurance or the Attorney General may institute proceedings to enforce all of the insurance laws of the State.

What are the penalties?

If it is determined that a violation of IL HIPAA has occurred, a penalty of up to \$100 per day for each violation may be assessed, but such penalties may not exceed \$5,000.

**Illinois Health and Safety Act (IL OSHA) -- Generally the same as federal law.**

Who is subject to the Act?

All public sector employers are subject to the provisions of the Health and Safety Act; private employers are covered under federal OSHA law.

Health and safety standards in the workplace

All State public employers are required to provide all employees with safe and healthful working conditions, free from recognized hazards that cause or are likely to cause death or serious physical harm, by complying with occupational safety and health standards. Employers must furnish employees with information regarding hazards in the workplace, including information about suitable precautions, relevant symptoms, and emergency treatment. Employers must post notices to inform employees of the protections and obligations provided under the Health and Safety Act, and employers may not discriminate or retaliate against employees because such employee caused any investigation or proceeding to occur under the provisions of the Act. Unless exempted, all employers must maintain records related to compliance with occupation safety and health standards, including work-related injuries, illnesses, and fatalities.

Who can make a claim under the Act?

The Illinois Department of Labor is authorized to enforce the standards of the Health and Safety Act.

What are the penalties?

For violations of the Health and Safety Act that are determined to be serious, other-than-serious, or failure to abate, which includes failure to post mandatory notices, civil penalties may be assessed in an amount up to \$1,000 for each violation and up to \$10,000 for each violation in the case of willful or repeat violations of the Act. Willful violations causing the death to any employee may also result in imprisonment of up to 6 months. Criminal penalties may also apply in certain other cases.

What are the defenses available to employers?

- ✓ IL OSHA has adopted the federal occupational safety and health standards promulgated by the United States Secretary of Labor, and thus similar defenses to OSHA violations may be available to public employers under IL OSHA. Employer defenses under OSHA include impossibility or economic unfeasibility of compliance, reasonable diligence, employee misconduct, or greater hazard.

**Human Rights Act (IL Human Rights Act) -- Generally the same as federal laws, but additionally prohibits discrimination based on ancestry, arrest record, marital status, sexual orientation, citizenship status, and military status or unfavorable discharge.**

Who is subject to the Act?

Employers that employed 15 or more employees during 20 or more workweeks within the preceding calendar year, but all employers in the case of alleged discrimination based upon

physical or mental handicap or sexual harassment, are subject to the provisions of the Illinois Human Rights Act.

### Unlawful employment discrimination

- Employers may not segregate, refuse to hire, or act with respect to recruitment, hiring, promotion, discharge, or any other employment related action or condition on the basis of citizenship status or unlawful discrimination. “Unlawful discrimination” includes discrimination based on race, color, religion, national origin, ancestry, age, sex, marital status, handicap, sexual orientation, military status, or unfavorable discharge from military service. As of January 1, 2010, employees may not be discriminated against based on their status of having an order of protection.
- Employers, employees, and agents of the employer are prohibited from engaging in sexual harassment. Additionally, employers may not inquire into criminal history information that has been ordered expunged as a basis for making employment decisions. Similar prohibitions exist for employment agencies and labor organizations.
- A new amendment added in 2008 creates a "civil rights violation," when an employer who participates in the federal E-Verify program engages in a discriminatory employment decision but does not follow the law's safe harbor procedures.
- With regard to immigration-related practices, employers may not request more or different documents than required by federal law or refuse to honor documents that on their face appear to be genuine. Employers are also prohibited from imposing restrictions that effectively prohibit an employee’s non-employment related communications from being spoken in the employee’s native language.
- With regard to State contracts, every party to the public contract and every eligible bidder must refrain from unlawful discrimination and discrimination based upon citizenship status, and every party must undertake affirmative action practices and have written sexual harassment policies.

### Who can make a claim under the Act?

Employees that have experienced unlawful discrimination or the Department of Human Rights may file a complaint with the Human Rights Commission based upon violations of the Illinois Human Rights Act. Additionally, the Attorney General may bring an action in the circuit court. Since 2008, employees may sue their employers for harassment and discrimination in addition to the available administrative remedies.

### What are the remedies?

Actual damages plus interest, backpay, employment, reinstatement, promotion, award of employment benefits due, attorney fees and costs, and other relief as may be necessary to make the individual “whole.” Civil penalties may also be assessed for violations.

### What are the defenses available to employers?

- ✓ Bona Fide Qualification/Reason – Employers may avoid liability under the Illinois Human Rights Act if the employer can prove that the employment decision was based on bona fide occupational qualification or any other bona fide reason that is not prohibited by the Act.

- ✓ Bona Fide Merit System – An employer may make employment decisions pursuant to a bona fide merit or retirement system without liability under the Illinois Human Rights Act, provided that such system is not used for unlawful discrimination and its administration does not have the effect of unlawful discrimination.

**Illinois Insurance Act – Accident and Health Insurance (IL COBRA)** -- *Generally the same as federal law.*

Who is subject to the Act?

All employers that maintain a group health plan for employees are subject to the provisions of IL COBRA.

- An employer’s group health plan must provide that employees and their eligible dependents, whose health insurance would otherwise terminate because of the termination of employment or a reduction in hours, are entitled to continue their hospital, surgical, and major medical insurance under the group’s plan.
- Employees are entitled to receive written notice of their IL COBRA right to continue coverage. An employer must notify the plan administrator within 30 days after an employee’s death, termination, reduction in hours of employment or entitlement to Medicare. An employee must notify the plan administrator within 60 days after events such as divorce or legal separation or a child’s ceasing to be covered as a dependent under the policy. A plan administrator must notify an employee or his or her family members of any right to COBRA coverage within 14 days after receiving information that a qualifying event has occurred. The employee must notify the plan administrator of his or her election of COBRA coverage within 60 days after the qualifying event or after the date the notice to elect COBRA coverage is sent, whichever is later.
- Continuation of benefits is only available for employees who have been continuously insured under the employer’s group policy during the 3 month period prior to the employee’s termination or reduction in hours. Continuation benefits need not include supplementary benefits such as dental, vision, and prescription drug benefits.
- The length of COBRA continuation depends upon the nature of the qualifying event.

<b>Qualifying Event</b>	<b>Who May Elect COBRA</b>	<b>Maximum Coverage Period</b>
Termination of Employment or reduction of hours	Employee and/or covered dependents	18 months
Disability of employee or covered family member at time of COBRA election or within 60 days after election	Employee and/or covered dependents	29 months
Divorce or legal separation	Spouse and/or dependent children	36 months
Death of employee	Spouse and/or dependent children	36 months

Entitlement to Medicare by covered employee before a qualifying event	Spouse and/or dependent children	36 months after date of entitlement to Medicare OR 18 months (29 months if there is a disability extension) after the covered employee's employment terminates or his hours are reduced.
Loss of dependent child status	Dependent child	36 months <sup>2</sup>

- A group health insurance policy conversion privilege applies in Illinois. An employee is entitled to have a converted health insurance policy issued to him or her when the employee's group health insurance has been terminated for any reason (other than discontinuance of the group policy entirely where there is a succeeding carrier or failure of the employee to pay required contributions) and the employee has been continuously insured for at least 3 months prior to the termination. Employees are entitled to receive written notice of the existence of the conversion privilege, and the converted health insurance policy must provide coverage for the employee and his/her dependents that were covered under the terminated group policy, and provide either comparable benefits or statutorily defined minimum benefits.

Who can make a claim under the Act?

The Illinois Department of Insurance or the Attorney General may institute proceedings to enforce all of the insurance laws of the State.

What are the penalties?

If it is determined that a violation of IL COBRA has occurred, a penalty of up to \$100 per day for each violation may be assessed, but such penalties may not exceed \$5,000. Insurance companies that willfully violate the provisions of IL COBRA may have their license revoked or suspended for up to two years, or may be assessed a penalty up to \$1,000.

**Lilly Ledbetter Amendments Adopted for the Illinois Equal Pay Act -- Generally the same as federal law.**

Who is subject to the Act?

Those covered by the EPA, ADEA and ADA.

Time Limitations

The law clarifies that a discriminatory compensation decision or other unlawful practice occurs each time compensation is paid pursuant to a discriminatory compensation decision. Under amendments to the Illinois EPA: 1) the period for filing a gender-based claim is doubled from 180 days to one year from the date the employee learns of the violation; 2) the period of limitations for filing such actions in state court has expanded from three years to five years; and 3) the period for employers to preserve certain records changed from three to five years.

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<sup>2</sup> See <http://www.insurance.illinois.gov/healthinsurance/continueCobra.asp>

**Illinois Personnel Records Review Act (PRRA)** -- *Protects the right of employees to review, copy, and comment on their personnel records.*

Who is subject to the Act?

All employers that employ 5 or more employees are subject to the provisions of the PRRA.

Review of personnel records

- Upon an employee's request, limited to two requests per year, an employer must permit an employee or a representative of the employee to inspect and copy within 7 days of the request any personnel documents (with some exceptions) related to an employee's employment, promotion, transfer, compensation, discharge, or disciplinary action. If an employee disagrees with any information contained in the personnel records, and if a correction is not mutually agreed to, an employee may submit a written statement explaining the employee's position that must be attached to the disputed record by the employer.
- An employer who receives a request for records of a disciplinary report, letter of reprimand, or other disciplinary action of an employee under the Freedom of Information Act (FOIA) may provide notification to the employee in written form or through electronic mail. Employers may not divulge to third parties any documentation of disciplinary actions taken with regard to an employee or former employee without first sending written notice to the employee, unless the employee waives such notice requirement. Documentation of disciplinary actions over 4 years old may not be disclosed to third parties. The PRRA also provides that an employer may not gather records of an employee's associations or non-employment activities.
- Employers may not disclose performance evaluations of public employees requested under FOIA.

Who can make a claim under the Act?

Employees that have been denied inspection rights may file a complaint with the Department of Labor, and if no action is taken may later file a claim in the circuit court to enforce the provisions of the PRRA.

What are the remedies?

A court may award an employee actual damages, plus costs. Willful and knowing violations of the PRRA may result in a \$200 penalty, actual damages, plus attorney fees and costs.

**Illinois Religious Freedom Protection and Civil Union Act (Civil Union Act)** –  
*Provides rights for those entering into civil unions.*

Effective Date

The law will become effective on June 1, 2011.

## Civil Unions

Allows same-sex and opposite-sex couples to enter into civil unions and provides the same legal obligations, responsibilities, protections and benefits of spouses. Under the new law, a "party to a civil union" is to be included in any familial definition where the term "spouse," "family," "immediate family," "dependent," or "next of kin" are stated. Illinois employers should consider whether their policies (including health and benefits plans), handbooks, and harassment training programs are in compliance with the new law.

**Victims' Economic Security and Safety Act (VESSA)** -- *Requires at least 12 weeks of unpaid job-protected leave for victims and family members of victims of domestic or sexual violence.*

## Who is subject to the Act?

Employees who work for employers that employ 15-49 employees are entitled to a total of 8 weeks leave during a 12-month period and employees who work for employers that employ 50 or more employees are entitled to 12 weeks leave during a 12-month period. Not all 50 workers need be employed in the same workplace or even in Illinois for coverage to apply.

## Entitlement to leave from employment

- An employee who is a victim or has a family or household member (which includes any person who is related by blood or by present or prior marriage, and any other person who shares a relationship through a son or daughter) who is a victim of domestic or sexual violence may take unpaid leave to seek medical attention, obtain victim services, obtain counseling, participate in safety planning and seek legal advice or attend court proceedings. The leave may be taken intermittently or on a reduced work schedule. The employee is entitled to continued health coverage during the leave, and the taking of leave cannot result in a reduction of any employment benefits that accrued before the leave was taken. Upon return from VESSA leave, the employee must be restored to the same employment position or an equivalent position with equivalent employee pay and benefits. An employer may not require employees to exhaust available paid or unpaid leave before taking VESSA leave. As a result, the employee could take VESSA leave
- and then add on any earned vacation or compensatory time. When practicable, an employer is entitled to 48 hours notice of VESSA leave. If an employee has an unscheduled absence from work, no action may be taken against the employee if the employee provides certification that the absence was caused by domestic or sexual violence.
- An employer may not discriminate against employees or applicants based on an individual's actual or perceived status as a victim of domestic or sexual violence, or an employee's request for work-related adjustments in response to domestic or sexual violence. Discrimination includes not making a reasonable accommodation for an otherwise qualified individual for the known limitations resulting from circumstances relating to domestic or sexual violence. Employers must maintain general employee records and such records must designate an employee's leave taken under the Act. Employers must also post notice of the rights provided to employees under VESSA.

### Employer notice requirements

Employers must post a notice in their workplace summarizing the Act. The Illinois Department of Labor provides a notice.

### Who can make a claim under the Act?

An employee may file a claim with the Department of Labor when an employer has interfered with the employee's VESSA rights or has discriminated against an employee based on the employee's status as a victim of domestic or sexual violence.

### What are the remedies?

If a violation is found to have occurred, damages may be awarded for lost compensation and benefits, including interest, plus attorney fees and costs. Additionally, equitable relief may be available, including an award of employment, reinstatement, promotion, and reasonable accommodations.

### What are the defenses available to employers?

- ✓ Undue Hardship – An employer may defend an allegation of impermissible discrimination under VESSA by demonstrating that reasonable accommodation would impose an undue hardship on the operation of the employer.

**Illinois Wage Payment and Collection Act (WPCA)** -- *Governs payment of wages and compensation* as amended by Pub. Act 96-1407 (effective 1/1/2011)

### Who is subject to the Act?

All employers are subject to the provisions of the WPCA.

### Wage payment and collection

The WPCA governs payment of earned wages, bonuses, commissions, vacations, and final compensation. Generally, all employers are required to pay every employee all wages earned at least semi-monthly. The WPCA requires employers to maintain employee records and to furnish each employee with statements related to wages earned and deductions made for each pay period.

### Who can make a claim under the Act?

Any employee that has been denied payment of earned compensation by an employer may bring a private action under the WPCA. Additionally, the Department of Labor is authorized to assist any employee in the collection of wages, final compensation, and amounts due to an employee trust or fund as a result of a collective bargaining agreement.

### Exhaustion of administrative remedies

Under the expanded IWPCA, employees may file suit directly on behalf of themselves or a class of employees, without first exhausting any administrative remedies. The new law makes it easier and quicker for employees to file unpaid wage claims in court. The IDOL must now establish a small claims process for claims under \$3,000.

### What are the remedies?

Aggrieved employees may be awarded compensation owed, interest penalties (2% per month), plus attorney fees and costs under the Attorney Fees in Wage Action Act. Any officers of a corporation or the employer's agents who knowingly permit violations of the WPCA are deemed to be employers of the employees, and thus may be subject to personal liability. Willful refusals to pay wages, or knowing discrimination or discharge of an employee due to an employee's effort to enforce the provisions of the WPCA may result in a Class B misdemeanor (if the wages are \$5,000 or less) or a Class A misdemeanor (if the wages are \$5,000 or more). If there is a second conviction within two years of a prior criminal conviction, the employer or agent is guilty of a Class 4 felony. Employees with retaliation claims can file a claim with the IDOL or file a lawsuit directly.

**Illinois Worker Adjustment and Retraining Notification Act (IL WARN) -- Generally the same as federal law.**

### Who is subject to the Act?

Private employers that employ 75 or more employees, excluding part-time employees, or employers that employ 75 or more employees who in the aggregate work at least 4,000 hours per week are subject to the provisions of IL WARN.

### Required notice

- An employer may not order a mass layoff, relocation, or employment loss unless the employer gives 60 days written notice to affected employees, the employee's representatives, various departments of the Illinois government, and the chief elected official of the municipal/county governments where the employment loss occurs. "Employment loss" includes termination, a layoff exceeding 6 months, or a reduction in hours of work more than 50% during each month of any 6-month period. "Mass layoff" means a reduction in force which (1) is not the result of a plant closing and results in an employment loss at a single site of employment during any 30-day period of at least 33% of the employees (excluding part-time employees) and at least 25 employees, or (2) is at least 250 employees (excluding part-time employees).
- When less than the minimum number of employees are affected by a plant closing or layoff, but 2 or more groups of employees are affected within any 90-day period which in the aggregate exceed the minimum number requirement, then such action will be considered to be a plant closing or mass layoff unless the employer can prove the employment loss was a result of separate and distinct actions and were not attempts to avoid the requirements of IL WARN.

### Who can make a claim under the Act

An employee, the employee's representative, the Department of Commerce and Economic Opportunity, the chief elected official of the municipal/county government where the employment loss occurred, or the Department of Labor may file a complaint with the Director of Labor pursuant to the provisions of IL WARN.

### What are the remedies?

An employer that fails to provide the requisite notice is liable to each employee that was entitled to notice who lost his/her employment for backpay and the value of any lost employee benefits. Liability is reduced by any wages paid to the employee during the 60-day period and any liability paid by the employer under federal law. Additionally, an employer may be subject to civil penalties up to \$500 for each day of the violation.

### What are the defenses available to employers?

- ✓ Good Faith Defense – Employer liability may be reduced if the employer proves that the act or omission that violated the provisions of IL WARN was done in good faith and the employer had reasonable grounds for believing that the act or omission was not a violation of the IL WARN provisions.
- ✓ No Notification Required – In the case of a plant closing, statutory notice may be waived if the business circumstances causing the plant closing were not reasonably foreseeable as of the time the notice was required. Likewise, the 60-day notice period may be waived under certain circumstances if at the time notice was required the employer was actively seeking capital or business which would have enabled the employer to avoid or postpone the termination, and the employer in good faith believed giving notice would have precluded the employer from obtaining the financing or business.

## OTHER ILLINOIS STATUTES

### **Child Labor Law**

Generally, minors under the age of 16 are not permitted to work in any gainful occupation in connection with certain enumerated hazardous businesses. Also, added in 2008, all minors under the age of 16 are prohibited from working in occupations that involve the handling of human blood, human blood products, human body fluids or human body tissues. However, minors between the ages of 14 and 16 may be permitted to work in nondangerous or nonhazardous occupational conditions outside of school hours and during school vacations. Many particular exceptions apply. Employers of minors must respect work hour/day limitations, and the employer must have on file the minor's employment certificate issued by the City or County Superintendent of Schools. When an out-of-state minor seeks in-state employment certificate, the IDOL will work with the a school representative in issuing the certificate. Violations of the Child Labor Law may result in a civil penalty of up to \$5,000 for each violation.

### **Crime Witness**

Employers may not terminate or threaten to terminate employment or otherwise punish or penalize an employee who is a witness to a crime for time taken away from work because of the employee's attendance at a criminal proceeding, under subpoena, related to the crime witnessed by the employee. An employer is not required to compensate an employee for time taken away from work. An employer who knowingly or intentionally violates this provision may be punished for contempt of court.

### **Day and Temporary Labor Services Act**

The third party client of a day and temporary labor agency must provide a day or temporary laborer with a Work Verification Form summarizing the work performed by the day or temporary laborer on any particular day. Failure to provide this form, or to comply with the provisions of the Act, may subject a third party client to civil penalties; higher civil penalties apply in the case of willful violations of the Act. Additionally, third party clients have a duty to verify a day and temporary labor agency's registered status before entering into a contract with the agency. It is a violation of the Act to enter into a contract with an unregistered agency. A person aggrieved by a violation of the Act has a private right of action and is entitled to collect wages and benefits owed, plus an equal amount of liquidated damages, attorney fees and costs, and other equitable relief as may be appropriate.

### **Jury Duty**

Any person summoned for jury duty must be given time off from employment to serve on the jury, but the employer is entitled to reasonable notice of the employee's jury service and the employer has no obligation to compensate the employee for time taken away from work. An employer may not discharge or threaten any employee by reason of the employee's participation in jury service. An employee is entitled to return to his/her position of employment without loss of seniority or employment benefits. An employer that violates this provision may be liable to an employee for any lost wages, employment benefits, and attorney fees. Additionally, the employer may be ordered to reinstate a discharged employee.

### **Right to Privacy in the Workplace Act**

An employer is prohibited, except where specifically provided by law, from refusing to hire, discharging, or otherwise disadvantaging any individual with regard to employment because the individual uses lawful products off of the premises of the employer during nonworking hours. However, an employer is permitted to have health, disability, or life insurance policies that make distinctions based on an employee's use of such lawful products. Moreover, an employer may not inquire whether a prospective employee has ever filed a claim or received benefits under the Workers' Compensation Act or Workers Occupation Diseases Act. The Department of Labor may enforce the provisions of this Act, and if no action is taken the employee/applicant may file a claim to recover actual damages plus costs. Willful and knowing violations of the Act may result in an additional award of \$200 and attorney fees.

### **Safety Inspection and Education Act**

The Safety Inspection and Education Act authorizes the Director of Labor to enforce occupational safety and health standards. The Act authorizes the Director of Labor to issue citations to employers for safety and health violations, and to assess civil penalties. Civil penalties may be reduced upon consideration of an employer's good faith, size of the business, and history of previous violations. Furthermore, the Act prohibits an employer from discharging or discriminating against an employee who files a complaint or testifies in connection with the rights provided under this Act or the Health and Safety Act.

### **Six Day Work Week**

Generally, all employers must provide each employee at least 24 consecutive hours of rest each calendar week, and at least a 20 minute meal period during workdays consisting of 7 ½ hours of continuous work. Employers must maintain records of hours worked by employees under the Act. The Director of Labor has the authority to enforce the Act and each violation may result in a fine of \$25 to \$100.

### **School Visitation Rights Act**

Employers that employ 50 or more employees must provide each employee leave from work totaling up to 8 hours during any school year to attend a child's school conferences or classroom related activities, provided that the employee has been employed for at least 6 consecutive months prior to the request and all of the employee's accrued personal or vacation leave (but not sick leave) has been exhausted. However, an employer is not required to grant leave if at the time leave is granted it would result in a greater than 5% reduction in work force. The employer must make a good faith effort to permit an employee to make up leave taken pursuant to the Act payable at the employees regular wage rate. Each violation of the Act may result in a \$100 fine.

### **Voting Leave**

Any person that is entitled to vote at a general or special election, or at any election at which propositions are submitted to a popular vote, in the State is entitled to 2 hours of leave from employment without penalty imposed by the employer. However, the employer is entitled to notice of leave and may specify the hours during which the employee may take the leave.