LEMLE & KELLEHER, L.L.P.

MODERN MANAGEMENT

AN OVERVIEW OF FEDERAL EMPLOYMENT LAW FOR EMPLOYERS

Baton Rouge
One American Place
301 Main Street
Suite 1100
Baton Rouge, LA 70825
Phone: 225.387.5068
Fax: 225.387.4995

Houston
Bank of America Center
700 Louisiana St.
Suite 2060
Houston, TX 77002
Phone: 713-247-0030
Fax: 713-247-0024

New Orleans
Pan-American Life Center
601 Poydras Street
21st Floor
New Orleans, LA 70130
Phone: 504.586.1241
Fax: 504.584.9142

LAWS GOVERNING EMPLOYERS AND LABOR RELATIONS.

National Labor Relations Act of 1947, 29 U.S.C. §§ 141 *et seq*.

The National Labor Relations Act ("NRLA") was established to govern the relationship between private-sector workers and their employers with respect to work stoppages, strikes and general labor strikes occurring in the early nineteen hundreds. Originally established in 1935, and commonly referred to as the Wagner Act, the NRLA provides the following basic rights for employees:

- To self-organize;
- To form, join, or assist labor organizations (and in Right-to-Work States to choose not to join an existing union as a condition of employment);
- To bargain collectively for wages and working conditions through representatives of their own choosing;
- To engage in other protected concerted activities with or without a union, which are usually group activities (two or more employees acting together) attempting to improve working conditions, such as wages and benefits;
- To refrain from any of these activities (however, a union and employer may, in a state where such agreements are permitted, enter into a lawful union-security clause).

The NLRA provides that the following actions by an employer are unfair labor practices and thus illegal conduct for an employer to engage in:

- Interference with, refraining or coercing of employees in the excise of the rights guaranteed in Section 7 (those listed above);
- Domination or interference with the formation or administration of any labor organization or financial contribution or other support to it;
- Discrimination in regard to hiring, or tenure of employment, or any term or condition of employment, to encourage or discourage membership in any labor organization;
- To discharge or otherwise discriminate against an employee because he or she has filed charges or given testimony under the NLRA;
- Refusing to bargain collectively with representatives of the employer's employees.

The Act prohibits both employers and unions from violating these employee rights both in union-connected activities as well as any where employees act "collectively" (*i.e.* jointly acting with other employees or acting on behalf of at least one or more other employee regarding wages, hours or working conditions).

Labor organizations can gain control and representation of "a unit [of employees] appropriate for bargaining" if the majority of the employees in the unit express such desire. The employer may voluntarily recognize the union through approval of signatures on a petition or card-check. Alternatively, the employer may in good faith decline to voluntarily recognize the union as representative of its employees and insist that the employees express their desires thought a secret-ballot election conducted by the National Labor Relations Board. The NLRA provides the authority for conducting representation elections, and through the unfair labor provisions of the NLRA, certain restrictions of employers and labor organizations are established, including provisions governing the employer's and union's interaction.

The NLRA is governed and administered by the National Labor Relations Board through its Headquarters office and regional offices throughout the country. The Board is divided into two sectors, the Board which is charged with handling the administrative proceedings of the Act, and the General Counsel who is responsible for the investigation and prosecution of unfair labor practices and the supervision of the regional offices that process unfair labor practices and representation cases locally.

Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.*

The Labor-Management Reporting and Disclosure Act ("LMRDA"), also known as the Landrum-Griffin Act, was enacted to curb any attempts of bribes in labor relations. The Act regulated certain disclosures required by a union and its officials, including requiring unions to file financial reports annually. The Act is enforceable against workers and unions covered by the NRLA as well as the RLA. The Act also provides general rules for internal union affairs, union official's relationships with employers, internal election of union officials, and establishing union officers as fiduciary officials in the handling of affairs of the union.

Railway Labor Act, 24 U.S.C. §§151-164.

The Railway Labor Act ("RLA") was enacted in 1926 to provide a legal framework for the resolution of labor management matters within the railway industry, including employee representation issues, collective bargaining, and contract administration processes where employees chose to be represented by a labor union. In 1936, the RLA was extended to the airline industry. The National Mediation Board is charged with administration of the Act through mediation of disputes between employers (railways and airlines) and employee representatives regarding rates of pay, rules and working conditions. Not all employee units within the railway and airline industry are covered by the RLA, but rather are governed by the NLRA.

The general principles of the RLA are to provide the nation with stable labor relations in the major transportation industries of the country. As such, the LRA does not permit self-help acts such as labor strikes or management lock-outs until extensive dispute resolution processes have been engaged in.

Norris-LaGuardia Act, §§ 101 *et seq.*

The Norris La Guardia Act ("NLGA") was enacted in 1932 to eliminate "yellow-dog" contracts ("yellow-dog" contracts are employees agree as a condition of employment that he or she will not join a labor union). The Act provides that employees are free to form or join unions without employer interference and removed jurisdiction from federal courts to issue injunctions in non-violent labor disputes. Despite the restrictions against injunctions in federal courts related to labor issues, many states permit injunctions by local courts to control mass picketing, violence, and threats.

LAWS REGULATING WAGES/ HOURS, EMPLOYEE BENEFITS, AND WORKPLACE SAFETY

Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.

Overview of the Wage & Hour Law

The federal wage and hour law (Fair Labor Standards Act – "FLSA") sets standards for the basic minimum wage and overtime pay for most private and public employment. The law requires employers to pay covered employees, who are not exempt, at least the federal minimum wage and overtime pay of 1½ times the regular rate of pay.

Hours and types of jobs that children can work are legally restricted, and record keeping requirements are established. The law is administered by the Employment Standard Administration's Wage and Hour Division ("WHD"), a part of the United States Department of Labor ("DOL").

Application of Law to Employees

Generally, anyone who performs services is an "employee" to whom the wage and hour law applies, if the employer can control what will be done and how it will be done. The deciding factor is the right to control, the method of work and the result of the services. If there is no right to control, then the person performing the services may be an "independent contractor."

There are situations where an individual can be considered an employee of two or more employers without there being a separate employment relationship for each employer. This is called "joint employment," and means that each employer is both individually and jointly responsible for complying with all parts of the wage and hour law.

The law defines "to employ" as including "to suffer or permit to work." Usually, when a person has done something of economic value for another with the person's knowledge or permission, there is an employment relationship.

Minimum Wage

On May 25, 2007, President George W. Bush signed legislation that, in part, increased the federal minimum wage in three steps:

1. To $5.85 per hour effective July 24, 2007;

2. To $6.55 per hour effective July 24, 2008; and

3. To $7.25 per hour effective July 24, 2009.

Compensable Time

General Rule

An "employee" must be compensated for all "hours worked." This includes all hours an employee is required to be on the employer's premises, on duty or at a prescribed work place. The work must be primarily for the employer's benefit. Compensation is due for all hours devoted to work controlled or required by the employer.

"Hours worked" includes time an employee is "suffered or permitted to work." Thus, work which the employer does not request, but permits, is work time. For example, employees may voluntarily continue to work at the end of the shift to finish a task, make corrections, or prepare reports. Regardless of the reason, if the employer knows or has reason to believe that the employee is continuing to work, the time must be counted as hours worked.

Rest Periods, Holidays, Vacations

The wage and hour law does not require an employer to count as "hours worked" those time periods that are paid but no work is performed, such as a rest period (at least 21 minutes of consecutive uninterrupted time), meal period (at least 30 minutes of consecutive uninterrupted time), holidays, vacations, or sick leave.

Waiting Time–Down Time

Normally, all hours which the employee is required to give the employer are compensable "hours worked" and there need not be any physical or mental exertion. A person may be hired to do nothing or merely wait for something to happen. The general test to determine if the hours are compensable is whether the employee is able to use the time effectively for his/her own purposes.

Preparatory and Concluding Activities

Generally, “hours worked” includes all activities which are an indispensable part of the employee’s principal activity. Included in the principal activity are activities that are closely related. All time spent engaging in these activities must be compensated. If the activity is an integral part of the workday or is performed before and/or after the workday, then it must be compensated.

Training Programs, Lectures, and Meetings

For training programs, meetings, etc., the time spent is not working time if all of the following four criteria are met:

1. Attendance is outside of the employee’s regular working hours;

2. Attendance is in fact voluntary;

3. The program, lecture, or meeting is not directly related to employee’s job; and

4. The employee does no productive work while attending.

Travel Time

Whether travel is compensable depends on the kind of travel involved. For instance, home-to-work travel generally is not compensable either when an employee works at a fixed location or at different job sites.

Travel during the work day, from job site to job site is “all in a day’s work” and must be counted as part of hours worked. For out-of-town travel, time spent traveling from home to airport or railroad depot is not compensable, but an employee must be paid for all other travel time during normal working hours.

Exempt Employees

Exempt from the overtime pay provisions of FLSA are certain "white collar" employees, such as executives, administrative and professional employees and outside salesmen. To qualify for these "white collar" exemptions from the overtime pay provisions of the Act, the employer must be able to establish that the individuals sought to be exempted meet very strict criteria. A job description is not determinative of whether an employee is exempt or not under FLSA. Instead, it is the actual duties and responsibilities of the employee that dictate that employee’s exempt status.

Wage & Hour Remedies

There are a number of permissible ways to determine an employee's overtime pay. However, great care must be used in establishing the method for calculating pay in order to avoid severe penalties. Employees may not waive any rights accorded to them under the FLSA. Violations of the FLSA can result in back pay, with an additional amount of liability as liquidated damages, plus attorneys' fees, covering a work period of up to three years.

Davis-Bacon Act, 40 U.S.C. § 276a.

The Davis-Bacon Act ("DBA") requires that laborers and mechanics who are employed by federal contractors in connection with contracts of more than $2,000 for the construction, alteration or repair of public buildings or works, as well as other construction work financed from federal funds be paid "prevailing" wages and benefits. These "prevailing wages and benefits" are those deemed by the DOL to be common among similar classes of laborers and mechanics employed in the area in which the work is to be performed. Also, laborers and mechanics covered by this law must be paid once each week.

The Government may terminate Davis-Bacon contracts if covered employees are not paid the prevailing rates established by the DOL. If the contract is terminated because of the contractor's noncompliance, the Government may complete the contract and hold the offending contractor liable for excess costs.

Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332.

This law applies to contractors/subcontractors who work on federal service contracts and federally funded and assisted construction contracts over $100,000. Generally, laborers and mechanics who work under such contracts must be paid at least time and one-half their basic rates of pay for all hours worked in excess of 40 in a workweek. In addition, laborers and mechanics must not be required to work in any place or under any working conditions that are unsanitary, hazardous or dangerous to the employee's health and safety.

The DOL is responsible for enforcing this Act.

Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45.

The Walsh-Healey law applies to contracts entered into by the federal government for the manufacturing or furnishing of materials, supplies, articles or equipment in any amount exceeding $10,000. The law requires that covered contractors pay not less than the minimum wages determined by the DOL to be prevailing for similar work or industries operating in the area. A contractor must also commit that the work subject to the law will not be performed under conditions which are unsanitary, hazardous or dangerous to the health and safety of employees.

Contractors who are found to have violated the Walsh-Healey Act are liable to the federal government for liquidated damages in an amount equal to the amount of wages underpaid. Only the government, as opposed to private individuals, can collect unpaid wages for employees.

Service Contract Act of 1965, 41 U.S.C. § 351.

A business which performs services for the federal government under contracts in excess of $2,500 may also be subject to the Service Contract Act of 1965 under which the DOL determines the "prevailing" wages and benefits for employees.

Contractors who violate the Service Contract Act are liable for a sum equal to the amount of any deductions, rebates, refunds or underpayment of compensation due to any employee. The Government may also cancel the contract and hold the original contractor liable for any additional cost resulting from a new contract.

Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601 *et seq*.

The Family and Medical Leave Act ("FMLA") of 1993 was signed into law by President Clinton on February 5, 2003. The stated legislative purpose of FMLA is to provide a means for employees to balance their work and family responsibilities by taking unpaid leave for certain qualifying reasons.

Generally, employers covered by FMLA must provide up to 12 weeks of unpaid, job-protected leave to eligible employees for certain family and medical reasons, including care for a newborn or adopted child, care for a spouse, child or parent with a serious health condition, or for the employee to be absent from work because of a serious personal health condition that prevents him or her from performing the functions of the job. Employees are eligible if they have worked for a covered employer for at least one year and have worked 1,250 hours for the employer during the previous 12 months.

An employer must maintain coverage for the employee on FMLA leave under any "group health plan" at the same level and under the same conditions as if the employee were not on leave.

In addition, FMLA generally requires the employer to return an employee to their former position and compensation, assuming the employee is still able to perform the essential functions of that position, held before taking FMLA leave or to a position with equivalent duties, compensation and benefits.

FMLA was intended to be liberally construed in favor of employees; therefore, employee rights under the law will be interpreted broadly, and exemptions and exceptions will be read narrowly. Accordingly, it is vital that employers comply with the guidelines of FMLA and keep abreast of changes and amendments in order to maintain compliance.

Military Service-Related FMLA Leave

On January 28, 2008 President Bush signed into law the National Defense Authorization Act ("NDAA").

NDAA significantly broadens FMLA by requiring employers to provide an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member up to 26 weeks of unpaid leave in a 12-month period to care for a family member who has suffered a serious injury or illness while on active military duty. This provision of the new law, which went into effect on January 28, 2008, applies to all FMLA-covered employers.

In addition, NDAA provides eligible employees the right to 12 weeks of FMLA leave for any "qualifying exigency" that arises when a family member is on active military duty or is notified of an impending call to active duty status in support of a military operation.

Enforcement of FMLA Rights

The Secretary of the DOL is granted statutory authority to investigate and resolve employee FMLA violation complaints. The Secretary enjoys the same powers of investigation as are available under the federal FLSA, including the subpoena power.

An eligible employee may bring a private civil action against an employer for violations. An employee is not required to file a complaint with the Wage and Hour Division prior to bringing such action. The statute of limitations is two years after the date of the last violation of FMLA, or three years in the case of willful violations.

An employee may be entitled to the following remedies against an employer if FMLA violations are proven:

1. Lost wages, benefits or other compensation;
2. If wages and benefits have not been lost, the amount of actual monetary damages incurred by the employee as a direct result of the violation (such as the cost of providing care for a family member, up to an amount equal to 12 weeks wages or salary for the aggrieved employee);
3. Judicial interest;
4. An additional amount of liquidated damages equal to the amount of the employee's actual damages. If the employer can demonstrate that its actions were taken in good faith the court has the discretion to reduce or eliminate the liquidated damages award;
5. Other equitable relief as may be appropriate, such as reinstatement in the case of a wrongfully terminated employee;
6. Attorneys' fees and costs, including expert witness fees.

Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*

The Employee Retirement Income Security Act of 1974 ("ERISA") is a federal law that sets minimum standards for most voluntarily established pension and health plans in private industry to provide protection for individuals in these plans.

ERISA requires plans to provide participants with plan information including important information about plan features and funding; provides fiduciary responsibilities for those who manage and control plan assets; requires plans to establish a grievance and appeals process for participants to obtain benefits from their plans; and gives participants the right to sue for benefits and breaches of fiduciary duty.

There have been a number of amendments to ERISA, expanding the protections available to health benefit plan participants and beneficiaries. One important amendment, the Consolidated Omnibus Budget Reconciliation Act ("COBRA"), provides some workers and their families with the right to continue their health coverage for a limited time after certain events, such as the loss of a job. Another amendment to ERISA is the Health Insurance Portability and Accountability Act ("HIPAA") which provides important protections for working Americans and their families who have pre-existing medical conditions or might otherwise suffer discrimination in health coverage based on factors that relate to an individual's health. Other important amendments include the Newborns' and Mothers' Health Protection Act, the Mental Health Parity Act, and the Women's Health and Cancer Rights Act.

In general, ERISA does not cover group health plans established or maintained by governmental entities, churches for their employees, or plans which are maintained solely to comply with applicable worker's compensation, unemployment, or disability laws. ERISA also does not cover plans maintained outside the United States primarily for the benefit of non-resident aliens or unfunded excess benefit plans.

ERISA Section 514 preempts all state laws that *relate to any employee benefit plan*, with certain, enumerated exceptions. The most important exceptions—i.e. state laws that survive despite the fact that they may *relate to* an employee benefit plan—are state insurance, banking, or securities laws, generally applicable criminal laws, and domestic relations orders that meet ERISA's qualification requirements.

A major limitation is placed on the insurance exception, known as the "deemer clause", which essentially provides that state insurance law cannot operate on employer self-funded benefit plans. The United States Supreme Court has created another limitation on the insurance exception, where a law regulating insurance will be pre-empted if it purports to add a remedy to a participant or beneficiary in an employee benefit plan that ERISA did not explicitly provide.

Consolidated Omnibus Budget Reconciliation Act of 1985, 26 U.S.C. § 498B; 29 U.S.C. §§ 1161 *et seq.*

Consolidated Omnibus Budget Reconciliation Act ("COBRA") amended ERISA, the Internal Revenue Code, and the Public Health Service Act to require employers to provide temporary health coverage under their group plans. COBRA requires such continuing coverage to be offered to covered employees, their spouses, their former spouses, and their dependent children when coverage would otherwise be terminated due to certain specific events, including death of the covered employee, termination, or reduction in the hours of a covered employee's employment for reasons other than gross misconduct, divorce or legal separation, entitlement to Medicare, and a child's loss of dependent status.

The covered employee entitled to COBRA is responsible for payment of premiums, plus a 2% administrative charge, which can be more costly than their payments while covered by the group plan because the employer no longer pays a portion of such premium. The COBRA payment, however, is usually less expensive than a new private health insurance plan. While COBRA mandates continuing coverage, it lasts for a limited time.

Generally, COBRA applies to all group health plans maintained by private-sector employers (with at least 20 employees) or by state and local governments. COBRA does not apply to the Federal Government, churches or certain church-related organizations. A group health plan under COBRA consists of an employer established or maintained program to provide families with medical care, regardless of whether it is provided through insurance, health maintenance, employer's assets or otherwise. Group health plans include employer-sponsored group health and dental plans as well as health flexible spending arrangements under a company's cafeteria plan. Life insurance is not considered medical care, nor are disability benefits.

Generally, health plans covered by COBRA are governed by ERISA. As such, employers are not required to establish plans or provide particular benefits, but employers are required to comply with ERISA's rules in creating their group plans.

<u>Coverage</u>

COBRA covers group health plans sponsored by employers with at least 20 employees for at least 50% of the previous calendar year. COBRA applies to both full-time and part-time employees. Coverage commences the day immediately after a qualifying event.

The number of employees is determined by looking at the previous year's employment. If, for a majority of the year, the employer had 20 or more employees, then the employer will be covered by requirements for the following year. If an employer loses employees during the year so that the number of employees drops below 20, the employer must continue COBRA coverage for the remainder of that year, but, if it had less than 20 employees for the majority of that year, it will not be required to offer COBRA coverage for the following year.

"Employee" is broadly defined to include partners, full-time employees, and part-time employees. A small employer exemption applies when an employer counts each full-time employee as one employee and each part-time employee as a fraction of an employee, based on average number of hours worked compared to a full-time employee, and such amount is less than 20.

If an employer is in a group of employers under common control, different rules apply. All employees of all the employers under common control are aggregated for purposes of determining whether the 'under 20-employees' rule applies. If there are 20 or more employees employed by all of the employers combined, then COBRA applies to each employer.

Qualifying Events

"Qualifying events" are those that cause an individual to lose his or her group health coverage. These include termination or reduction in hours of work, death of employee, divorce or legal separation, loss of dependent status, a covered employee's entitlement to Medicare coverage, loss of "dependent child" status under plan rules, and (in the case of retiree health coverage only) the bankruptcy of an employer, but only if this event causes a loss of health coverage. The type of qualifying event determines who the qualified beneficiaries are and the length of continuing coverage available.

Qualified Beneficiaries

A qualified beneficiary is someone who was covered by a group health plan on the day before a qualifying event occurred that caused him or her to lose coverage. Only certain individuals are considered qualified beneficiaries, and the type of qualifying event determines who can be considered qualified when it happens. To be qualified, the individual must be a covered employee, that employee's spouse or former spouse, or that employee's dependent child. A child born to or placed for adoption with or by a covered employee is automatically qualified. Agents, independent contractors, and directors who participate in the group plan are also qualified, but they are not if they do not participate because they are not "employees."

Retiree Benefits Bankruptcy Protection Act of 1988, 11 U.S.C. § 1114.

By implication, the statute imposing legal duty on a debtor to honor terms of a collective bargaining agreement, at least until the agreement is properly rejected, creates a claim on behalf of the debtor's employees in the event that the debtor fails to comply with law. In enacting the section of the Bankruptcy Code governing the payment of insurance benefits to retired employees, Congress sought to minimize the impact of Chapter 11 on retirees while, at the same time, recognizing that modifications of retiree benefits may be necessary to the debtor's reorganization.

Before the amendment, payments under deferred compensation plans did not qualify as "retiree benefits" as defined by the Bankruptcy Code, even if the plan could have been used to provide participants with post-retirement income; the plan's purpose was not to provide benefits to participants in the event of sickness, accident, disability, or death, but to defer income, and requisite income taxes, until some later date. The usual remedies where a debtor in possession fails to comply with the Bankruptcy Code, such as conversion to Chapter 7, dismissal of case, or appointment of a trustee or examiner, are ineffective to aid retirees seeking to have the debtor pay retirement benefits pursuant to 11 USCA § 1114.

Another change reflecting concern over employer-employee relations in Chapter 11 in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, 119 Stat. 23 (April 20, 2005) ("BAPCPA"), is found in an amendment to Code § 1114 that restricts even pre-petition modification of retiree health plans by debtors. Under the amendment, the court is to issue an order of reinstatement of retiree benefits as of the date that the modification was made if (1) the debtor modified the benefits during the 180 days preceding the commencement of the case and (2) the debtor was insolvent at the time the benefits were modified. 11 U.S.C.A. § 1114(l). This requirement is qualified by allowing the court to find "that the balance of the equities clearly favors such modification." 11 U.S.C.A. § 1114(l)(2).

The Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (1970).

Congress passed the Occupational and Safety Health Act ("OSH Act") to ensure worker and workplace safety. The goal was to make sure employers provide their workers a place of employment free from recognized hazards to safety and health, such as exposure to toxic chemicals, excessive noise levels, mechanical dangers, heat or cold stress, or unsanitary conditions.

In order to establish standards for workplace health and safety, the Act also created the National Institute for Occupational Safety and Health ("NIOSH") as the research institution for the Occupational Safety and Health Administration ("OSHA"). OSHA is a division of the DOL that oversees the administration of the Act and enforces standards in all 50 states.

The OSH Act assigns to OSHA two principal functions: setting standards and conducting workplace inspections to ensure that employers are complying with the standards and providing a safe and healthful workplace. OSHA standards may require that employers adopt certain practices, means, methods or processes reasonably necessary to protect workers on the job. It is the responsibility of employers to become familiar with standards applicable to their establishments, to eliminate hazardous conditions to the extent possible, and to comply with the standards. Compliance may include ensuring that employees have and use personal protective equipment when required for safety or health. Employees must comply with all rules and regulations that are applicable to their own actions and conduct.

Even in areas where OSHA has not promulgated a standard addressing a specific hazard, employers are responsible for complying with the OSH Act's "general duty" clause. The general duty clause of the OSH Act [Section 5(a)(1)] states that each employer "shall furnish . . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

States with OSHA-approved job safety and health programs must set standards that are at least as effective as the equivalent federal standard. Most of the state-plan states adopt standards identical to the federal ones (two states, New York and Connecticut, have plans which cover only public sector employees).

Employees are granted several important rights by the OSH Act. Among them are the right to: complain to OSHA about safety and health conditions in their workplace and have their identity kept confidential from the employer, contest the time period OSHA allows for correcting standards violations, and participate in OSHA workplace inspections.

<u>Coverage</u>

The OSH Act covers all employees except workers who are self-employed and public employees in state and local governments.

In states with OSHA-approved state plans, public employees in state and local governments are covered by their state's OSHA-approved plan. Federal employees are covered under the OSH Act's federal employee occupational safety and health programs 29 CFR Part 1960. United States Postal Service employees, however, are subject to the same OSH Act coverage provisions as are private sector employers.

The OSH Act does not apply to particular working conditions addressed by regulations or standards affecting occupational safety or health that are issued by federal agencies, other than OSHA, or by a state atomic energy agency. Other federal agencies that have issued requirements affecting job safety or health include the Mine Safety and Health Administration and some agencies of the Department of Transportation.

Employer Responsibilities

If you are an employer covered by the OSH Act, you must provide your employees with jobs and a place of employment free from recognized hazards that are causing, or are likely to cause, death or serious physical harm. Among other actions, you must also comply with the OSHA statutory requirements, standards, and regulations that, in part, require you to do the following:

- Provide well-maintained tools and equipment, including appropriate personal protective equipment;
- Provide medical examinations;
- Provide training required by OSHA standards;
- Report to OSHA within 8 hours accidents that result in fatalities;
- Report to OSHA within 8 hours accidents that result in the hospitalization of three or more employees;
- Keep records of work-related accidents, injuries, illnesses and their causes and post annual summaries for the required period of time. A number of specific industries in the retail, service, finance, insurance, and real estate sectors that are classified as low-hazard are exempt from most requirements of the regulation, as are small businesses with 10 or fewer employees (see 29 CFR Part 1904);
- Post prominently the OSHA poster (OSHA 3165) informing employees of their rights and responsibilities;
- Provide employees access to their medical and exposure records;
- Do not retaliate against employees who exercise their rights under the OSH Act;
- Post OSHA citations and abatement verification notices at or near the worksite;
- Abate cited violations within the prescribed period; and
- Respond to survey requests for data from the Bureau of Labor Statistics, OSHA, or a designee of either agency.

Employer Rights

When working with OSHA, you may do the following:

- Request identification from OSHA compliance officers;
- Request an inspection warrant;
- Be advised by compliance officers of the reason for an inspection;
- Have an opening and closing conference with compliance officers;
- Accompany compliance officers on inspections;
- Request an informal conference after an inspection;
- File a Notice of Contest to citations, proposed penalties, or both;
- Apply for a variance from a standard's requirements under certain circumstances;
- Be assured of the confidentiality of trade secrets; and
- Submit a written request to the National Institute for Occupational Safety and Health for information on potentially toxic substances in your workplace.

Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801.

Through the Federal Mine Safety and Health Act of 1977 ("MSHA"), also known as the Mine Act, the United States Congress amended the Federal Coal Mine Health and Safety Act of 1969 by encompassing all mines under one legislation; this includes all mines, surface and underground, regardless of size, commodity mined, or method of extraction. The Act required mine operators to provide training for employees and mandated annual refresher training. It defined violator penalties, permitted inspections, and allowed the closing of dangerous mines.

Congress created the Mine Safety and Health Administration ("MSHA") under the DOL to administer the Act and enforce compliance with mandatory safety and health standards. Some of the health and safety standards established and monitored by the MSHA include possible cave-ins, flammable and explosive gases, electrical fires, equipment rollovers and maintenance, airborne contaminants, noise, and dust. The MSHA was also given the responsibility of investigating mine accidents and providing technical and compliance assistance.

The Drug-Free Workplace Act of 1998, 15 U.S.C. § 654.

The Drug Free Workplace Act of 1998 was passed in a national effort to control illegal drug use through the regulation of government contractors. It requires all government contractors to certify that they provide a drug-free workplace, and to publish a statement at each facility listing prohibited drug related behaviors and the actions that will be taken against violators. Contractors are further required to establish an ongoing drug-free awareness program that educates and notifies employees of the availability of counseling programs and the penalties of abuse in the workplace. As a condition of employment, employees of government contractors must notify the contractor of any criminal drug convictions occurring in the workplace, and the contractor in turn must impose a penalty for an employee convicted of a drug violation in the workplace. All violations of the above requirements must be immediately disclosed to the procuring agency. Contractors who fail to comply with the Drug-Free Workplace Act of 1998 are subject to sanction.

ANTI-DISCRIMINATION IN EMPLOYMENT LAWS

In 1964, President Lyndon Johnson pressed Congress to pass the Civil Rights Act of 1866. Since then there have been amendments and judicial interpretations and extensions of rights by the United States Supreme Court. From the 1991 Amendments to the Civil Rights Act to the 2008 Amendments to the American with Disabilities Act, we have seen the evolution of protections. Now with the election of the first African American United States President, our Nation has realized the change envisioned by Presidents Lincoln and Johnson.

Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e *et seq*.

Title VII of the Civil Rights Act (Title VII) is the most often utilized and known provision of the Civil Rights Act. It applies to employers having 15 or more employees.

Title VII provides that an employer may not discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race, color, religion, sex or national origin. The law specifically makes it illegal to limit, segregate, or classify employees in any way which would deprive or tend to deprive the employees of employment opportunities or otherwise adversely affect their status and opportunities as employees. Applicants for employment are protected, as well as persons who are actually hired. Employees who quit and prove a constructive discharge can be protected. The law follows employment and has been extended to protect former employees in the employment reference process.

Title VII prohibits overt, intentional discrimination known as disparate treatment. It also prohibits employment practices that are "fair in form but discriminatory in operation," frequently referred to as "disparate impact." Thus, a weight and height requirement not really needed for a job may be designed to eliminate as applicants women or even persons of a certain national origin generally known to be less tall. The United States Supreme Court has held that subjective personnel procedures such as interviews, evaluations and recommendations may also be subject to a "disparate impact" analysis.

Prohibited Employment Practices

Title VII does not require preferential treatment to any individual or group of individuals based on an imbalance that may exist in the work force. Similarly, it is not unlawful for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a *bona fide* seniority or merit system, or a system which measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin. Such an intention, however, may be inferred from the facts and circumstances and statistics.

Burden of Proof

To establish a claim of disparate treatment discrimination, an employee must put forth *prima facie* evidence. She does so by either direct evidence of discrimination or circumstantial evidence sufficient to create a rebuttable inference that the employee was subjected to discrimination. To overcome such an inference of discrimination, the employer must then present a legitimate, non-discriminatory reason for its actions. To prevail, the employee (or applicant) must then rebut the employer's position by showing that the articulated reason is a pretext for discrimination.

The United States Supreme Court has held that pretext can be established by direct or circumstantial evidence. One way an employee can prove pretext is by showing that the reason set forth by the employer is not true. An employee can also prevail by showing a mixed motive i.e., that discrimination was not "the" motivating factor for the action but "a" motivating factor for the challenged action by the employer. In such an instance, the remedies available maybe more limited.

For "disparate impact", if an employee (or applicant) can show that persons in a protected class (African-Americans, women, Seventh Day Adventists, etc.) are disproportionately affected in their employment opportunities by supposedly "neutral" employment practices of the employer, the employer could be found guilty of disparate impact discrimination unless it can prove the "business necessity" of the practices.

Bona-Fide Occupational Qualifications

Under Title VII, an exception to the general anti-discrimination rule is available for *bona fide* occupational qualifications (BFOQs). These BFOQ exceptions are extremely rare and limited to certain circumstances such as when an individual is required for a position because of his or her sex.

Customer preference does not provide the basis for a BFOQ exception, e.g., a Company's preference for male over female workers on an offshore platform.

Reasonable Accommodation to Religious Beliefs

With respect to the anti-discrimination rules on religion, an employer must make reasonable accommodations to a sincerely held religious belief. The employer has an affirmative obligation, where reasonable and without undue burden to other employees, to accommodate religious beliefs. For example, the reassignment of employees from certain shifts or schedules which interfere with an employee's religious observances. Consideration must also be given to granting a temporary leave of absence to accommodate an employee's religious needs. The religious belief must, however, be proven to be sincerely held and observed by the employee and not just an excuse for a day off.

Retaliation Prohibited

Title VII prohibits any retaliatory action against an employee who opposes a discriminatory practice in good faith. It also prohibits retaliation against an employee who initiates or participates in an action or proceeding under the Act. Opposition has recently been held by the United States Supreme Court to include reporting harassment during in an investigation conducted by an employer. Even when a claim of discrimination is meritless, retaliation is forbidden if the employee sincerely believed the allegations to be supportable.

Opposition is informing an employer that the employee believes that the employer is engaging in prohibited discrimination. Opposition is protected if it is based on a good faith belief that the complaint of practice violates anti-discrimination laws. The manner of the opposition must be reasonable. Examples include:

- Complaining about discrimination
- Threatening to file a charge of discrimination
- Refusing to obey an order reasonably believed to be discriminatory
- Reporting harassment in response to employer questions during an employer's internal investigation of alleged discriminatory practice

Participation means taking part in an employment discrimination proceeding even if the claims (s) are ultimately found unfounded. Examples include:

- Filing a charge of discrimination
- Serving as a witness in an EEOC investigation or a discrimination suit

Enforcement of Title VII

The Act is administered and enforced by the Equal Employment Opportunity Commission ("EEOC"). The EEOC is empowered by Congress to investigate charges of discrimination and, where appropriate, seek mediation or a voluntary settlement of the discriminatory practice, dismiss the charge and/or proceed with an action against the employer. The EEOC also issues interpretative guidelines and regulations.

To pursue a claim of discrimination under Title VII, an individual must first file a charge with the EEOC within 180 days of the alleged discriminatory act, or it will be deemed untimely (in states where an approved state or local civil rights agency operates, the filing period for an EEOC charge is 300 days). Before a person can seek judicial relief from alleged discriminatory practices under Title VII, a Notice of Right to Sue must be obtained from the EEOC.

The individual must then file a lawsuit in federal district court within 90 days of receipt of the Notice of Right to Sue. Some federal circuit courts of appeal have adopted a presumptive receipt date of seven to ten days from the date of the notice when the employee is unable to prove or attest to the date of receipt. The processing of a grievance with the employer does not suspend the time period for filing an EEOC charge.

Title VII Remedies

Title VII provides for monetary and equitable remedies. As first enacted, it provided remedies designed to make a person whole, such as reinstatement, front pay in lieu of reinstatement, back pay and loss benefits. In the case of a discharge, for example, the wronged employee may be reinstated to his former position (or promoted to a position he would have received but for the discharge) and receive full back pay and benefits. The Civil Rights Act of 1991 amended Title VII to permit awards of compensatory damages against private and public employers. That amendment also provided for the recovery of punitive damages against a private employer if it is found to have acted with malice or reckless indifference to the rights of the employee. Additionally, the court may issue an injunction against the employer prohibiting future acts of discrimination. Although Title VII provides for the award of attorneys' fees to the prevailing party, the courts have constrained an employer's availability to such an award. A prevailing employer can be awarded attorneys' fees but only if it proves that the employee's claim was frivolous, unreasonable or without foundation even though not brought in subjective bad faith.

Civil Rights Act of 1991, 42 U.S.C. § 1981a, 42 U.S.C. § 1981(b), (c).

The Civil Rights Act of 1991 amended Title VII, Section 1981 of the Civil Rights Act of 1866, the Attorney's Fees Awards Act of 1976, the Americans With Disabilities Act of 1990 and the Age Discrimination in Employment Act of 1967. This Act provided for enhanced damages and jury trials which has made it more difficult and costly for employers to defend discrimination cases.

Compensatory and Punitive Damages

The provisions of the Civil Rights Act of 1991 amended the 1866 Civil Rights Act (42 U.S.C. § 1981a) to extend recovery of compensatory and punitive damages to victims of sex, race, national origin, color, religious and disability discrimination. Previously only victims of intentional racial or ethnic bias could obtain compensatory and punitive damages.

Before the Civil Rights Act of 1991, only equitable relief such as back pay, front pay, and reinstatement were available under Title VII. Now awards of compensatory damages are available against private and public employers for intentional discrimination.

Compensatory damages are damages for emotional distress, humiliation, embarrassment or loss of enjoyment of life. They do not include back pay, interest on back pay, or any other type of relief already available under Title VII.

Punitive damages may be recovered against non-public employers, but only when "the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

Statutory Cap

Under 42 U.S.C. § 1981a, there is a ceiling on the amount of compensatory and punitive damages that can be awarded. That cap is determined by the number of employees. Damage awards are capped as follows:

- 15 to 100 employees—$50,000
- 101 to 200 employees—$100,000

- 201 to 500 employees—$200,000
- 500 or more employees—$300,000

Americans with Disabilities Act Awards

The Act contained a specific provision that governed damage awards under the Americans With Disabilities Act ("ADA"). Specifically, the Act provided that damages will not be awarded if the employer demonstrates "good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business."

Jury Trials

The 1991 Amendments extended jury trials to Title VII claims.

Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

An employment practice which adversely impacts or disparately treats pregnant women violates Title VII unless a business necessity or BFOQ defense can be established. The Pregnancy Discrimination Act ("PDA") states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work ..." The United States Supreme Court has interpreted the PDA to require that non-employee spouses of male employees receive pregnancy medical care when such benefits are provided to female employees under the employer's medical plan. An employer is not required to have a leave of absence policy or a medical plan, but once the employer establishes medical leaves or provides medical benefits, it is unlawful to exclude pregnancy coverage from these plans.

Equal Pay Act of 1963, 29 U.S.C. § 206; Lilly Ledbetter Fair Pay Act of 2009.

The Equal Pay Act ("EPA") is incorporated in the FLSA and Title VII. The EPA prohibits employers who are subject to the minimum wage provisions of the FLSA from discriminating, within any establishment, between employees on the basis of sex, by paying wages to employees of one sex at a rate less than the rate at which it pays wages to employees of the opposite sex for equal work on jobs, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. Generally, an establishment is a distinct physical place of business rather than an entire business or enterprise composed of several places of business.

The EPA permits differences in wages if the differences are based on a seniority system, a merit system, or a system which measures earnings by quantity or quality of production, or if the differential is based on any factor other than sex. These are affirmative defenses the employer bears the burden of proof demonstrating.

The term “equal work” is judicially interpreted to mean “substantially equal work.” The jobs need not be “identical.” It is job content, i.e., duties actually performed, not job titles that determine whether jobs are “substantially similar”.

Actions for damages under the EPA must be filed within two years after the cause of action accrued, except that suits for “willful violations” may be filed up to three years after the violation. Each paycheck is a new act of discrimination that resets the time limit to file a claim under the Lilly Ledbetter Fair Pay Act.

Remedies

Under the EPA, a court may award back wages, attorneys’ fees and possibly liquidated damages in an amount equal to the back wages. Attorneys’ fees are available to the prevailing employee but not available to employers under the EPA, unlike Title VII.

The enforcement of the EPA has been assigned to the EEOC. However, unlike Title VII, there is no requirement that a plaintiff exhaust her administrative remedies prior to filing an action in court.

Claims for discrimination in compensation can also be brought under Title VII, the ADA and the ADEA. Unlike the EPA there is no requirement under these other laws that the job be substantially equal. Nor do these other statutes require the claimant to work in the same establishment.

Section 1 of the Civil Rights Act of 1866, 42 U.S.C. § 1981.

This law prohibits discrimination in the making and enforcement of contracts (including employment contracts) on the basis of race. The law has been interpreted to prohibit discrimination against persons having physical characteristics (particularly color) distinguishing them from white persons. The statute applies to all contractual stages and all stages of the employment relationship including the termination of employment. It has been extended by the United States Supreme Court to prohibit retaliation. Section 1981 is totally independent of Title VII and can result in the award of uncapped compensatory and punitive damages. This Act has provided for a jury trial since its enactment. Attorneys’ fees are available under 42 U.S.C. § 1987 for a violation of § 1981.

Section 1 of the Civil Rights Act of 1871 (Section 1983), 42 U.S.C. § 1983.

Section 1983 applies to employers acting under the power of state law (police and fire departments, public schools and colleges, public or semi-public hospitals, political subdivisions of the state, etc.). It prohibits employment discrimination against persons on the basis of race, color, religion, sex or national origin. In addition, the law covers discrimination based on a variety of other distinctions such as union activity, political affiliation and the like. Relief is similar to that available under Section 1981 of the Civil Rights Act, and the right to a jury trial exists.

Section 2 of the Civil Rights Act of 1871, 42, U.S.C. § 1985(3).

Section 1985 prohibits discrimination on the basis of race or color by employers acting under the guise of state law and, under certain conditions, employers who conspire to violate an employee's rights. The remedies under this law parallel those available under Sections 1981 and 1983. Jury trials are available under this law.

Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634.

The Age Discrimination in Employment Act of 1967 ("ADEA") prohibits an employer from refusing to hire, fire, or otherwise discriminate against a person age 40 or older, solely on the basis of age, this includes denying an employee pay or fringe benefits because of age, or classifying employees into groups on the basis of age in a way that unfairly deprives individuals of employment opportunities. Generally, an employer may not discriminate against a person 40 years or older for a younger individual, even if that younger individual is over the age of 40. The ADEA is applicable to employers who have twenty or more employees for twenty or more calendar weeks in the current or preceding calendar year.

Decisions based solely on age when based on a *bona fide* occupational qualification for the reasonably necessary operations of a particular business may not be discrimination under the ADEA. Further, the ADEA carves out compulsory retirement exceptions for "*bona fide* executives" or "high policymakers", as well as certain voluntary retirement requests by the employer.

A plaintiff-employee may not file a civil action under the ADEA until 60 days after a charge of unlawful discrimination has been filed with the EEOC. However, unlike a Title VII claim, the employee need not wait for a Right to Sue Notice from the EEOC before filing suit. Employers are subject to damages including back pay, attorneys' fees, front pay, liquidated damages for willful violations, and injunctive relief.

Older Workers Benefit Protection Act, 29 U.S.C. § 623.

The Older Workers Benefit Protection Act of 1990 ("OWBPA") amended the Age Discrimination in Employment Act ("ADEA") to prohibit employers from discriminating against older workers by denying certain employee benefits.

In some circumstances, an employee's rights under the OWBPA and the ADEA can be waived if specific criteria are met. Of utmost importance is the requirement that the waivers of potential age discrimination claims be “knowing and voluntary.”

Regarding restructuring and reduction in force (“RIF”) programs and early retirement plans, the OWBPA requires employers to provide information about the ages of both discharged and retained employees to those who are considering releasing their age claims.

Deciding which employees comprise the group or organizational unit for the OWBPA’s disclosure requirements can be a logistical nightmare for an employer. Unfortunately, the OWBPA itself offers little guidance on what an appropriate definition might be.

The EEOC regulations, however, do offer some assistance in defining the scope of the group or organizational unit. The commission’s stance is that employers should examine their organizational structure and decision-making process.

Case law interpreting the OWBPA’s requirements is somewhat limited on how to define a group or organizational unit. Much like the EEOC’s regulations, however, courts have held that the definition of group or organization can include employees at multiple facilities.

Thus, to determine the appropriate group or organizational unit under the OWBPA and minimize the risk of an invalid waiver, the individual company should look at how it's organized and how it determined the employees who would and wouldn't be included in its reduction in force.

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* and Americans with Disabilities Act Amendments Act of 2008.

The Americans with Disabilities Act of 1990 (“ADA”) provides that a “covered entity” (*i.e.* an employer with 15 or more employees) shall not discriminate against “a qualified individual with a disability.” Much like other employment discrimination statutes, this includes discrimination occurring during the application process, hiring, compensation, promotions, job assignments, benefits, terminations, training, and other conditions and privileges. The ADA protects disabled employees against adverse decisions by an employer to limit or classify an applicant or employee or not offer or make a reasonable accommodation to a known physical or mental limitation of the disabled employee after being requested to do such.

<u>Qualified Individual</u>

A “qualified individual” with a disability is an individual that can (1) satisfy the requisite skill, experience, education and other job-related requirements and (2) perform the essential functions of a position with or without reasonable accommodation. Essential job functions are those that are the most important job duties, the critical elements that must be performed to achieve the objectives of the job, not merely marginal functions.

An employer may require medical examinations as a post-hiring condition of employment however, the medical examination must be required of all employees.

Disability

With the enactment of the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”) in 2008, Congress overturned several United States Supreme Court decisions which it believed had interpreted the ADA too narrowly. In its Congressional findings and purpose, Congress states: “The definition of disability shall be construed in favor of broad coverage of individuals, to the maximum extent permitted by the terms of the ADA.” The ADAAA amends the ADA to define a “disability” as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” In addition to actual disabilities, the ADA/ADAAA also protects (1) individuals with “a record of … impairment,” and (2) individuals who are “regarded as” being disabled. Thus, individuals who have recovered from past impairments, as well as those who have been misclassified or perceived as having an impairment, are protected.

The ADAAA also broadened the definition by stating only one major life activity needs limitation and that impairments can be episodic or in remission. Impairments now shall be determined without regard to ameliorative effects of mitigating measures such as medicines or prosthetic devices that may treat or compensate for the condition. An exception is made for eye glasses and contact lenses.

Major Life Activity

The ADAAA now defines a “major life activity” as including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working. Additionally, now after the ADAAA, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, normal cell growing, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Regarded As

As stated above, individuals that are regarded as having a disability are a qualified individual under the ADA and as such, have the same remedies available as those with an actual disability. An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under the ADA/ADAAA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Reasonable Accommodation

Employers may have to provide a "reasonable accommodation" to enable an individual with a disability to meet a qualification standard that is job-related and consistent with business necessity or to perform the essential functions of the individual's position. A "reasonable accommodation" is any change in the work environment or in the way things are customarily done that enables an applicant or employee with a disability to enjoy equal employment opportunities. An employer never has to provide an accommodation that would cause "undue hardship" which is a significant difficulty or expense, which includes removing an essential function of the job.

The Changes made by the ADAAA

The Americans with Disabilities Act Amendments Act of 2008 expanded and broadened the list of impairments under major life activities (discussed above) and gives broader protections for disabled workers. The Act overturned a 1999 United States Supreme Court decision which held that an employee is not disabled if the disability can be corrected by mitigating measures and that there must be more than one major life activity limited. The Act also rejected another United States Supreme Court opinion that had narrowly defined "substantially limits" to mean "severely restricts" and instructed the EEOC to set a new standard consistent with Congress' instruction to broadly construe coverage.

The ADAAA also provides that "regard as" being disabled requirements are met whether or not the actual or perceived impairment actually limits or is perceived to limit a major life activity. The Amendments limit the "regarded as" status by not allowing it to apply to impairments that are "transitory" or less than six months. Further, "regarded as" individuals are not entitled to reasonable accommodations from the employer.

LAWS AFFECTING GOVERNMENT CONTRACTORS AND EMPLOYERS RECEIVING FEDERAL FINANCIAL ASSISTANCE.

Executive Order 11246.

EEO and Affirmative Action Guidelines for Federal Contractors Regarding Race, Color, Gender, Religion, and National Origin

The United States DOL's Office of Federal Contract Compliance Programs (OFCCP) administers and enforces Executive Order 11246, which prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over $10,000 in government business in one year:

- From discriminating against employees or applicants on the basis of race, color, religion, sex, or national origin.

- The Executive Order also requires Government contractors to take affirmative action to insure that equal opportunity is provided in all aspects of their employment and employment decisions.

Enforcement

OFCCP conducts compliance reviews to investigate the employment practices of government contractors. During a compliance review, a compliance officer examines the contractor's affirmative action program; checks personnel, payroll, and other employment records; interviews employees and company officials; and investigates virtually all aspects of employment in the company. The contractor's special efforts to achieve equal opportunity through affirmative action are also investigated.

When a compliance review discloses problems, OFCCP attempts to work with the contractor, often entering into a conciliation agreement. A conciliation agreement may include reinstatement, back pay, job offers, seniority credit, promotions or other affirmative action measures to redress discrimination.

If conciliation is not reached, sanctions may be imposed. For example, a contractor could lose its government contracts or subcontractors or be declared ineligible for any future government contracts.

Affirmative Action

Executive Order 11246 requires that employers establish affirmative action programs which require, among other items, incorporating nondiscrimination provisions in contracts, a published equal employment opportunity policy, appointment of EEO officers, self-analysis to insure non-discrimination compliance, corrective action, and an established system of recordkeeping and reports to help contractors identify and analyze potential problems in the participation and utilization of women and minorities in the contractor's workforce.

Each government contractor who employs 50 or more employees and has $50,000 or more in government contracts annually must develop a written affirmative action program for inspection by the OFCCP.

Rehabilitation Act of 1973, 29 U.S.C. §§ 706 *et seq.*

The Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment and in the employment practices of federal contractors. The standards used to determine employment discrimination under the Rehabilitation Act are the same as those used in Title I of the Americans with Disabilities Act.

The most relevant sections of this Act provide:

- Section 501 requires affirmative action and prohibits discrimination in employment by Federal agencies of the Executive branch of government.
- Section 503 requires affirmative action to hire, retain, and promote qualified individuals with disabilities and prohibits employment discrimination by Federal government contractors and subcontractors with contracts of more than $10,000. All covered contractors and subcontractors must also include a specific equal employment opportunity clause in each of their non-exempt contracts and subcontracts.
- Section 504 requires that qualified individuals with disabilities shall not be excluded from, denied access to or be subjected to discrimination under any program or activity that either receives Federal financial assistance or is conducted by any Executive agency or the United States Postal Service.
- This law is enforced by the Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) within the DOL. However, Section 504 may also be enforced through private lawsuits without a requirement for a "right to sue" letter.
- The definition of a "disabled" individual under this Act was the pattern for that under the ADA. Under the Rehabilitation Act, the term includes any individual who is an alcoholic or drug abuser unless his current use of alcohol or drugs prevents him from performing the duties of the job in question; or his employment, by reason of his current alcohol or drug abuse, would constitute a direct threat to the property or safety of others. Some agencies have also defined individuals with AIDS as "disabled" under the Rehabilitation Act.

<u>Prohibited Conduct</u>

Failure to comply with the Rehabilitation Act can result in the loss of government contracts or financial assistance, and persons found to have been discriminated against may be granted reinstatement, back pay, court costs and attorneys' fees.

Government contractors must invite applicants and employees who believe they are disabled within the meaning of the Act to identify themselves, and make an affirmative attempt to employ qualified disabled persons. Although the contractor may inquire into an applicant's or employee's mental or physical condition and may conduct a medical examination prior to hiring the person or making a change in employment status, any questions on an employment application about past or present mental or physical conditions may create a compliance problem if the applicant is not hired or the employee is adversely affected. Regulations permit questions related to the ability of the applicant or employee to perform a particular job as distinguished from general questions about periods of past hospitalization, surgeries, medications, claims for workers' compensation, etc.

An employer subject to this Act may have to prepare a written affirmative action plan and maintain records similar to those imposed by the OFCCP under Executive Order 11246, although the reporting requirements are somewhat different.

Vietnam Era Veterans Readjustment Assistance Act of 1974, 38 U.S.C. § 2021, 38 U.S.C. § 4212, as amended.

The Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended ("VEVRAA") requires that contractors and subcontractors with a federal contract or subcontract in the amount of $100,000 or more, entered into on or after December 1, 2003, for the purchase, sale or use of personal property or non-personal services (including construction), take affirmative action to employ and advance in employment qualified covered veterans. Disabled veterans, recently separated veterans (veterans within 3 years of their discharge or release from active duty), veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized (referred to as "other protected veterans"), and Armed Forces service medal veterans are covered veterans under VEVRAA.

In addition, VEVRAA requires contractors and subcontractors to list their employment openings with the appropriate employment service delivery system, and that covered veterans receive priority in referral to such openings.

Further, VEVRAA requires federal contractors and subcontractors to compile and submit annually a report on the number of current employees who are covered veterans.

The affirmative action and mandatory job-listing provisions of VEVRAA are enforced by the Employment Standards Administration's office of Federal Contract Compliance Programs (OFCCP) within the United States DOL. DOL's Veterans' Employment and Training Service (VETS) administers the veteran employment reporting requirement.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.*

Title VI of the Civil Rights Act of 1964 governs Equal Employment Opportunity. It prevents discrimination in hiring, employment decisions and work place operations on the basis of race, color, national origin, religion or sex as a condition of employment or memberships by employer, employment agencies, and unions. All institutions or agencies with fifteen or more employees—including state and local governments and labor organizations are covered under the amended Act whether or not they receive federal funds. Title VI prohibits discriminatory practices in all terms and conditions of employment, including: recruitment, selection, assignment, transfer, layoff, discharge, and recall; opportunities for promotion; in-service training or development opportunities ; wage and salaries; sick leave time and pay; vacation time and pay; overtime work and pay; medical, hospital, life and accident insurance; retirement plans and benefits; and other staff benefits.. Title VI is enforced by the federal agency extending financial assistance, and the remedy for noncompliance is the cancellation of further federal financial assistance.

Civil Rights Restoration Act 20 U.S.C. § 1687, 29 U.S.C. § 706, 29 U.S.C. § 794, 42 U.S.C. § 2000d-4a, 42 U.S.C. § 6101.

The Civil Rights Restoration Act specifies that recipients of federal funds must comply with civil rights laws in all areas, not just in the particular program and activity that received the federal funding. It also specifies that an institution which receives federal financial assistance is prohibited from discriminating on the basis of race, color, national origin, religion, sex, disability or age in a program or activity which does not directly benefit from such assistance.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

Title IX of the Education Amendments of 1972 is the major federal law prohibiting sex discrimination in educational institutions, public or private, receiving federal financial assistance. Enforcement is primarily achieved through a cutoff of federal funds.

Omnibus Crime Control and Safe Streets Act of 1968 , 42 U.S.C. § 3789(d).

The Omnibus Crime Control and Safe Streets Act of 1968 ("Safe Streets Act") prohibits discrimination against persons on the basis of race, color, religion, national origin or sex regarding federal financial and technical assistance available to state and local law enforcement and criminal justice agencies. The United States Department of Justice is authorized to prosecute violations of this law.

Drug-Free Workplace Act of 1988, 41 U.S.C. §§ 701-707.

This Act requires federal grantees and contractors receiving any amount of federal assistance to certify that they maintain a drug-free workplace. The drug-free workplace certification is a pre-condition of receiving federal grant funds.
Those employers covered by the Act must:

- Publish a statement notifying employees that unlawful use, manufacture, distribution, or possession of a controlled substance is prohibited in the workplace;
- Ensure that each employee working on a contract is given a copy of the statement;
- Establish a drug-free awareness program to inform employees of the dangers of drug abuse in the workplace, policy of maintaining a drug-free workplace, and any available drug rehabilitation and employee assistance programs;
- Notify employees, via the statement, that any drug conviction must be reported to the employer within five days of the conviction;
- Notify the granting agency within 10 days after receiving notice of such a conviction; and

- Within 30 days of notice of an employee's conviction for a drug violation in the workplace, an employer must either take appropriate personnel action against the employee, which can include termination, or require the employee to participate satisfactorily in a drug assistance or rehabilitation program that is approved by federal, state, or local health, or law enforcement.

However, drug-free workplace programs are not required by any DOL laws or regulations, and DOL does not administer the Drug-Free Workplace Act of 1988. Instead, the agency granting federal financial assistance may apply sanctions to an employer that makes a false statement in the certification or fails to make a good faith effort to comply with the drug-free regulations. These sanctions include: suspension of payments under a grant; suspension or termination of a grant; and suspension or debarment from federally assisted activities.

GENERAL EMPLOYER OBLIGATIONS.

Uniformed Services Employment and Re-Employment Rights Act (USERRA), 38 U.S.C. §§ 4301-4335.

The Uniformed Services Employment and Re-Employment Rights Act provides individuals who serve or have served in the Armed Forces, Reserves, National Guard or other "uniformed services" are not disadvantaged in their civilian careers because of their service, are promptly reemployed in their civilian jobs upon their return from duty and are not discriminated against in employment based on past, present or future military service.

Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA), 50 U.S.C. §§ 501-593 and Servicemembers Civil Relief Act of 2003.

These Acts provide significant protections to servicemembers through suspension of many civil liabilities for individuals in military service while the individual is on call to active duty. Relief includes staying of court hearings, reduction of interest rate for pre-service loans and obligations, court action before eviction for servicemember's family from rental property and other liabilities. Of importance to employers are the requirements related to health insurance, including COBRA-like benefits for the individual's covered family members and reinstatement of health insurance benefits upon return from active duty without the administration of a wait period.

Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq*. and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).

These Acts prohibit any employer from hiring non-United States citizens known to be in the United States illegally or who are legally present in the country but do not have the proper work authorization documents. Other state laws may apply additional penalties for the hiring of undocumented or illegal immigrants. The Acts place the onerous on the employer to ensure compliance with these laws by requiring that employers confirm appropriate identification documents and authorization to work in the United States by every employee within three days of hiring the new employee. An employer must maintain these records for three years (or one year after the termination of a hired employee, if the employee worked less than three years). Violations of these Acts may lead to civil and criminal penalties.

In addition to protections from national origin discrimination under Title VII, these Acts provide for similar protections against national origin and citizenship status, however, duplicative claims of discrimination may not be filed with the EEOC if an individual is pursuing his or her rights under these Acts with the Department of Justice.

Employee Polygraph Protection Act of 1998 (EPPA), 29 U.S.C. §§ 2001-2009.

The Employee Polygraph Protection Act establishes guidelines for polygraph testing (lie detection tests) and imposes restrictions on most private employers for when such can occur. Employers cannot request, suggest or require any job applicant to take a pre-employment polygraph exam. Employers may, at times, request a current employee to take a polygraph exam, however specific and detailed conditions must be satisfied before an exam may be administered.

Worker Adjustment and Retraining Notification Act (WARN) 29 U.S.C. §§2101-2109.

The WARN Act requires employers to give advance notice to employees who will be affected by a plant closing or a reduction-in-force. The Act applies to private-sector and not-for-profit employers who have 100 or more full-time employees who have worked at least six months in the previous 12 months and who average at least 20 hours of work per week.

Generally, a 60-day written notice is required before an employer may close a plant or perform a mass reduction-in-force (several exceptions may apply for shortening the time or providing notice subsequent to the reduction-in-force such as faltering companies, natural disasters and unforeseeable business circumstances). Failing to comply with the WARN Act may subject the employer to penalties including back pay and benefits per each applicable employee for each day that the notice was not provided up to 60-days.

The 60-day notice must be provided when: 50 or more full-time employees at a single worksite are expected to be terminated/laid-off in a 30-day period; when 50 or more full-time employees at a single worksite are laid off within a 30-day period for as long as six months, and those terminated/laid-off constitute thirty-three percent of the workforce; when 500 or more full-time employees at a single worksite are expected to be terminated/laid-off within 30 days despite the percentage of the workforce which is represented in the terminations/lay-offs. The law also provides notice may be required if employees work hours are going to be reduced more than fifty percent during each month of any six month period.

Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681.

The Fair Credit Reporting Act applies to employers who desire to run employment background screenings on applicants. Prior to receiving a consumer report (defined as "any written, oral, or other communication of any information by consumer reporting agency bearing on [the applicant or employee's] credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living") from a third-party Consumer Reporting Agency, the employer must certify that they will comply with and follow the Fair Credit Reporting Act. Employers receiving such information must use such information for employment purposes only and certify that the information will not be used in violation of any federal or state equal opportunity laws. Employers must give notice to an applicant in the event that any adverse action is taken against the applicant based in whole or in part on the contents of the consumer report.

Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. § 1181 *et seq*., 42 U.S.C. §§ 300gg *et seq*. ("HIPAA").

Availability of Health Coverage

HIPAA does not allow plan participants to literally transport their health insurance coverage from one employer to the next, but instead ensures the availability of coverage to participants by placing certain restrictions on the ability of group health plans to exclude coverage due to pre-existing medical conditions. Group health plans may refuse to provide benefits relating to pre-existing conditions for a period of 12 months after enrollment in the plan or 18 months in the case of late enrollment. However, individuals may reduce this exclusionary period if they had group health plan coverage or health insurance prior to enrollment in the plan. The pre-existing condition exclusion period must be reduced by the amount of time that the individual had "creditable coverage" prior to enrolling in the plan and after any "significant breaks" in coverage. "Creditable coverage" includes nearly all group and individual health plans as well as coverage under Medicare and Medicaid programs, military coverage or coverage under state-sponsored health plans. A "significant break" in coverage is defined as any 63 day period where the individual does not have any creditable coverage. HIPAA also requires employers to provide participants who end their coverage under a group health plan with a "certificate of creditable coverage" which can then be used by the participant to reduce the exclusionary pre-existing condition exclusion period.

Privacy Requirements

The Privacy Rule became effective April 14, 2003 with a one-year extension for certain "small plans." The HIPAA Privacy Rule regulates the use and disclosure of certain information held by "covered entities" (generally, health care clearinghouses, employer sponsored health plans, health insurers, and medical service providers that engage in certain transactions). It establishes rules and requirements for the use and disclosure of Protected Health Information (PHI), which is defined as any information held by a covered entity regarding the health status, provision of health care, or payment for health care that can be linked to an individual. The definition has been interpreted broadly to include any part of an individual's medical record or payment history for medical services.

A covered entity is permitted to disclose PHI as necessary to facilitate medical treatment, payment for medical services, or health care operations. The covered entity may also disclose PHI pursuant to a qualifying authorization provided by the individual. The regulations contain detailed requirements in order for the authorization to comply with HIPAA privacy requirements.

Discrimination Prohibited

Group health plans are also prohibited from discriminating against participants and beneficiaries on the basis of health-status related factors, including medical condition/medical history, claims experience, disability or genetic information with respect to enrollment, eligibility, waiting periods or contribution levels. For example, a plan cannot exclude otherwise eligible participants with a disability or an individual with a substantial benefits claim history from enrollment and participation in a group plan due to cost considerations associated with insuring that individual. The statute does not require a group health plan to provide coverage for any specific medical treatment or procedure and does not prohibit limits on the amount, level or nature of benefits that are uniformly applied to plan participants.

The Federal Bankruptcy Act, 11 U.S.C. § 525.

Employers are prohibited from terminating or otherwise discriminating against employees with respect to the terms and conditions of employment *solely* because they have declared bankruptcy or been a debtor in a bankruptcy proceeding.

Consumer Credit Protection Act, 16 U.S.C. §§1671 *et seq*.

This Act prohibits an employer from terminating an employee due to a single wage garnishment proceeding. An employer may terminate an employee due to two or more garnishments on two or more separate debts. However, it should be noted that EEOC guidelines indicate that termination of an employee based on a history of wage garnishments could give rise to a charge of disparate impact discrimination due to the higher incident of garnishment proceedings experienced by minorities.

Longshoremens' and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

Employers are prohibited from terminating or otherwise retaliating against longshoremen and harbor workers because they have asserted claims for workers' compensation benefits under this federal statute.

The Jones Act, 46 U.S.C. § 688 and General Maritime Law.

The Jones Act and General Maritime law provide causes of action in favor of seaman against their employer for personal injury suffered in the course of maritime employment. Employers are prohibited from terminating or otherwise retaliating against employees because they have asserted these rights.

Whistleblower Protection.

A number of federal statutes, including several federal environmental laws, prohibit employers from retaliating against employees who report a violation of the statute or assist government agencies in the enforcement of these statutes by providing testimony or other assistance. Examples of such federal whistleblower statutes include: the Solid Waste Disposal Act, 42 U.S.C.§ 6971; the Clean Air Act, 42 U.S.C. § 7622; the Safe Water Drinking Act 42 U.S.C.§ 300j-9(I); the Toxic Substances Control Act, 15 U.S.C.§ 2622; the Energy Reorganization Act, 42 U.S.C.§ 5851; the Water Pollution Control Act, 33 U.S.C.§ 1367.

Record Keeping/Posting Requirements.

Many federal fair employment statutes, including Title VII, the FLSA and the FMLA, require employers to maintain certain employment records for various periods of time and require employers to post notices of employees' rights in the workplace. Employers should consult their labor and employment law counsel for advice on compliance with these record keeping and posting requirements.

About Lemle & Kelleher, L.L.P.

Lemle & Kelleher is one of the oldest major law firms in Louisiana, tracing its origins to the late 19th century when New Orleans was experiencing a boom as the shipping and commercial center of the South. Building on that genesis, we have diversified and expanded our capabilities for more than 100 years to meet the growing needs of our clients regionally and nationally. Today, Lemle & Kelleher offers responsive, innovative, and experienced legal representation covering a broad range of practice areas. For more information please visit www.lemle.com.

Your Lemle & Kelleher Labpr amd Employment Law Team Contact Information:

E. Fredrick Preis, Jr., epreis@lemle.com, (504) 585-6371
Eve B. Masinter, emasinter@lemle.com, (504) 584-9173
David M. Whitaker, dwhitaker@lemle.com, 504-584-9404
Louis Colletta, Jr., lcolletta@lemle.com. 504-584-9147
Bryce G. Murray, bmurray@lemle.com, 504-585-6359
Bridget A. Dinvaut, bdinvaut@lemle.com, (504) 586-1241

