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BY



**HUMAN RESOURCES ATTORNEY & COUNSELOR
LABOR & EMPLOYMENT LAW ON BEHALF OF MANAGEMENT**

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CITY HALL, CHICAGO

PRESENTATION HANDOUT

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What is Human Resources & Why It Matters

Human resources (HR-also referred to as human capital) is the management of employees as a capital asset. That is, a business acquires & manages employees in a manner similar to the acquisition & management of any other capital asset. Now what exactly does this entail?

Employees are obviously human & a business resource. However, in the same way that machinery or equipment is capital that's acquired, used, or that can appreciate or depreciate in value, HR relates to the management of employees in a similar fashion. Although this explanation may seem callous, when further scrutinized it's evident that effective HR pays as much attention to the "human" half of its name as it does to the "resources" half.

HR concerns the approach & ideology a business adopts for its culture & its employee life cycle. It's how a business enhances & protects its human assets, & ultimately how a business maximizes profits. Recruiting, selecting, compensating, motivating, maintaining & promoting employees are all core aspects 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 & HR affect profit.

Therefore, in order to increase profit & decrease expenses, management must know how to treat employees in a way that enhances their value. Ultimately, successful HR helps to maximize profit by minimizing employment related expenses & 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 &, perhaps most importantly, legal & civil rights. HR poses problems for a business when it fails to understand how these changes influence macro & micro HR.

Micro & Macro HR

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

Micro HR is the actual execution of those duties mandated at the macro level. These duties include the administration of policies regarding the usual core functions of HR (see above).

How Macro & Micro HR Impact the Bottom Line

As stated above, a business will encounter difficulties when it fails to account for changes to macro & micro HR practices & changes to our labor & employment laws. Such difficulties include an unsafe workplace, attendance issues, employee conflict, union organizing & 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, etc. However, much of this money can exit through the "back door" because of poor HR practices. For instance, time & money is lost when a business realizes that it hired the wrong employee & may now have to discharge that employee. Consequently, that business will have to spend money & time finding & training a new employee & may even have to defend its treatment & discharge of the former employee. Recognizing & efficiently resolving these problems often costs a great deal of time, energy & money.

However, time, energy & money spent upfront, or proactively, on HR related matters could help to reduce, & in certain instances eliminate, the loss of money out the "back door." Thus, HR becomes an investment in capital. Time, energy & money are saved & increased productivity & profits result.

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

Labor & Employment Law Defined

Labor & employment law generally refers to the body of law regulating the workplace & all HR/human capital related matters. However, labor law & 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 law regulating labor unions & associations & their relationship with management. Such laws include the National Labor Relations Act & similar federal, state & local labor laws. These laws permit employee organizing, electing representation & entering into legally binding contracts with management.

Generally, employment law concerns the body of law & rules regulating civil rights & workplace conduct. Civil rights include a workplace free from discrimination & 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, religion, military status, pregnancy, & 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 & 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 & employee associations. On the micro level, this refers to practices & rules for dealing with individual employee issues concerning unions & associations.

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

Employment Policies and Handbooks-To Use or Not To Use

In general, there's no mandate that a business must have written policies or manuals. However, many public sector contracts & liability insurance carriers require, or strongly urge, policyholders to have documented policies.

Also, businesses looking for a sale or merger, or that have grown to the point where ad hoc policies and procedures are too inefficient & inconsistent, should consider creating documented policies or handbooks to help determine & improve the value of their workforce. Of course, profit is the ultimate determinant of value in the private sector.

Consequently, most businesses that wish to obtain government work, receive grants or some type of outside funding, or carry insurance, may need written policies.

There are many canned resources available to help businesses document and plan their HR policies. Some are credible. However, the problem associated with many of the canned products is that they don't address the company's actual needs & may not be current.

For example, many canned publications only address sexual harassment. However, if a company has never faced sexual harassment, but has faced racial harassment, what good is that policy?

After deciding whether to have documented policies, another key question is what policies to use. Factors such as the business' regulatory environment, industry & region (i.e., context) will dictate the answer.

Furthermore, a business has to determine what form these policies should take, e.g., a written memo, a multi-page document or a bound manual. The decision comes down to company size & complexity and purposes of the policies (again, context).

The larger and more complex the company, the greater the need for written employment policies addressing a large number and range of issues; i.e., a larger document. The smaller and less complex a business is means that it will probably have fewer issues to address, and it might not even have to put all of its in policies writing.

However, even a small company in a highly regulated or complex industry will probably have to address a greater number of employment issues via written policies; e.g., safety, record retention and destruction, and compliance reporting. In short, the complexity of a company and its industry is just as good an indicator of what form employment policies should take than the size of the workforce.

The purpose of the policies is another important indicator of which policies to have or put in writing. For example, if a 20-year old business has never addressed workplace violence issues, then it

probably doesn't need to address this issue. Or, at most, it might not need to exhaustively address this issue because past performance is a credible indicator of future events. However, a relatively new business that is undergoing rapid growth, and is hiring from a population that's at-risk to violence, might need to be more proactive and address workplace violence at the outset. In this workplace violence example, company size and industry complexity are less an indicator of policy needs and form than its intended purpose. In short, a company shouldn't seek to address issues it hasn't encountered, unless it could reasonably expect to encounter these issues in the near future, or it's somehow required by law or regulation to address them.

When discussing what kinds of policies to implement with clients or prospective clients, I emphasize that it's impossible to sufficiently cover every issue or circumstance that arises, and it's impossible to put everything in writing. Therefore, common sense & some sort of disclaimer is necessary.

Nevertheless, some businesses, especially small businesses, believe that it's better to put nothing in writing. This way, they won't give contentious employees and their attorneys ideas about lawsuits and complaints. Well I understand that logic, but I don't necessarily agree. The reason I don't agree is simple—unemployment compensation.

Financially speaking, unemployment compensation ("UC") disproportionately impacts against smaller businesses than it does larger businesses. It tends to eat up a greater percentage of a small business' operating expenses. Furthermore, UC claims administrators tend to only deny benefits when the employer provides them with documented proof of employee ineligibility; e.g., misconduct, quitting work, absenteeism. Moreover, UC claims processors usually seek documented proof of violations via employment policies. They expect the employment policies themselves to be in writing. It's another aspect of government bureaucracy.

Consequently, from a cost versus benefit perspective, if a business is paying a lot in UC, lower UC expenses may further serve to make a business more attractive to a buyer or partner.

Employment Agreements—to Use or Not to Use?

These agreements are used to protect employers from a variety of problems:

- To discourage some sort of employee conduct (e.g., noncompete or nonsolicitation), or to identify conditions & terms of employment;
- During pre-hire to define wages, hours, benefits, confidentiality, protection of business secrets & 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; &
- During employment for promotions, demotions, wage deductions, garnishments, & waiver of any legal or statutory rights.

When considering whether to use such an agreement, a business should determine the following (this isn't an exhaustive list of issues as each business needs to decide what's best for it on a case-by-case basis):

- 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 violation? What are the actual & foreseeable damages due to violation?
- How much is lost vs. saved or gained by using these agreements? It's all about the money.
- Should the language & format of the agreement reflect the business' employment policies in tone & language, or is it a completely isolated document?

No hard & fast rules exist for when & how to incorporate employment agreements, & for the most part, they're not legally required unless certain circumstances exist such as to waive 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/layout & legal compliance. Conciseness, plain language & thoroughness cannot be stressed enough.

However, all agreements should permit the employer to recover damages, costs & expenses from the employee or other party (assuming law permits such recovery). This won't absolutely prevent a breach from occurring, but it's a great preventive measure.

Enforceability of agreements is often an issue because if a breach 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 & slander concerns.

Obviously, the most extreme action an employer can legally take is to sue an ex-employee for violating the agreement. But, a lawsuit costs a lot of time & money, even if damages, costs & expenses can be recovered from an employee.

A lawsuit or some other sort of complaint filed by an ex-employee might be easier to deal with. As long as the terms of the agreement's confidentiality, nondisclosure & other prohibitions are legally compliant, no court or third party tribunal should adjudicate a lawsuit or complaint against the employer. Furthermore, costs, expenses & damages may be awarded to the employer.

Clients typically ask whether entering into an employment agreement creates a legal precedent within their company or will instill a feeling 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 benefit. 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 & the legal ramifications of using such an agreement.

The concerns regarding employee morale & 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.), & 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 & sterile manner what should or shouldn't be done. It's a completely different matter to actually draft & execute an agreement in a way that sufficiently communicates that this is an isolated & unique circumstance, & a serious & 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 & disputes. But, many of these issues are avoidable & resolvable via a professionally drafted & executed agreements & 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 as little as \$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, & the settlement reached is \$1,000, that's \$2,300. This doesn't even include the cost of employees spending time away from work to deal with this matter, & 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 & benefits, front pay, punitive or exemplary damages, reinstatement or promotion. Furthermore, a court or agency may order training (e.g., diversity & harassment), affirmative action & monitoring. Those are additional & substantial costs that the business may bear.

According to Jury Verdict Research (JVR), which compiles samples of employment discrimination verdicts for analysis, the median compensatory award for employment related cases, among all economic sectors:

- Rose from \$200k in 2006 to \$252k in 2007;
- Overall from 2001-2007 the median award rose from \$147.5k to \$252k or 70%.
- From 2001-2007, the median verdict in federal court discrimination cases was \$175k, but it was \$250k for state court verdicts;
- Among settlement of cases, 23 % resulted in payments of \$100,000 to \$250,000; about 18% were over \$250,000; &
- These above award and settlement amounts are exclusive of legal fees—both claimants and defense fees. Cumulative legal fees sometimes exceed the cost of liability.

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; &
- 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.

The Likelihood of Getting Into a Dispute

Some statistics compiled by government & 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) 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 & resolve. From "Working Up a Suit" by Barbara Bowers, Best's Review, Jan. 2005, Vol. 105, Issue 9.

According to the EEOC, they filed:

- 403 in FY 2006 (*FY 10/1-9/30*),
- 362 in FY 2007; & oddly enough declined to
- 325 in FY 2008, the lowest in 12 years.

The monetary benefits paid over all of these suits averaged \$110k in 2006, \$151k in 2007 & skyrocketed to \$315k in 2008. From www.eeoc.gov.

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.

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 most 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; & 75,768 in 2006. But, in FY 2007, the number of charges filed increased to 82,792, & in FY 2008 jumped to 95,402. From <http://www.eeoc.gov>.

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 & 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 JVR:

- It costs \$5,000 to train 200 employees at \$25 each on employment issues such as harassment & discrimination.
- If that same company is sued, the cost to litigate the case is approximately \$155,000, & 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 & \$304,000 to settle.

From "Risk Management—Why Train?" 2006, www.emtrain.com, citing JVR's "Employment Practice Liability: Jury Award Trends & Statistics, 2005 Edition.

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

There are many inquiries which might lead to the inference that the employer is discriminating against a member of a protected class. Because of the legal implications & potential liability attached to them, these same inquiries shouldn't be made via e-communication.

Always focus on the essential functions of the job. Essential job functions may be defined by a *valid* job description.

For all candidates:

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

Concerning questions, it's generally okay to:

- Focus on questions related to the *essential job functions*. Put another way, are the questions asked intended to solicit information connected to the applicant's ability & willingness to perform the essential job functions, or are they more indicative of illegal bias?
 - It's usually not an essential function to be of a certain race, age, sex, sexual orientation, etc. Exceptions are extremely limited.
- Ask questions to determine reliability. Such questions include asking what hours & days the person can work, or specific days or times they can't work.
- Ask if the applicant is legally eligible to work in the U.S. or if they have ever worked under another name.
- Ask if they have ever been convicted of a crime. If they've been convicted, then you could also ask what, when & how the case was resolved. However, you should only be concerned with a criminal conviction if such information relates to essential job functions. Moreover, the date of conviction may be relevant depending on the magnitude of the crime.
 - Must get written permission to do a criminal background check.
- Ask behavior oriented questions. Again, ask all candidates the same questions.
- Ask what kind of education or degrees a candidate has & what schools they attended.
- Ask an applicant's date of birth to determine employment eligibility. Use a disclaimer or indicate that the applicant is being asked only to determine eligibility.

- Relative to languages spoken, if the job requires language fluency, other than English, then you can ask if the applicant has that ability.
 - Don't ask about their native language.
- Ask if applicant has a problem with joining organizations, clubs, etc., that directly relate to ability to perform essential job functions; e.g., chambers of commerce or business groups.

Don't ask:

- About children, dependents, pregnancy or plans to start a family. If the candidate indicates that they're pregnant, then congratulate them, but don't relate pregnancy to the job unless some sort of accommodation is indicated.
- If the applicant owns or rents a car, unless the job requires having own transportation (e.g., sales or site visits).
- Questions to determine where the candidate is from; i.e., national origin.
- If the applicant has ever been arrested.
- If a candidate has any physical or mental disabilities. Also, don't ask if the applicant has any medical or behavioral problems, or if they're being treated for the same.
- If the applicant owns or rents a home
- If the candidate ever had wages garnished or if they've ever declared bankruptcy.
- About discharge from military service.
 - Can ask about the applicant's education, training & experience while in the military.
- What clubs, organizations, or societies they belong to, including fraternities or sororities.
- If they've filed for disability, worker's compensation, unemployment compensation or if they've ever sued or filed a complaint against a prior employer.
- About religious & ideological beliefs, associations or affiliations. *Possible exception:* if employer is a religious organization.
- Don't ask about gender or sexuality, including bisexuality, homosexuality or transgenderism.
- Don't ask about titles such as Mr., Mrs. & Ms.
- Previous residential addresses.
- When graduated college or high school; anything that has any bearing on age, ethnicity or socioeconomic class.

Job Candidate Application & Selection Summary

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

For all candidates:

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

- Reasonableness is generally contingent upon why needed, cost & 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. These questions might be useful as they're generally nondiscriminatory, & they elicit performance & conduct related information.

Examples of such questions include:

- Describe a situation in which you & 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 & 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 that person with the relevant part of the report & summary of rights/ recourse options.

Per the Illinois Criminal Identification Act you can't ask job applicants to disclose criminal convictions which have been expunged or sealed, & you can't ask if applicant has any expunged or sealed convictions & records.

Employment Testing:

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

Employee Screening & Risk Assessment

Co-Authored by Tony Ramos & Charles Krugel

Recent headlines of workplace violence 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 & negligent retention lawsuits are increasing, & so are employer expense & liability as a result of these suits. "According to a 2001 report by Public Personnel Management, employers have lost more than 79% of negligent hiring cases." Moreover, "average settlement of a negligent hiring lawsuit is nearly \$1 million." (Human Resources Management study; both above stats cited from ISO Review, Negligent Hiring: Employer Risk, <http://www.iso.com/Research-and-Analyses/ISO-Review/Negligent-Hiring-Employer-Risk.html>).

Underlying the idea of negligent hiring & retention is an employer's legal responsibility to provide employees, customers & the public a reasonably safe environment, & 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 & legal liability perspective, it's increasingly crucial that businesses conduct criminal background checks, conduct such checks in a competent manner & 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 & social service organizations are required to screen candidates), & 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 & 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 & screening professionals, to determine what constitutes a competent background search. Generally, such a search is based upon the essential requirements of the position & 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, & the particulars of the business' industry, necessitate the need to screen out convicted criminals, & 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 & connect it to the job.

In short, if you undertake criminal record checking, then choose a competent screener & screening method, check all candidates & employees, & conduct the search in a good faith & reasonable manner, & use the results appropriately. As with all human resources related matters, in order to minimize expense & legal exposure, focus on prevention & proaction--research your screener & work with them to best determine what you need & 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 knowledgeable vendor who can clearly explain your screening options & their limitations. Typical choices include state, county court, national criminal databases & fingerprint searches. There are also choices of supplemental screening options which include driving record, credit reports, workers compensation, employment history, educational history & 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 & provide up to ten-years of past residential history & names or aliases used.
- **County-court Record Search**
 - Counties to be searched should be selected based on the results of the trace & never from the job application. This will also provide you with the most accurate & 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 & 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 & types of screening options selected which determine the actual cost, one can expect to pay \$20 to \$35 per person.

Co-Author: Tony Ramos, t Ramos@integrasecurity.org, has also authored "The Guide to Background Checks" which he developed for the Illinois Association of Chiefs of Police & is available for download from his web-site at www.integrasecurity.org

Independent Contractor vs. Employee: Summary of Classification Issues

Advantage of the independent contractor classification:

- Avoid federal & state withholding taxes.

Disadvantage:

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

How to Distinguish Between the Two:

- Degree of control & independence is the key.
- Independent contractors have a great deal of control over their working conditions, environment, & 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 pay might not matter.
 - Use own work methods; not trained by the principal; outside principal's scope of expertise.
 - Use own tools, materials, etc.
 - Closed ended contract/agreement with a start & finish date.
- Employees have little control over the above-mentioned factors.
 - Employees are subject to using the employer's materials, tools, processes, property, etc.
 - Employees generally work within scope of principal's core services.

See the following for additional information:
www.irs.gov.

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 lead to an illegal classification.

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

Exclusions exist for businesses earning less than \$500k in annual revenue & 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, & secondary schools & institutions of higher education; & federal, state, & local government agencies.

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

- Executive, administrative, & professional employees (including teachers & academic administrative personnel in elementary &

secondary schools), outside sales employees, & certain skilled computer professionals;

- Employees of certain seasonal amusement or recreational establishments;
- Employees of certain small newspapers & switchboard operators of small telephone companies;
- Employees in newspaper delivery; &
- Casual babysitters & 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 & mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers (consumers, businesses);
- Railroad & air line employees, taxi drivers, some employees of motor carriers, & local delivery employees paid on approved trip rate plans;
- Announcers, news editors, & chief engineers of certain non-metropolitan broadcasting stations;
- Domestic service workers who reside in their employers' residences; &
- 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 & employees of certain bulk petroleum distributors;
- Employees of hospitals & 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); &
- 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.

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% & 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 & \$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 & 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 & how an employee will be eligible or ineligible for UC.

Usually, if an employee is fired due to intentional wrongdoing, refuses reasonable employment & then becomes separated, quits for reasons not attributable to the employer, or is not able & 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 & it should consist of three parts.

First, the employer should discipline & 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 & 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, & 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; & 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. & 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 & 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 & How of Documentation

Documentation is a key to winning UC claims because government bureaucrats are looking for the most efficient & professional way to decide claims. The quality & 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 & 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., 1st 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 & 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 & 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, & they should be contested as soon as the claim is received (not after it advances to the appellate levels) & within the mandated time period. It's always cheaper & 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 & 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 & older), marital status, family status, union activity, & in an increasing number of jurisdictions—sexual orientation, & 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 & the misconduct standard, & creates a workplace free from legally prohibited harassment & 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 & 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 & follow company employment policies.

David Prosnitz is the founder & president of Personnel Planners, 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 st violation; up to \$500 for 2 nd 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.
Criminal Conviction Information Acts or Criminal Identification Acts	All employers (except many law enforcement or prosecutorial agencies)	If conducting criminal background checks for employment purposes, must obtain applicant's express approval & maintain on file for a specified number of years. Can't ask applicants to disclose criminal convictions which have been expunged or sealed. Also, can't ask if they have any expunged or sealed records.	Fines, actual & general compensatory damages, attorney's fees & costs. Criminal penalties in certain circumstances
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.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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.
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, & 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.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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.
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 7/1/09 \$8.00/hour; & 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.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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.
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.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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.
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 & 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 & 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.
Federal Trade Commission Act	All employers; except financial services	Ancillary effect in employment due to other laws enforced by Federal Trade Commission; gives FTC & Congress authority over U.S. commerce/trade issues; establishes fair trade & commerce requirements	Nominal fines up to \$5k/violation; cease & desist orders; compliance monitoring/reporting; imprisonment for criminal acts
Genetic Information Nondiscrimination Act (GINA)	15 or more employees	Can't discriminate on basis of proven or perceived genetic tendencies. Pre-employment physical examinations are limited & disability related inquiries prohibited. Very narrow exceptions to how an employer can use legally obtained genetic information.	Equitable relief; i.e., reinstatement, promotion, etc.). Back pay, front pay, lost benefits, attorney's fees & costs, & compensatory & punitive damages.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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.
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	Have an affirmative action program. Keep records for 2 yrs.	Reinstatement, hiring, back pay, benefits, debarment, cancellation of contract.

Act/Law	Coverage	Basic Requirements	Damages/Penalties
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)

Employee's Name

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

Employee's Position Title, Department/Division

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).

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

Employee's Comments

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

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 9-plus years; www.charlesakrugel.com.

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 & 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, & member of the Government Affairs Team. One of Chicagoland's largest business associations & one of our most important advocates on behalf of business;
- Board Chairman for the YMCA Alliance, the workforce development arm of the YMCA's of Metropolitan Chicago;
- Member of the Young Professionals Board of the Chicago Bar Foundation, the charitable arm of the Chicago Bar Association; &
- Member of the Board of Directors for ChildServ (www.childserv.org), a 100-plus year old child & family advocacy, housing & adoption organization.

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. &, 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.