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**BY**

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PRESENTATION HANDOUT

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## What is Human Resources and Why It Matters

My definition of HR (also referred to as human capital) is that it's the management of employees as a capital asset. A business acquires and manages employees in a manner similar to the acquisition and management of any other capital asset. Now what exactly does this entail?

Employees are obviously human and a business resource. However, in the same way that machinery or equipment is capital that is acquired, utilized, appreciated or depreciates in value, and which can be improved, sold or discarded, HR relates to the management of employees in a similar fashion. Although this explanation may seem callous, when further scrutinized it is evident that HR pays as much attention to the "human" half of its name as it does to the "resources" half.

HR concerns the approach and ideology a business adopts for its culture and the life cycle of its employees. It's how a business enhances and protects its human assets, and ultimately how a business maximizes profits. Recruiting, selecting, compensating, motivating, maintaining and promoting employees are all part of HR. Consequently, to some extent, all businesses with more than one employee practice HR. Yet, an effective HR philosophy has to acknowledge that because employees affect every facet of business, employees have an enormous impact on profit.

### *HR AFFECTS PROFIT*

Therefore, in order to increase profit and decrease expenses, management must know how to treat employees in a way which enhances their value. Ultimately, effective HR helps to maximize profit by minimizing employment related expenses and maximizing employee performance.

In U.S. industry, modern HR theories date back to the Industrial Revolution. Moreover, since the Industrial Revolution, HR has evolved along with changes in production, distribution, finance and, perhaps most importantly, legal and civil rights. HR poses problems for a business when it fails to understand how these changes influence macro and micro HR.

### **Micro and Macro HR**

Macro HR is the strategic function of HR in a particular work environment. It encompasses the understanding of what HR means to a business; that is, how HR fits into the organization's structure, mission and planning. Macro HR further incorporates policy and practice development. It's the "big picture" stuff of HR.

Micro HR is the actual execution of duties as delineated at the macro level. These duties include the administration of policies regarding the selection, hiring, compensation, placement, performance management, promotion, conflict resolution, discipline and discharge of employees.

### **How Macro and Micro HR Impact the Bottom Line**

As stated above, a business will encounter difficulties when it fails to account for changes to macro and micro HR practices and changes to our labor and employment laws. Such difficulties include an unsafe workplace, attendance issues, conflict, union organizing and litigation. Simply stated, when a business encounters HR related problems, money is lost.

Businesses have money coming in through the "front door" via revenue, venture capital, grants, investors, etc. However, much of this money can exit through the "back door" because of poor HR practices. For instance, time and money is lost when a business realizes that it hired the wrong employee and

may now have to discharge that employee. Consequently, that business will have to spend money and time finding and training a new employee and may even have to defend its treatment and discharge of the former employee. Recognizing and efficiently resolving these problems often costs a great deal of time, energy and money.

However, time, energy and money spent upfront, proactively, on HR related matters could help to reduce, and in certain instances eliminate, the loss of money out the "back door." Thus, HR becomes an investment in capital. Time, energy and money are saved and increased productivity and profits result. The cost of employment related disputes and the savings associated with proactive and preventive practices are examined on the following page.

Knowing which HR practices to adopt and which HR disciplines to focus on is crucial in resolving macro and micro HR issues. Effective HR helps transform business from just a place to work into an environment which provides employees varied opportunities for meaningful contributions. Meaningful employee contributions lead to decreased operating costs, increased profits and innovation. Implicit in this explanation is the fact that results are measurable via means such as before and after analyses and time and expense audits.

### **Labor & Employment Law Defined**

Labor and employment law generally refers to the body of law regulating the workplace and all HR/human capital related matters. However, labor law and employment law are two distinct categories which are often confused with one another because they somewhat overlap.

Labor law usually refers to the body of laws regulating labor unions and associations and their relationship with management. Such laws include the National Labor Relations Act and other similar federal, state and local labor laws. These laws permit employee organizing, electing representation and entering into legally binding contracts with management.

Generally, employment law concerns the body of laws and rules regulating civil rights and workplace conduct. Civil rights include a workplace free from discrimination and harassment for all people (not just employees, it could be customers or the public) who fit into one of the legally protected classes (e.g., race, gender, disability, national origin, religion, military status, pregnancy, and in some instances sexual or gender orientation). Conduct laws refer to the employer's treatment of its employees. Like labor laws, these are federal, state and local laws.

### **Labor & Employee Relations Defined**

On the macro HR level, labor relations refers to the philosophy a business adopts for dealing with labor unions, union organizing and employee associations. On the micro level, this refers to practices and rules for dealing with individual employee issues concerning unions and associations.

Employee relations refers to the ideology (macro) a business adopts for dealing with harassment and discrimination and other employee issues. This is generally unrelated to labor unions or employee associations. This may include communication, discipline, recognition and payroll policies. On the micro level, it generally refers to how laws and rules are applied to individual or groups of employees.

## Employment Agreements—to Use or Not to Use?

These agreements are increasingly being used to protect employers from a variety of possible harm. Reasons for using employment agreements include the following:

- Generally, to discourage some sort of employee conduct (e.g., noncompete or nonsolicitation), or to clearly and succinctly identify some or most conditions and terms of employment;
- Pre-hire to define wages, hours, benefits, confidentiality, protection of business secrets and other similar information;
- Upon separation of employment as a sort of insurance to obtain a waiver of any legal or statutory claims, provide unearned severance or separation benefits; and
- During employment for promotions, demotions, wage deductions, garnishments, and waiver of any legal or statutory rights.

When considering whether to use such an agreement, a business should determine the following:

- What employee or ex-employee conduct is being encouraged or discouraged?
- What's being protected? What's the value of the protected information or items?
- What will it cost to enforce the agreement in case of breach? What are the actual and foreseeable damages due to breach?
- How much is lost vs. saved or gained by using these agreements? It's all about the money.
- Will this be a stand-alone agreement or part of the business' normal operations? Should the language and format of the agreement reflect the business' employment policies in tone and language, or is it completely isolated?

No hard and fast rules exist for when and how to incorporate employment agreements, and for the most part, they're not legally required unless certain circumstances exist such as the waiver of any legal or statutory claims, or to legally bind the other party to some sort of obligation.

Special attention must be paid to every aspect of wording, organization and legal compliance. Conciseness, plain language and thoroughness cannot be stressed enough.

However, all agreements should permit the employer to recover damages, costs and expenses from the employee or other party (assuming the legal system permits such recovery). This won't absolutely prevent a breach from occurring, but it increases the likelihood that such breach won't occur.

Enforceability of agreements is often an issue because if a breach of the agreement occurs, the employer still needs to take enforcement action. This does not necessarily mean that the employer has to

sue. The employer can issue some type of warning (letter, phone call, etc.), or the employer can contact the opposing party. The latter action poses its own

risks due to ethical concerns, antitrust, defamation, libel and slander concerns.

Obviously, the most extreme action an employer can legally take is to sue the ex-employee for breaching the agreement. A lawsuit will cost the business time and money, even if they can recover damages, costs and expenses from the employee.

With respect to a lawsuit or some other sort of complaint by the ex-employee, this is usually easier to deal with. As long as the terms of the agreement's confidentiality, nondisclosure and other prohibitions are legally compliant, no court or other tribunal should adjudicate a lawsuit or complaint against the employer, and costs, expenses and damages should be awarded to the employer.

Clients typically ask whether by entering into an employment agreement they're setting a legal precedent within their company or creating a feeling or belief of entitlement to such a benefit among employees. In short, it's not likely that the company will be legally obligated to offer the same. However, if others learn about such agreements, there's a greater degree of possibility that complications like a sense of entitlement will result. So, when deciding whether to use employment agreements, a business should consider the impact on employee morale, and to at least some extent consider the legal ramifications of using such an agreement.

The concerns regarding employee morale and feelings of entitlement can be combated by using these agreements infrequently or in extreme circumstances (e.g., in order to protect company confidentiality, capital, etc.), and making it clear to employees that they are at-will employees (if applicable).

In other words, it's relatively easy in an article like this to state in a generic and sterile manner what should or shouldn't be done. It's a completely different matter to actually draft and execute an agreement in a way that sufficiently communicates that this is an isolated and unique circumstance, and a serious and binding agreement with provisions that must be honored.

In short, how employment agreements are implemented is crucial. Issues with execution are what lead to misunderstandings and disputes. But, many of these issues are avoidable and resolvable via a professionally drafted and executed agreements and the advice of competent legal counsel.

How Much Money Does an Employment Dispute Cost &  
What's Your Likelihood of Getting Into an Employment Related Dispute or Being Sued?

**The Cost**

One approach to determining cost is past experience. I've settled employment cases at the administrative level for \$1,000. However, past performance is neither a reliable predictor nor a guarantee of future performance.

Here's another way to compute the cost of a dispute: If a complaint is filed with an administrative agency such as the Equal Employment Opportunity Commission (EEOC), a business should expect to pay a minimum of 5 hours for attorney's fees to just negotiate a quick settlement. Thus, if attorney's fees are \$250/hour, miscellaneous costs are \$50, and the settlement reached is \$1,000, that's \$2,300 spent. This doesn't even include the cost of employees spending time away from work to deal with this matter, and any other transportation, gas or lost sales, profits, etc. If the case isn't quickly settled or if it proceeds to court, then we're looking at additional expense.

Another cost is the employee's damages. Damages may include back pay and benefits, front pay, punitive or exemplary damages, reinstatement or promotion. Furthermore, a court or agency may order training (e.g., diversity and harassment), affirmative action and monitoring. This is an additional and substantial cost that the business may bear.

According to Jury Verdict Research ([www.juryverdictresearch.com](http://www.juryverdictresearch.com)), which compiles samples of employment discrimination verdicts for analysis, the median compensatory award for employment related cases, among all economic sectors:

- rose 18% in 2003 to \$250,000;
- fell to \$210,308 in 2004;
- from 1998-2004, the award was \$581,000; and
- from 1998-2004, 42% of all jury awards to plaintiffs in cases concerning age, disability, gender, race, pregnancy or religious discrimination or retaliation were between \$249,000 to \$499,000;
- 10% of all jury verdicts, for these same employee categories, was \$1,000,000 and up;

From "Working Up a Suit" by Barbara Bowers, *Best's Review*, Jan. 2005, Vol. 105, issue 9, pp. 74-77; and Horner & Bagnell, LLC, *Employment & Labor Law Update*, August 2006.

According to Jury Verdict Research, the average award:

- was \$990,000 from 1998-2004, within the manufacturing, industrial and high tech sectors, the average jury verdict award for employment discrimination cases;
- from 98-04, within the service and retail sectors it was \$486,000; and
- From 98-04, within the transportation sectors—\$445,000. From: "Risk Management—Why Train?" 2006, [http://www.emtrain.com/risk\\_manage\\_why\\_train.shtml](http://www.emtrain.com/risk_manage_why_train.shtml), citing Jury Verdict Research's "Employment Practice Liability: Jury Award Trends and Statistics," 2005 Edition.

According to insurance industry research:

- The general cost to settle a "frivolous employment case is \$30,000-\$40,000 (per a March 2005 statement from a Senior Vice President of London American General Agency; and
- 550 employment related lawsuits are filed every day (per a March 2005 statement from a Vice President of the National Union Fire Insurance Company). From: "Heads Up! Employees at Large," in [www.insurancejournal.com/magazines/southeast/2005/03/07/coverstory/52769.htm](http://www.insurancejournal.com/magazines/southeast/2005/03/07/coverstory/52769.htm).

**The Likelihood of Getting Into a Dispute**

Some statistics compiled by government and private industry might help to determine the probability of an employment related complaint or suit being filed, in addition to the cost to settle or litigate these complaints.

According to a 2004 Chubb Insurance ([www.chubb.com](http://www.chubb.com)) survey, during the previous few years, 1 in 4 or 25% of privately held companies have been sued by an employee or former employee. However, it's estimated that 75% of these claims are groundless. Nevertheless, these claims still cost money to handle and resolve. From "Working Up a Suit" by Barbara Bowers, *Best's Review*, Jan. 2005, Vol. 105, Issue 9, pp. 74-77.

According to the EEOC, they filed:

- 421 lawsuits in FY 2004,
- 416 in FY 2005,
- 403 in FY 2006, &
- 362 in FY 2007.

The monetary benefits paid over all of these suits averaged \$51.3 million from FY 2000-2002. However, in FY 2003, the amount awarded jumped to \$146.6 million, and in 2004 it increased to \$168.6 million. In 2005, it fell to \$104.8 million. However, in 2006, it fell to \$44.3 million and in 2007, it was \$54.8 million. From <http://www.eeoc.gov/stats/litigation.html>; this depicts complete litigation statistics from FY 1992 – FY 2007). I have no idea why 2006 and 2007 were so low.

Regarding money paid on all complaints, *not including lawsuits*, from fiscal years 2000-2005 an average of \$251.8 million was paid by businesses. From [www.eeoc.gov/stats/all.html](http://www.eeoc.gov/stats/all.html).

Interestingly, the number of actual charges filed with the EEOC by employees has increased. From FY 1997-FY 2001, an annual average of 79,690 charges were filed. In FY 2002, the highest number of charges in the last 11 FYs were filed—84,442. The number dropped to 81,293 in FY 2003; 79,432 in 2004; 75,428 in 2005; and 75,768 in 2006. But, in FY 2007, the number of charges filed increased to 82,792. From <http://www.eeoc.gov/stats/charges.html>.

The above numbers just relate to the EEOC. This leaves out the courts, the Illinois Department of Human Rights, the Cook County Commission on Human Rights, the federal and state labor departments, labor boards, Homeland Security, etc. There's a lot of money at stake here.

As I said before, it's much cheaper to prevent these problems from arising via proactive or preventive human resources. For example, according to Jury Verdict Research:

- It costs \$5,000 to train 200 employees at \$25 each on employment issues such as harassment and discrimination.
- If that same company is sued, the cost to litigate the case is approximately \$155,000, and the cost to settle is about \$85,000.
- Yet, the cost to litigate or settle an individual case, *when no training occurs*, is \$960,750 to litigate and \$304,000 to settle.

From "Risk Management—Why Train?" 2006, [www.emtrain.com/risk\\_manage\\_why\\_train.shtml](http://www.emtrain.com/risk_manage_why_train.shtml), citing Jury Verdict Research's "Employment Practice Liability: Jury Award Trends and Statistics," 2005 Edition.

In short, it pays for almost any business of any size, to have a basic understanding of human resources and employment law, and to have access to a great labor and employment attorney.

## What's Appropriate to Ask Job Candidates?

Although there are only a few explicitly illegal questions that an employer should never ask a job applicant, there are many more questions which might lead to the inference that the employer intended to illegally exclude (discriminate against) a member of a protected class. One way to help avoid or minimize liability for discrimination is to ask all applicants all of the same questions.

Additionally, it's crucial that you focus on questions related to the *essential job functions*. Or, put another way, are the questions you're asking intended to solicit information connected to the applicant's ability and willingness to perform the essential job functions, or are they more indicative of illegal bias? In almost all cases, it's not an essential job function to be of a certain race, age, sex, sexual orientation, etc. Exceptions are extremely limited.

Don't ask questions to determine if the applicant has children or dependents, or plans to start a family. Such questions include asking about the number of children, having a babysitter or even if the applicant has a car (unless, the job requires that the applicant has their own transportation). If the candidate indicates that they're pregnant, then you can congratulate them, but don't relate their pregnancy to the job unless they indicate that they require some sort of accommodation.

You can ask questions to determine an applicant's reliability. Such questions include asking what hours and days the person can work; are there specific days or times they can't work, or if they have outside responsibilities that will interfere with work.

Relative to an applicant's national origin, you shouldn't ask questions to determine where the candidate is from. Such questions include asking where their parents are from or maiden names. You can ask if the applicant is legally eligible to work in the U.S., or if they have ever worked under a different or another name.

With respect to arrest and conviction records, you can't ask if the applicant has ever been arrested. You can ask if they have ever been convicted of a crime. If they've been convicted, then you could also ask what, when and how the case was resolved. Essentially, you should only be concerned with a criminal conviction if such information relates to essential functions; e.g., handling money or being with children. Moreover, the date of conviction may be relevant depending on the magnitude of the crime. For example, 5 years after conviction or completion of the sentence or probation could be a good cut off date. Also, acquire the applicant's written waiver/permission to conduct the criminal background check.

You can't ask if a candidate has any physical or mental disabilities. Also, you can't ask if the applicant has an alcohol or drug problem, or if they take any medications. The above prohibitions are negated if the applicant explicitly and without your solicitation discloses any disability, impairment, drug or medication usage. If this is the case, you can ask if they can work the hours and days you specify, or if the applicant has nonwork related responsibilities which would interfere with their ability to perform the essential job functions. Moreover, you can ask if the applicant can perform the essential job functions with or without an accommodation.

Relative to credit record and financial history, you cannot ask if the applicant owns or rents a home, if they've ever had wages garnished or if they've ever declared bankruptcy. You can disclose that you'll be conducting a pre or post job offer credit check in compliance with the Fair Credit Reporting Act

and the Consumer Credit Reporting Reform Act (obtain candidate's written permission to check).

Regarding military record, you cannot ask about discharge. You can ask about the applicant's education, training and work experience while in the military.

Relative to languages spoken, if the job requires language fluency, other than English, then you can ask if the applicant has that ability. However, you shouldn't just ask what the applicant's native language is. This could lead to an inference of national origin or race discrimination.

In the "old boys' network" it used to be asked of applicants what clubs, organizations, lodges or societies they belonged to. Now, due to their association with weeding out members of protected classes, these questions are inadvisable. You can ask about membership or associations only if they directly relate to the applicant's ability to perform the essential job functions. E.g., "We expect you to become involved with local chambers of commerce, because this is how we develop new business and alliances. Do you have problem with this?"

Relative to time off from work, work related injuries or worker's compensation, you should never ask if the applicant has ever filed for worker's compensation, unemployment compensation or if they have ever sued or filed a complaint against a prior employer. Also, you should never ask if the applicant had any prior work related injuries. Again, you can ask if there are specific days or times that the applicant can't work, or whether the applicant can perform the essential job functions.

You can ask behavior oriented questions such as how the applicant handled prior workplace disruptions or disputes, or how they would handle job related issues or matters that are related to the position.

Asking about religious and ideological beliefs, associations or affiliations is usually indicative of illegal bias. They rarely, if ever, relate to the essential job duties and will only serve as an invitation to lawsuits. The exception is if your organization or business is a religious organization.

Don't ask about gender or sexuality, including bisexuality, homosexuality or transgenderism. Don't ask about titles such as: Mr., Ms., Mrs., or Miss.

Previous addresses (residential) have traditionally been asked on job applications and interviews. Such information is rarely related to job duties, skills, abilities or knowledge. So, don't make such an inquiry. If you believe that such information is relevant, then you can get this by doing a credit or background investigation.

Also, asking someone when they graduated college or high school may be indicative of age bias, so don't ask when they graduated or attended. You could ask what kind of education or degrees they have.

You can ask an applicant's date of birth to determine employment eligibility. Use a disclaimer or indication that the applicant is being asked only for purpose of determining eligibility.

Some of the information contained in this page was adapted from the following articles: Society of Human Resource Management Whitepaper-Guidelines on Interview and Employment Application Questions" by Nail & Scharinger, 1998, 1999, 2002; Society of Human Resource Management Whitepaper: "ADA Job Interview Checklist for Supervisors," by Pritchard, 1992, 1999, 2002; & "333 Interviewing Questions," by Borgman Associates, 1993.

## **Job Candidate Application & Selection Summary**

Focus on the essential functions of the job. Essential job functions usually defined via a valid job description.

For all candidates:

- Ask the same questions,
- Use the same background checking processes, use the same tests; and
- Score/assess the same way; i.e., don't adjust scoring/assessment system unless for a valid and/or legal purpose.

Don't discriminate in the hiring process on the basis of any protected class (see below); unless:

- mandated pursuant to a legally binding order or agreement, or
- you're doing so based on a "bona fide occupational qualification."

Can ask if candidate can perform the essential job functions with or without an accommodation (or a reasonable accommodation).

- Type of accommodation is generally contingent upon why needed, cost and feasibility.

Don't ask questions intended to elicit, or which unintentionally elicit, information regarding:

- race
- gender
- religious beliefs
- age
- sexual orientation
- disability
- military status
- socioeconomic status-own home, rent home, how will pay for home, education, etc.
- national origin.

Currently, it's popular to ask behavioral questions of candidates. These questions might be useful as they're generally nondiscriminatory, and they elicit performance and conduct related information. Examples of such questions include:

- Describe a situation in which you and another coworker conflicted. What happened? How did you deal with the situation? How was the situation resolved?

- Describe a situation where your employer asked you to do something which you believe may have been unethical or unprofitable for the business? How did you handle this? What was the outcome?

Background Checking—Compliance with federal laws like the Fair Credit Reporting Act, Consumer Credit Protection Act and state law like the Illinois Uniform Conviction Information Act is contingent upon:

- disclosure of the background check;
- disclosure of the reason for background check;
- procurement of candidate or employee's written release(s)—could be more than 1 release depending on the checks conducted.

Also:

- subsequent to the selection process, if a candidate or employee is rejected as a result of the check, then provide employee with the relevant part of the report and summary of rights/ recourse options.

Employment Testing:

- Make sure that the test is valid, reliable and used for the purpose(s) intended.

## Employee Screening and Risk Assessment

**Co-Authored by Tony Ramos & Charles Krugel**

Recent headlines of workplace violence, violence by home service personnel, as well as convicted rapists working as private security officers or childcare providers, have raised serious questions regarding employee screening programs.

- What is negligent hiring?
- Should all companies be expected to have a screening policy?
- Does every employee need to be screened?
- What is considered an acceptable screening program?
- How much should a company expect to pay for screening?
- What can it cost a company should they chose not to have a screening program?
- Are all screening companies alike?

*According to attorney Charles Krugel:*

Negligent hiring and negligent retention lawsuits are increasing, and so are employer expense and liability as a result of these suits. Underlying the idea of negligent hiring and retention is an employer's legal responsibility to provide employees, customers and the public a reasonably safe environment, and the liability imputed to employers when they fail to exercise reasonable care in providing such an environment. It's when this failure occurs that as an employer, your business, could be held liable for negligent hiring or retention.

Consequently, from a cost containment and legal liability perspective, it's increasingly crucial that businesses conduct criminal background checks, conduct such checks in a competent manner and take reasonable action as a result of these inquiries. This means that if an employer undertakes criminal background checking, in order to avoid legal liability, it should carefully choose who does the screening as well as what's searched.

Although, Illinois doesn't require many businesses to screen job candidates (most education and social service organizations are required to screen candidates), and the Illinois Human Rights Act mandates that an employer cannot use a candidate's "arrest record" as the basis for denial of employment (narrow exceptions exist), the possible liability resulting from a business' failure to screen can cripple that business. According to a 2001 report by the Society of Human Resources Management and American Background Information Services, Inc., the average settlement for negligent hiring lawsuits exceeds \$1.6 million.

Obviously, much of the burden falls on employers, with the guidance of competent legal counsel and screening professionals, to determine what constitutes a competent background search. Generally, such a search is based upon the essential requirements of the position and the industry's particular circumstances.

Usually, courts don't examine why screening is done. The courts look at why the essential duties of the job, and the particulars of the business' industry, necessitate the need to screen out convicted criminals, and which types of crimes prevent a candidate from being hired. Therefore, just knowing that a job candidate has been convicted of a crime may not be enough to insulate your business from liability. You'll probably need to know the exact nature of the conviction and connect it to the job.

In short, as a business, if you undertake criminal record checking, then choose a competent screener and screening

method, check all candidates and employees, conduct the search in a good faith and reasonable manner, and use the results of those checks in a good faith and reasonable fashion. As with all human resources related matters, in order to minimize expense and legal exposure, focus on prevention and proaction--research your screener and work with them to best determine what you need and why you need it.

### **Vendor Selection - Tony Ramos**

Selecting the wrong screening vendor can be equal to or more devastating than hiring the wrong employee. The wrong vendor can provide you with nothing more than a false sense of security.

Select a vendor who has the knowledge, experience and can clearly explain your screening options and their limitations. Typical choices include state, county court, national criminal databases and fingerprint searches. There are also choices of supplemental screening options which include driving record, credit reports, workers compensation, employment history, educational history and civil records as well. Your vendor can assist you in developing the right plan to match your needs.

### **Basic Program**

- **Vendor Selection**
  - Select a vendor who can demonstrate a **national hit rate of at least 10%**. Hit rate is the **most** effective way to determine the quality of the service. In short, for every 100 applicants screened, the vendor should be finding at least 10 with a criminal record. Don't be surprised if a vendor is hesitant or actually refuses to provide this information. Many operate with only a 6% or less hit-rate.
- **Social Security Trace**
  - This will help validate the number and provide up to ten-years of past residential history and names or aliases used.
- **County-court Record Search**
  - Counties to be searched should be selected based on the results of the trace and never from the job application. This will also provide you with the most accurate and current information available.
- **National Criminal Database Search**
  - For a more comprehensive program, include a national criminal database search. **Important note**, database findings must be verified by court records before acting upon them. Also, databases searches should only be used to supplement an actual court record search and not in place of.
- **FCRA (Fair Credit Reporting Act) Compliant**
  - Ensure your vendor is fully FCRA compliant, this will provide you with additional protective immunity against some civil lawsuits.
- **Cost**
  - While there are many factors such as volume and types of screening options selected which determine the actual cost, one can expect to pay \$20 to \$35 per person.

Co-Author: Tony Ramos, [tramos@integrasecurity.org](mailto:tramos@integrasecurity.org), has also authored "The Guide to Background Checks" which he developed for the Illinois Association of Chiefs of Police and is available for download from his web-site at [www.integrasecurity.org](http://www.integrasecurity.org)

## Independent Contractor vs. Employee: Summary of Classification Issues

Advantage of the independent contractor classification:

- Avoid federal and state withholding taxes.

Disadvantage:

- If improperly classify employee (intent is irrelevant), then penalty, which may include payment of taxes by employer, 5%–25% penalty for each month of nonpayment.

How to Distinguish Between the Two:

- Degree of control and independence is the key.
- Independent contractors have a great deal of control over their working conditions, environment, and freedom to work for anyone.
  - Such control might include control over work schedule, when paid, work for other businesses, location of work, able to maintain separate/distinct identity
  - Commission might not matter.
  - Use own methods of work; not trained by their principal.
  - Use own tools, materials, etc.
  - Closed ended contract/agreement with a start and finish date.
- Employees have little control over the above-mentioned factors.
  - Employees are subject to using the employer's materials, tools, processes, property, etc.

See the following for additional information:

[www.irs.gov/businesses/small/article/0,,id=99921,00.html](http://www.irs.gov/businesses/small/article/0,,id=99921,00.html)

### Overtime—Exempt vs. Nonexempt Classifications

Overtime at a minimum of 1 1/2 times the regular rate of pay is required after 40 hours of work in a workweek.

Don't arbitrarily classify. This will probably result in an illegal classification.

Most businesses are covered by the Fair Labor Standards Act. This is the federal law governing minimum wage and overtime.

Exclusions exists for businesses earning less than \$500k in annual revenue and not engaged in interstate commerce or hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill, or disabled who reside on the premises; schools for children who are mentally, or physically disabled or gifted; preschools, elementary, and secondary schools and institutions of higher education; and federal, state, and local government agencies.

The following are examples of employees exempt from both the minimum wage and overtime pay requirements:

- Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals;
- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers and switchboard operators of small telephone companies;
- Employees in newspaper delivery; and
- Casual babysitters and persons employed as companions to the elderly or infirm.

The following are examples of workers exempt from overtime pay requirements:

- Certain commissioned employees of retail or service establishments;
- Auto, truck, trailer, farm implement, boat, or aircraft salespersons, clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers (consumers, businesses);
- Railroad and air line employees, taxi drivers, some employees of motor carriers, and local delivery employees paid on approved trip rate plans;
- Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences; and
- Employees of motion picture theaters.

Certain employees may be partially exempt from the overtime pay requirements. These include:

- Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors;
- Employees of hospitals and residential care establishments that have agreements with the employees that they will work 14-day periods in lieu of 7-day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14-day work period, whichever is the greater number of overtime hours); and
- Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job-specific. Employers may require such employees to engage in these activities up to 10 hours in a workweek. Employers must pay normal wages for the hours spent in such training but need not pay overtime premium pay for training hours.

For additional information see:

[www.dol.gov/esa/whd/flsa/faq.htm](http://www.dol.gov/esa/whd/flsa/faq.htm)

## **The Costs of Unemployment Compensation (UC) Claims**

*Co-Authored by David Prosnitz & Charles Krugel*

Generally, a company's unemployment tax rate is experience rated: it goes up or down over time depending on a company's history with awarded unemployment claims.

In Illinois, for example, rates vary between 1.0% and 8.2%. The first \$12,000 of each employee's wages will be taxed in 2008. So, a million dollar taxable payroll can have unemployment taxes between \$10,000 and \$82,000. Obviously, lower tax rates make a difference to the bottom line.

The actual cost of a claim may vary, since claimants may collect just 2 weeks or 26. The average claim costs an employer \$4,200 but claims can cost a company in excess of \$10,000.

Each claim can affect 3 years of unemployment tax rates since state formulas used to assign rates ordinarily use a 3 year moving period to assign a tax rate. This is one reason why employers don't realize the expense involved in a single claim. The expense is spread over a 3 or 4 year period.

Smaller employers are hit harder by single claims than larger ones, though the different impact of a claim on a tax rate does not change the actual cost to the employer significantly. The average cost, big firm or small, of an unemployment claim is \$4,200.

Employers can contest the cost of these claims by fighting unwarranted applications for benefits. Employees terminated for misconduct or employees who quit for reasons not attributable to the employer are legally not entitled to unemployment benefits.

If employers do not fight unemployment claims, they are meekly acquiescing to their costs. This permits claimants who behaved badly at work to collect a reward for their bad behavior and it insures that the employer pays an unreasonable tax expense.

### **Eligibility for UC**

Because UC is a government administered bureaucracy, like much of government, it's not administered in a cost effective, logical or exacting manner. Many factors play a role as to whether and how an employee will be eligible or ineligible for UC.

Usually, if an employee is fired due to intentional wrongdoing, refuses reasonable employment and then becomes separated, quits for reasons not attributable to the employer, or is not able and available for work, they're not eligible for UC. If the employee is separated from employment through no fault of their own, whether for lay off, furlough, reduced hours, or there appears to be mixed or uncertain causes for separation (e.g., poor performance, undocumented problems, constructive discharge), then they'll be eligible for UC. Since an employee must do something discernibly wrong to be denied benefits under the

misconduct standard, vague reasons for firing an employee often lead to unemployment benefits. More specifically, a former employee will be disqualified from receiving unemployment benefits if they were terminated for misconduct or they quit for reasons not attributable to the employer.

While many factors are beyond the employer's control, the main reason for a company's unemployment tax rate increase or decrease is the eligibility or ineligibility of former employees who file for UC. If fewer people collect against a company, over time, the company will have a lower tax rate. If more people collect against a company, the rate will go higher. If an employer successfully contests its unemployment claims, it can gain control of its unemployment tax rate.

### **Terminating for Misconduct (Including Conduct, Excessive Absenteeism & Tardiness)**

Employers should have a UC cost control program and it should consist of three parts.

First, the employer should discipline and terminate employees in light of the misconduct standard used by many UC agencies. Basically, misconduct is an intentional or willful act of wrongdoing that does harm or potential harm to the employer and that violates a known or reasonable rule. Additionally, it's something for which the person had been warned, or the action is of such magnitude that no warning is necessary (e.g., theft or violence).

Second, the employer should warn appropriately because prior warnings help prove the willful nature of the last wrongdoing. The UC administration ordinarily wants one warning in the year prior to discharge. Generally, it's best if the employer has a progressive warning system though, depending on the nature of an offense, the employer may warn, suspend or terminate at any time. The life of a disciplinary action, from the standpoint of the UC system, is a year. So, if after a suspension, the employee has no related incidents for a year, on the next occurrence, progressive discipline starts over at the warning level.

It helps if the employer behaves as a reasonable person might. That is, employees should be terminated only when there is proof of wrongdoing. The infraction should be serious in the sense that there was harm or potential harm to the employer, the infraction should violate a known or reasonable rule, and the employee should have had an appropriate warning. A reasonable person will discuss the wrongdoing with the employee. This is a check on the employer's reasonableness; and should the employee admit to wrongdoing, this also is good evidence for the employer.

Third, employers should document all infractions, especially ones that lead to termination. This shows

that the employer fired the employee for what occurred at that time, since the form should have been completed when the wrongdoing happened. Recording disciplinary actions in writing may also help the employer remember details they would otherwise forget. And the proof of a wrongdoing is often in the details. Documentation is further discussed in the next section.

Also, remember that if an employer discharges an employee within the first 30 days of employment, Illinois doesn't find that business chargeable for UC.

However, employers need to understand that problems such as employee incompetence or performance issues do not usually constitute misconduct. Moreover, personality issues or failure to fit into the workplace aren't sufficient reasons to negate the awarding of UC. Attitude, personality, incompetence and performance issues have to be tied to some sort of willful misconduct by the employee in order for the employee to be denied UC.

### **The What, When, Why and How of Documentation**

Documentation is a key to winning UC claims because government bureaucrats are looking for the most efficient and professional way to decide claims. The quality and quantity of information available makes the government official's job easier. If an employer makes the bureaucrat's job easier, the employer's effort will be rewarded. Here's what the UC administration typically looks for:

- Easy to read and understand
- Consistent—using the same forms, filled out in the same way, consistent language
- Details: Date, time of day, names/signatures, job titles
- Indicate the level of discipline; i.e., 1<sup>st</sup> warning, final warning, probation, etc.
- Quotations or paraphrasing/summarizing of employee statements are useful
- Indicating whether the employee signed or received any documentation; or if employee refused to sign or receive the same
- Employment policies/practices that are easy to read and understand
  - Documentation should be created contemporaneously with or ASAP after the event to be documented occurs; doing so increases the credibility of the documentation
- Impressions are okay; personal judgments about the employee aren't
  - Indicating that the employee is lying, nervous, upset, angry is okay
  - Calling the employee a “scumbag,” “piece of \*&\$@” or any other profanity or name isn't okay
- Any of the documenter's personal opinions or observations referencing any protected class

isn't proper, unless it's to document what the employee or a witness indicated and if it's relevant to the incident being documented

### **When to Contest or Not Contest an UC Claim**

All unwarranted UC claims should be contested, and they should be contested as soon as the claim is received (not after it advances to the appellate levels) and within the mandated time period. It's always cheaper and easier to contest a claim at the lowest administrative level of the claims process.

### **When or If to Appeal a Claim**

Whenever it's either cost effective, the employer didn't properly represent itself or wasn't properly represented at the lower level of claims processing.

### **Following UC Guidelines in Making Terminations Relates to Labor and Employment Laws**

The fact is that in almost all circumstances employers can't take *any* employment action on the basis of race, sex, national origin, ethnicity, religion, socio economic status, military status, disability, age (40 and older), marital status, family status, union activity, and in an increasing number of jurisdictions—sexual orientation, and any other legally protected class or category. These prohibitions equally apply to unemployment compensation.

However, if an employer utilizes the concepts of equal employment opportunity and the misconduct standard, and creates a workplace free from legally prohibited harassment and discrimination, it's much easier to maintain a legally compliant workplace. Moreover, the employer will be able to minimize their unemployment compensation expenses.

Employers need to remember that when documenting incidents or when reporting to a state's UC agency they should not make any references to the protected classes unless for the purposes of quoting or summarizing what another employee said and for clarifying the record. An employer's failure to do so may not just result in the awarding of unemployment compensation, but may also result in an agency complaint or a lawsuit.

Just remember to act without regard to the protected classes, train the entire workforce and follow company employment policies.

*David Prosnitz is the founder and president of Personnel Planners, [www.unemploymentclaims.com](http://www.unemploymentclaims.com), a Chicago based unemployment compensation cost control company that services more than 800 businesses.*

## ILLINOIS LABOR & EMPLOYMENT LAWS

### Some Laws Likely to Be Encountered by Businesses

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Attorneys Fees in Wage Action Act	All employers	Must pay all wages owed to an employee once separated.	Employer liable for reasonable attorney's fees & costs.
Chicago Clean Indoor Air Ordinance	All employers	Smoking banned in enclosed workplaces. Post appropriate signs/notices.	Fines up to \$100 for 1 <sup>st</sup> violation; up to \$500 for 2 <sup>nd</sup> violation w/in 1 year; up to \$2500 for each additional violation w/in 1-year & a 60-day suspension or revocation of any permit or license.
Chicago Human Rights Ordinance	All employers	Can't discriminate on basis of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military service, source of income or social status. There are narrowly construed exceptions.	Fine of \$100 to \$500 per violation. Each day a violation continues is a separate offense.
Child Labor Law	All employers	Pertains to children under 16; children 14 & 15 years old can work, but employer must obtain certification. Limits work to 3 hours on a school day or 18 hours in a school week.	Each violation is a Class A misdemeanor. Each day out of compliance is a separate violation. Violations are subject to a fine up to \$5k for each violation.
Cook County Human Rights Ordinance	All employers	Can't discriminate on basis of race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation, marital status, parental status, military service, source of income or social status. There are narrowly construed exceptions.	Actual damages, back pay, attorney's fees & costs, fine of \$100 to \$500 per violation. Each day a violation continues is a separate offense. Remedial action; e.g., hiring, reinstatement, promotion.
Directory of New Hires (part of the Unemployment Insurance Act)	All employers	Must report identifying information on all new employees within 20 days of first workday to Illinois Directory of New Hires.	Employer that knowingly fails to comply is subject to a fine of \$15 per employee not reported within 21 days after being notified by IDES. An employer conspiring with the new employee to avoid the law is guilty of a class B misdemeanor & eligible for a fine no greater than \$500 per unreported employee.
Drug Free Workplace Act	Employers of 25 or more & with state of IL contracts or grants of \$5k or more	Employer must publish a notice that drugs (e.g., controlled substances) are prohibited in the workplace, that actions will be taken for policy violations, & that employees must notify employer within 5 days of any criminal drug conviction.	Suspension of payment, termination or debarment, ineligibility for any state contract/grant for at least 1 year, but not more than 5 years.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Employee Classification Act	All construction, trucking, landscaping, building & related trades	Can't misclassify "employees" as "independent contractors."	Up to \$1,500 civil penalty per violation; up to \$2,500/violation for repeat violations; debarment from state contracts. Individuals have a private right of action for \$ damages, including fees & costs.
Employment Record Disclosure Act	All employers	Employer providing a job reference to a prospective employer will have civil immunity if it provides truthful & only job performance information.	None specified (but perhaps an employer can be held liable for libel, slander or defamation?).
Equal Wage Act	Employers of 6 or more engaged in any manufacturing	Pay equal wages for equal work. Exceptions permissible due to differences in skills, abilities, training, education, tenure, etc.	Fine of \$25 to \$100 for each violation.
Illinois Insurance Act--Continuation Law, Spousal Continuation Law, and Dependent Child Continuation Law (state equivalent of fed. COBRA)	All employers with group health insurance & HMO contracts in Illinois	Upon employee separation, employer must provide COVERED employee who has been enrolled in the plan for at least 3 months, prior to separation, the option to continue hospital, surgical & major medical coverage for 9 months for self & dependants.	None specified although payment of premiums is possible.
IL Human Rights Act	Employers of 15 or more working during 20 or more weeks in the calendar year. But, if disability or sexual harassment alleged, then Act covers all employers	Can't discriminate against employees on basis of race, color, national origin, sex, age, marital status, military status, religion, arrest record or handicap. Maintain records for 1 year; indefinitely for complaints.	Damages include: Cease & desist order, actual damages, emotional distress, hiring, reinstatement, promotion, back pay & benefits; attorney's fees & costs; compliance reports; posting of notices; penalty payments to the state; loss of state contracts for up to 3 years.
Illinois Income Withholding for Support Act	All employers	Employers are required to withhold pay/salary/compensation pursuant to court ordered child support or spousal maintenance.	\$100/per day with no limitation. Each day in violation is a distinct violation.
IL Uniform Conviction Information Act	All employers conducting criminal background checks	If conducting criminal background checks for employment purposes, must obtain applicant's signature for release & maintain on file for at least 2 years.	Up to \$1k for willful violation, plus actual & general compensatory damages, attorney's fees & costs. Criminal penalties in certain circumstances.
IL Wage Assignment Act	All private employers	Employer obligated to honor a valid wage assignment.	Employer's refusal may be grounds for court action to recover entire amount of the debt from the employer. Employer can't fire or suspend employee due to wage demands; may be a Class A misdemeanor.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
IL Wage Payment & Collection Act	All employers	Employer must pay all wages at least semi-monthly & within 13 days of when earned. Must pay wages & unused vacation time upon end of employment, but not later than next payday. Exclusions for certain exempt employees & per contract/agreement.	Employer liable for penalty if the IL Dept. of Labor determines wages owed, & employer doesn't pay. Penalties are 1% per calendar day up to double the amount of the award; may be found guilty of a Class C misdemeanor.
Jury Act (Right to Time Off for Jury Duty)	All employers	Employer must allow time off for jury duty. Can't retaliate for time off. FLSA exempt employees must be paid (offset for nominal jury duty pay permitted). Employee must provide employer a copy of the summons within 10 days of the date of issuance of the summons to the employee.	Employer may be charged with contempt of court & any damages for lost wages & benefits. Also, if employee fired then reinstatement.
Medical Examination of Employees Act	All employers	Employer must pay for prescreening or post offer medical exam, if exam is a condition of hiring or employment.	Violations are a petty offense & carry a fine of up to \$100 for each offense.
Minimum Wage Law (Illinois)	Workers 18 & older; 4 or more employees, excluding family members	Starting 7/1/07 \$7.50/hour; 7/1/08 \$7.75/hour; 7/1/09 \$8.00/hour; and 7/1/10 \$8.25/hour.	Payment of back wages, legal costs, attorneys' fees. Other penalties including punitive damages (up to 20% of back wages) may apply.
One Day Rest in Seven Act	Most employers (exclusions for emergency, safety & security workers)	Employer must provide non-executive & non-professional employees 24 consecutive hours off in every calendar week. Exceptions include part-time employee working less than 20 hours, emergencies, security guards. A 20 minute minimum break/meal period is required for each 7 ½ hours of consecutive work.	Each violation incurs potential fine of \$25 to \$100. Also may be found guilty of a petty offense.
Personnel Record Review Act	5 or more employees	At least 2-times/year, let employees inspect their files & add own statements or rebuttals. Records are documents used for hiring or other personnel actions.	Each violation is a petty offense. Failure to comply may be contempt of court. Actual damages, costs & fees may be awarded. Willful & knowing violations are fineable at \$200/violation.
Prevailing Wage Act	Many employers with public works contracts or subcontracts	Employer must pay the state's stipulated minimum wage for work. The wage is set by a board.	Guilty of Class A misdemeanor. Back pay (pay the variance), subject to minimum 20% penalties & 2% punitive damages. Multiple violations may lead to 2-year debarment.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Right to Privacy in the Workplace Act	All employers, except some nonprofits	Can't discriminate for lawful activities outside of work. No inquiry of employee or prior employers whether employee has previously filed a worker's compensation claim or occupational disease claim.	Actual damages, costs & fees awardable. If willful violation, then a \$200 fine.
Sales Representative Act	All employers who contract with sales people on a commission basis; only covers most goods (not services)	Employer must pay sales representative according to terms of contract, past practice or industry custom. Commission must be paid within 13 days of separation/last day.	Up to 3-times the amount owed (exemplary damages), attorney's fees & court costs.
Time Off for Official Meetings Act	All employers	Must allow employees who are elected officials of local government or school board time off for official meetings (employee must provide advance notice). No retaliation attending. Time off can be unpaid.	None specified
Time-Off for Voting	All employers	Upon advance notice, employer must allow employees to leave work for 2-hour period between opening & closing of polls to vote. Can be nonpaid.	None specified
Toxic Substances Disclosure to Employees Act	5 or more full-time employees or at least 20 full & part time employees more employees	Must inform Dept. of Labor & employees of potential hazards, safety precautions & emergency procedures concerning exposure to toxic substances in the workplace which pose known suspected health hazards & which may cause death or serious physical harm. Must label all toxic substances & train all routinely exposed. Exemptions based on industry, substances faced & other factors.	\$1k/violation & not more than \$10k for each willful or repetitive violation. Punitive damages up to 10-times the total penalty or \$20k (whichever is larger). Back pay, attorney fees & costs. Reinstate employee. Institute training programs.
Unemployment Insurance Act	All employers	Must pay unemployment insurance contributions to IL, must file a quarterly Employer's Contribution & Wage Report, & report all new hires within 30 days.	Failing to report hires may result in a penalty equal to the lesser of (a) \$5 for each \$10k of the total wages paid by employer during the period (quarter), or (b) \$2,500 for each month failing to report. Employer who willfully fails to pay any required contribution shall be required to pay those contributions plus a penalty equal to 60% of the amount of the unpaid contributions.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Victims' Economic Security & Safety Act	50 or more employees (private employers); all state & local public sector employers	Victims of domestic violence, or household member who is a victim, can take up to 12 weeks of leave during 12-month period. Can be unpaid. Post notice.	Pay damages equal to the amount of wages, salary, employment benefits, public assistance, or other compensation denied or lost with interest; reinstatement, promotion and reasonable accommodations; attorney's fees, expert witness fees, & other costs of the action; penalty of 1% per day to the employee for each day of delay in paying the damages to the employee.
Wage Deductions for Benefit of Creditors	All employers	Employer must notify employee of any withholding/deductions re garnishments. Employer must honor court orders for garnishments.	If employer refuses or neglects to honor a judicial order, the creditor may be able to collect the total amount of the debt, plus fees & costs from employer. Employer can be convicted for Class A misdemeanor for retaliating against employee due to deductions.
Wages of Women & Minors Act	All employers	Employers can't pay minors under age 18 or women an oppressive & unreasonable wage (i.e., less than fair and reasonable for the value of the work & less than a living wage).	Can be convicted of a Class B misdemeanor, pay back wages, attorney's fees & costs.
Whistle Blower Statutes (Federal & State)	All employers	Many federal & state laws prohibit discriminatory or punitive actions against employees who report illegal activities.	Criminal & civil penalties, including fines & imprisonment.
Workers' Compensation Act	All employers who elect coverage. Failure to elect (i.e., no insurance) exposes employers to common law liability	Employers must insure or self insure. Pay disability benefits & expenses for work related injuries. Refrain from retaliating against employees for pursuing rights under this Act.	Any willful neglect or violation is a petty criminal offense. Monetary penalties vary on basis of offense.

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## FEDERAL LABOR & EMPLOYMENT LAWS

### Some Laws Likely to Be Encountered by Small Businesses

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Age Discrimination in Employment Act (ADEA)	20 or more employees	Discrimination against persons 40 years of age or older prohibited. Includes all terms & conditions of employment. Keep records for 3 years.	Back pay, front pay, attorney's fees & costs, equitable relief, liquidated damages.
Americans with Disabilities Act (ADA)	15 or more employees	Discrimination in terms or conditions of employment prohibited against qualified individuals with physical or mental disabilities. Reasonable accommodation must be provided for known disabilities. Pre-employment physical examinations are limited & disability related inquiries prohibited. Keep records for 1-2 years; indefinitely if charge filed.	Equitable relief; i.e., reinstatement, promotion, etc.). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages.
Civil Rights Act of 1866 (AKA Section 1981)	Covers most employers	Prohibits race discrimination; keep records indefinitely.	Compensatory damages, punitive damages, back pay, front pay, attorney's fees & costs, & equitable relief (e.g., reinstatement, promotion).
Consolidated Omnibus Benefits Reconciliation Act (COBRA)	Employer who provides group health plans & has 20 or more employees	Within 30 days post separation, must offer qualified beneficiaries the opportunity to purchase continued coverage. Keep records for 6 years.	\$100-\$200/day fine per employee
Consumer Credit Protection Act	All employers	Can't discharge an employee due to garnishments/wage deductions for debt.	Reinstatement, back pay, restitution for garnishments/deductions, civil penalties including fines up to \$1k &/or imprisonment up to 1 year.
Drug Free Workplace Act	At least 25 employees & federal contracts of \$25k or more	Must have a drug free policy & program.	Suspension of payments, contract termination, debarment up to 5 years.
Employee Polygraph Protection Act	All employers except government & businesses handling controlled substances or security companies	Can't use lie detectors for pre-employment screening or during employment. Can't take adverse personnel action for refusing polygraph.	Hiring, reinstatement, promotion, lost pay, benefits & civil penalties up to \$10k.
Employee Retirement Income Security Act (ERISA)	Employers that offer pension or welfare benefit plans for employees	Must fund an insurance system to protect certain kinds of retirement benefits; premium payments to the U.S. Pension Benefit Guaranty Corp.; file plans with the U.S. Dept. of Labor & follow funding rules requiring all funds held in trust for employees. Keep records for 6 years.	Penalty of up to \$1,110/day for noncompliance. Penalty from 5%-100% of the amount concerned for certain violations, mandatory penalties of up to 20% for violations of fiduciary duties.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Equal Pay Act	All employers	Must equally pay men & women for same work. Differences may be based on seniority or bona fide merit system.	Back pay, attorney's fees & costs, liquidated damages.
Executive Order #11246	All federal contractors & subcontractors with 50 or more employees & \$50k or more of contracts	Can't discriminate on basis of race, color, religion, sex or national origin. Affirmative action plan required. Keep records for 2 years.	Barred from future contracts, back pay, promotions, seniority credit.
Fair & Accurate Credit Transactions Act of 2003	All employers	Undoes some of the more onerous employment investigation aspects of the Fair Credit Reporting Act.	Same as Fair Credit Reporting Act below.
Fair Credit Reporting Act	All employers	Limited use of consumer/credit reports for employment decisions. Must make written disclosure to the employee & obtain written authorization from employee. Before adverse action is taken, employer must provide candidate/employee with the report & summary of rights.	Actual/compensatory damages, attorney's fees & costs, punitive damages, \$2.5k fine per violation, criminal penalties, for willful & knowing violations, including imprisonment up to 2 years.
Fair Labor Standards Act (FLSA)	Covers most employers	Employers must pay all non-exempt employees at least federal minimum wage & overtime for any hours worked in excess of 40 hours in a workweek. Narrow exclusions.	Compensatory damages, liquidated damages, equitable relief, & attorney's fees & costs. Criminal prosecution is possible along with penalty up to \$10k for willful violations.
Family Medical Leave Act of 1993	50 or more employees within 75 mile radius	Must permit employees up to 12 weeks of unpaid leave in any 12-month period for many family related matters. Job is protected; health care continued. Keep records for 3 years.	Reinstatement &/or promotion, back pay, benefits, compensatory damages, fees & expenses.
Health Insurance Portability & Accountability Act (HIPAA)	Employer who provides a group health plan & has 2 or more employees	Group health plan must have coverage for pre-existing conditions of new employees, certifications of coverage to former employees, enrollment periods to employees, & protection for mothers & newborns. Restrictions on dissemination of plan participant medical info. & records.	\$100/day per individual/employee. Criminal fines up to \$250k & imprisonment (limited circumstances).
Immigration Reform & Control Act of 1986	Record keeping provisions apply to all employers. Employers of 4 or more may not discriminate due to national origin/citizenship	Can't hire any person not legally authorized to work in the U.S. So, employers must verify employment eligibility. Can't discriminate in hiring or discharge due to national origin/citizenship. Keep records for 3 years.	Back pay, equitable remedies, fines up to \$10k per violation, criminal sanctions-up to 6 months in prison &/or \$3k fine for each unauthorized employee.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
National Labor Relations Act (Employee Free Choice Act???)	All employers	Can't threaten or discriminate against employees engaged in union or concerted activities, involving a labor organization. Keep records indefinitely.	Injunctive/equitable relief. Criminal fines up to \$5k &/or imprisonment up to 1 year.
Occupational Safety & Health Act	All employers	Must keep workplace free from recognized hazards likely to cause death or serious harm. Maintain records of work related injuries & illnesses. Keep records for 5 years.	Penalties up to \$7k per violation, penalties up to \$7k per day for failure to control violations, penalties from \$5k to \$70k per willful violation, & criminal penalties with a fine up to \$250k & 1 year prison term.
Rehabilitation Act of 1973	Covers all businesses with federal contracts, subcontracting agreements or receiving any federal financial aid	Can't discriminate on basis of a disability in terms or conditions of employment. Must have an affirmative action plan. Keep records for 1 year.	Compensatory damages, back pay, attorney's fees & costs, equitable relief; e.g., reinstatement, promotion.
Title VII of the Civil Rights Act of 1964, Amended 1991, 2009 (Leadbetter Equal Pay)	15 or more employees	Discrimination on basis of race, color, religion, sex & national origin & pregnancy/maternity. Covers all employment actions, including hiring, firing, promotion, pay, practices & all other terms & conditions of employment. Keep records for 1 year; indefinite if charge is filed.	Equitable relief; e.g., reinstatement, promotion). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages.
Uniformed Services Employment & Reemployment Rights Act (USERRA)	All employers	Can't discriminate against applicants or employees on basis of military obligations or connection. Allows for continuation of benefits during military duty.	Equitable relief, e.g., reinstatement, promotion, back pay, benefits, attorney's fees & costs, penalties for willful violations.
Vietnam Era Veteran's Readjustment Assistance Act	Federal contractors & subcontractors with contracts or subcontracts of \$25k or more	Must have an affirmative action program. Keep records for 2 years.	Reinstatement, hiring, back pay, benefits, debarment, cancellation of contract.
Whistle Blower Statutes (Federal & State)	All employers	Many federal & state laws prohibit discriminatory or punitive actions against employees who report illegal activities. Keep records of complaint indefinitely.	Criminal & civil penalties, including fines & imprisonment.
Worker Adjustment Retraining & Notification Act	100 or more employees	Notice of at least 60 days prior to closing or layoff of 50 or more employees.	Back pay & benefits, up to 60 days; \$500/day civil penalty, up to 60 days; attorneys' fees.

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SAMPLE-EMPLOYEE ACTION REPORT (EAR)

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Employee's Name

Employee's S.S./I.D. # (if available)

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Employee's Position Title, Department/Division

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Describe in detail the reason(s) for EAR (e.g., recognition, advisement, discipline-warning, demotion, termination, other/etc.). Be specific, include date(s), time(s), place(s), witnesses, impressions (continue on reverse side or additional sheets).

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If any further action is needed or to be taken, describe in detail.

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Employee's Comments

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Employee Signature (Signature does not mean employee agrees or disagrees with EAR; signature only means that EAR as been discussed with employee).

Date

---

Supervisor's &/or Preparer's Signature

Date

---

Was EAR discussed with employee?

Yes

No

When?/Date

---

Who discussed EAR w/employee?/Signature & Title

When?/Date

**Use reverse side or additional sheets for additional comments/information**

## FREE RESOURCES FOR RESEARCHING LABOR & EMPLOYMENT LAW

There's a great deal of free high quality information available on the Internet. Many companies, universities, and professional organizations post their HR related policies and related information on the Web.

When using search engines such as Google or Yahoo it may be helpful to know what search terms to use. When using the following terms, use quotation marks as they help to reduce the number of frivolous hits. Also, combine terms to reduce excessive and irrelevant hits. The following terms are not all-inclusive and are only suggestive. However, I've personally found them to be useful, especially when combined with one another or in conjunction with the name of a statute or regulatory agency, also in quotation marks.

Search terms:

"workplace behavior," workplace harassment," "occupational safety," "discipline policies," "discipline procedures," "human resources policies," "human resources procedures", "human resources practices," "free download," "free downloads," "sample policy," "sample policies," free, "labor law," "labor relations," "employment law," "employee relations," "employment relations," and "labor and employee relations."

All links checked and working as of June 15, 2008.

- Chuck Krugel's Website [www.charlesakrugel.com](http://www.charlesakrugel.com)
- The Human Resource Store [www.hrstore.com](http://www.hrstore.com)
- Free Workplace Legal Compliance Posters (*all of them*) [www.ides.state.il.us/employer/pubs/fastfax.asp#posters](http://www.ides.state.il.us/employer/pubs/fastfax.asp#posters) & <http://www.state.il.us/agency/idol/Posters/poster.htm>
- Integra Security Alliance [www.integrasecurity.org](http://www.integrasecurity.org)
  - Under some of the links, there's useful information regarding screening, security and investigations
- Personnel Planners, [www.unemploymentclaims.com](http://www.unemploymentclaims.com)
  - Free information about unemployment compensation
- Equal Employment Opportunity Commission [www.eeoc.gov/employers/overview.html](http://www.eeoc.gov/employers/overview.html)
- Business & Legal Reports [www.blr.com](http://www.blr.com)
  - Updates concerning labor and employment law and HR
- Commerce Clearing House <http://hr.cch.com/>
  - Updates concerning labor and employment law and HR
- 19th Judicial Circuit Court of Illinois [www.19thcircuitcourt.state.il.us](http://www.19thcircuitcourt.state.il.us)
  - Excellent starting point for researching federal, state and local law. Well organized and easy to use.
- Illinois Society for Human Resources Management [www.illinoisshrm.org](http://www.illinoisshrm.org)
  - General HR legal and policy information
- Human Resources Management Association of Chicago [www.hrmac.org](http://www.hrmac.org)
  - General HR legal and policy information
- Illinois Department of Labor [www.state.il.us/Agency/idol/](http://www.state.il.us/Agency/idol/)
- Privacy Rights Clearinghouse (background checking) [www.privacyrights.org/workplace.htm](http://www.privacyrights.org/workplace.htm)
- Internal Revenue Service [www.irs.gov](http://www.irs.gov)
- U.S. Department of Labor [www.dol.gov](http://www.dol.gov)

As a management side labor & employment attorney & human resources (HR) consultant, I have more than 15 years of experience in the field & have been running my own practice for 8-plus years; [www.charlesakrugel.com](http://www.charlesakrugel.com). Furthermore, I'm aligned with The Human Resource Store; [www.hrstore.com](http://www.hrstore.com), as its Director of Legal &



Compliance related services, & the Integra Security Alliance, [www.integrasecurity.org](http://www.integrasecurity.org).

In my own practice, my clients are small to medium sized companies in a variety of industries. Besides providing traditional labor & employment law services, I represent companies desiring to institute

preventive & proactive HR functions. These functions include policies & procedures, which help to efficiently and discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.

Relative to results, I have negotiated more than 100 labor & employment agreements & contracts, including noncompete & severance/separation agreements, collective bargaining & related labor agreements. Also, I have argued more than 11 arbitrations, 13 mediations & 39 agency cases/complaints & have resolved 100-plus labor grievances & similar in-house complaints & completed over 100 in-house investigations. Moreover, I'm a published author in my field & am frequently the subject labor & employment law related TV, radio & newspaper interviews. My website contains most of these interviews.

My career choice is the result of a long running fascination with workplace behavior, management styles, & how & why people pursue particular vocations. While in college, I advanced my interest by majoring in psychology. After college, I pursued graduate study in industrial/organizational (I/O) psychology with the thought of being an I/O consultant. During my first year of graduate school, I realized that the practice of I/O psychology was too "touchy feely" for me. Consequently, I decided that once I earned my masters degree in I/O psychology, I would attend law school.

I earned my law degree (Juris Doctorate) from Ohio Northern University. My MA degree in I/O psychology is from the University of North Carolina at Charlotte. My BS degree in psychology is from Bradley University. During law & graduate schools, I was a graduate student representative for each school's university senate. During college, I was a rush chairman & executive board member for my fraternity.

Regarding to civic & association involvement, I'm on the following boards of directors:

- Member of the Board of Directors of the Greater O'Hare Association (GOA), [www.greater-ohare.com](http://www.greater-ohare.com), one of Chicagoland's largest business associations & one of our most important advocates on behalf of business;
- Board Chairman for the YMCA Alliance ([www.ymcachgo.org/programs/workforce\\_dev.php](http://www.ymcachgo.org/programs/workforce_dev.php));
- Board President for Youth Communication Chicago, [www.youthcommunicationchicago.org](http://www.youthcommunicationchicago.org), the publisher of teen created media products in Chicago;
- Member of the Board of Directors for ChildServ ([www.childserv.org](http://www.childserv.org)), a 100-plus year old child & family advocacy, housing & adoption organization; and

Also, I have been legal counsel for the Chicago chapter of Bikers Against Child Abuse (BACA); & I'm a volunteer "big brother"/mentor via the Jewish Children's Bureau. And, I'm an active member of the Chicago chapter of the Labor & Employment Relations Association, the Chicagoland Chamber of Commerce (member of the Employment Law & Workforce Quality Committees).

Finally, some personal background information. I'm a native Chicagoan. Born & raised in West Rogers Park. I graduated from Rogers Public School. For high school, I graduated from Niles North in Skokie. It was during childhood that I was indoctrinated into the ways of business, self-employment & entrepreneurship. My father owned & ran his own chain of pharmacies in Chicago for 35 years. My grandfather was an immigrant businessman who owned his own grocery stores in Chicago. Family taught me the value of hard work & how to compete & succeed in business.