ADA TITLE III

by Abigail Kofman

Title III guarantees disabled individuals the "full and equal enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation."

- **Places of public accommodation** include private and public schools; inns, hotels, motels, and other places of lodging; restaurants, bars; theaters, stadiums, convention centers; bakeries; most retailers; parks, museums; hospitals; and many more.
- **Owners, operators, lessees and lessors** are responsible for ensuring compliance with the ADA. Parties can allocate financial responsibility but not liability.
- **Title III Requirements/Prohibitions:**
  - Must provide auxiliary aids and services to extent necessary to achieve effective communication, unless they would fundamentally alter the nature of the public accommodation's services or pose an undue burden.
  - Must remove architectural barriers to access, where such removal is "readily achievable." Different standards for altered/renovated and new structures.
  - Must modify policies, practices, and procedures unless the modifications required would fundamentally alter the nature of the goods or services.
  - May not use eligibility criteria which screen out, or tend to screen out, the disabled unless the criteria are necessary to (1) provide goods or services or (2) safety.
- **ADA Facility Requirements** (state law may have different requirements):
  - There are almost a thousand regulations. In other words, it is easy to establish a violation.
    - Target Areas/Most Common Violations: Accessible Parking and Access Aisles; Access to Entrance; Restrooms; Sales and Service Counters; ATM's; and Seating.
- **Website Accessibility:**
  - Increasingly, plaintiffs' lawyers are claiming that publicly available websites are inaccessible to users with disabilities, thereby disadvantaging individuals with disabilities in a modern society that is largely driven by an electronic marketplace. Many people with disabilities use "assistive technology" to enable them to use computers and access the internet.
  - For example, individuals who are blind or have low vision may use screen readers – devices that speak the text on a monitor – to assist them in accessing a website's content. However, such users cannot fully access a site unless it is designed to work with the screen-reading software. Another example of an accessibility barrier that needs to be addressed is ensuring your individual website pages are coded so that users can navigate by means of a keyboard or single-switch access device alone, without need of a mouse. Users who cannot use a mouse with precision could find your website unnavigable without this design. Websites that do not accommodate assistive technology can create unnecessary barriers for users with disabilities, and help fuel website accessibility claims.

- **Service Animals:**
  - **I**nclude only dogs individually trained to do work or perform tasks for the benefit of an individual with a disability. No other animals – except trained miniature horses – are permitted. Emotional support dogs are NOT recognized as service animals. Psychiatric service dogs ARE recognized.
  - May ask: 1) if the animal is required due to a disability; and 2) what task/work the animal is trained to do. May not require: 1) proof of service animal certification/licensing; 2) medical documentation; 3) ask the dog to demonstrate its ability to perform the task/work identified.
  - May ask that the service animal be removed when the animal is a direct threat, out of control or not housebroken, or if the presence of the animal would fundamentally alter the program or service provided (e.g. a barking dog in a library). Allergies and fear of dogs are not valid reasons for removal.

- **When you get back to the office:**
  - Survey existing facilities – get input from experienced architect;
  - Train personnel in dealing with and assisting disabled patrons;
  - Review and update policies to ensure compliance with the regulations;
  - Assess the accessibility of your website from the perspective of the user;
  - Engage the services of a website accessibility expert to ensure that your website has the appropriate features.

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

Top Ten Mistakes Employers Make on I-9 Forms

by Ilanit Fischler

1. **Storing I-9 Forms in the Wrong Place.** Completing I-9 Forms requires collecting personal information about employees. Keep this in mind when determining where to store these forms and any corresponding documentation.

   Best Practice Tips: USCIS recommends that employers keep the I-9 separate from personnel records to facilitate an inspection request. No matter how or where the Form I-9 is stored, the employer must be able to present them to government officials for inspection within 3 business days of the date when the forms are requested. Since Form I-9 contains an employee's private information, employers should ensure that private information is protected and that only authorized individuals should be able to access these documents.

2. **Using an Outdated Version of the I-9 Form.** Several versions of the I-9 Forms have been issued since the form was first introduced in 1987. Not all versions are valid for use.

   Reminders: To determine whether you are using the correct version of I-9 Form, look at the revision date printed on the bottom left corner of the form, and not the expiration date printed at the top of the form. Currently, the Forms showing a revision date of 07/17/2017 are valid.

3. **Completing Section 1 in an Untimely Manner.** Section 1 must be completed by the employee no later than the first day of employment for pay, but not before accepting a job offer.

4. **Failing to Ensure all Relevant Fields are Fully and Properly Completed**. Section 1 must be completed by the employee. However, the employer is responsible for reviewing and ensuring that employees fully and properly complete it. The employer is responsible for completing Sections 2 and 3.

   Reminders:
   - *To ensure the form is fully completed, write "N/A" when appropriate. For example, if an employee does not have a middle name, make sure that field is not left blank.*
   - *Don't forget that providing an email address, telephone number, and social security number (unless the employer participates in E-Verify) in Section 1 is optional.*

5. **Completing Section 2 in an Untimely Manner**. Section 2 must be completed by the employer within 3 business days from the date the employee starts work for pay. However, if the employee is hired to work for less than 3 days, it must be completed no later than the end of the first day of employment.

6. **Telling Employees What Specific Documents They Must Present for Review and Verification**. Employers CANNOT specify which particular type of documents the employee may present.

7. **Reviewing Photocopies of Identity or Employment Authorization Documents**. Employers must physically examine original documents in the employee's physical presence. Employers are not required to be document experts. If the documents reasonably appear to be genuine and relate to the person presenting it, employers may accept that document to complete Section 2 of the I-9 Form.

   Best Practice Tip: If your company makes a photocopy of the documents presented for I-9 purposes, you must retain a photocopy of the supporting documents for all I-9s.

8. **Failing to Re-Verify Expiring Work Authorization Documents**. Employers must re-verify the employment authorization of certain employees before his or her employment authorization expires.

   Best Practice Tip: Set a calendar reminder at least 90 days before the date reverification is required to ensure deadlines are not missed.

   Reminder: You do not need to re-verify U.S. citizens or lawful permanent residents. Also, reverification does not apply to expiring List B documents.

9. **Completing the Spanish Version of the Form**. Form I-9 is available in English and Spanish. However, only employers in Puerto Rico may complete the Spanish version. Employers in the United States may use the Spanish version as a guide, but the English version must be completed and retained for all employees.

   Reminder: Be sure to indicate in Section 1 if a translator was utilized in the completion of the Form I-9.

10. **Non-Compliance with Retention Requirements**. Employers must retain an I-9 Form for each employee hired. Once the individual's employment has terminated, the employer must determine how long after termination the Form I-9 must be retained, either three years after the date of hire or one year after the date employment is terminated, whichever is later. Form I-9 can be retained on paper, microform or electronically.

    Best Practice Tip: Conduct periodic self-audits to ensure compliance with these and other requirements.

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

A Full Plate for USDOL in 2018

by David Buchsbaum

The latest regulatory agenda shows four wage-hour items on the U.S. Labor Department's (USDOL) plate. In addition to revisiting the federal Fair Labor Standards Act's (FLSA) white-collar exemptions and tips-related regulations, USDOL intends to publish *proposed* rules later this year on child labor restrictions and the regular rate.

Child Labor

The FLSA's child labor restrictions, including the hazardous occupations orders, currently provide limited exceptions for apprentices and student learners under certain circumstances (*i.e.*, not your typical youth employment scenario). The USDOL plans to consider whether these exceptions to certain child labor restrictions should be expanded to allow for safer, "meaningful" opportunities: a need which benefits the future workforce and help abate a common complaint among employers that "youth" are not pursuing some vocations. Notably, although the abstract provided is heavily focused on these programs, perhaps the title of the rule ("*Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA*") leaves some room for broader changes to the hazardous occupations themselves.

Regular Rate

The FLSA requires employers to use an employee's "regular rate" when determining the overtime premium for a particular workweek. While the actual calculation for the "regular rate" based on remuneration for employment and the hours worked comes from case law, the statute itself sets forth that it includes "all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include" eight categories of remuneration. Indeed, there are no regulations in this regard; rather Part 778 as it currently stands is the agency's "official interpretation" with respect to overtime compensation.

While the agenda item broadly reads "*Regular Rate Under the Fair Labor Standards Act*", the abstract specifically states that the USDOL "will propose to amend 29 CFR part 778, to clarify, update, and define regular rate requirements under section 7(e)(2) of the Act." Subsection 7(e)(2) in particular provides that the remuneration shall not include:

Payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment.

Though the title might lead one to speculate optimistically that the agency is going to (i) clarify that fluctuating workweek plans are not so rigid (yet again needing to revisit a mess created in 2011) or (ii) clarify and update the examples at Part 778 regarding how the overtime premium actually is calculated with respect to amounts that do *not* fall within any of the eight categorical exclusions, the abstract indicates that the revisions will be far more limited. Nonetheless, clarifying the USDOL's position on 7(e)(2) could resolve some of the disputes that have increased over the last few years.

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The Bottom Line

Of course, it is not uncommon for an agency to fail to meet the target dates given in these agendas, so exactly when we will see any developments remains uncertain. Moreover, the USDOL's authority varies across these areas and in particular, similar to how its authority is limited with respect to tip practices, it cannot define the regular rate contrary to the statutory language (employers looking for more extensive solutions should, again, look to Congress). Regardless, between the four items identified on the agenda, it appears USDOL will be *very* busy.

Agency / Division	Anticipated NPRM	Title of Proposed Rulemaking	RIN
DOL/WHD	August 2018	Tip Regulations Under the Fair Labor Standards Act (FLSA)	1235-AA21
DOL/WHD	September 2018	Regular Rate Under the Fair Labor Standards Act	1235-AA24
DOL/WHD	October 2018	Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA	1235-AA22
DOL/WHD	January 2019	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees	1235-AA20

Ten Tips to take back to the office

1. Re-evaluate the status of exempt employees, especially in light of the possible changes to the federal regulations.
2. Maintain accurate records of hours worked by nonexempt employees.
3. Ensure all nonexempt employees get paid at least the applicable minimum wage.
4. Ensure all nonexempt employees are properly paid overtime on all of their compensation, including commissions and other incentive based bonuses.
5. Ensure that you are only deducting time for bona fide meal breaks, and not rest breaks.
6. Compensate nonexempt employees for training and travel time.
7. Ensure that employees paid on commission or bonus have written pay plan.
8. Review whether “independent contractors,” “casual labor,” “contracted employees,” or “freelancers,” should be non-employees or employees.
9. Ensure that deductions from pay are required by law or permitted under written agreement that complies with the law.
10. Evaluate whether nonexempt employees are working remotely and ensure that such time is being captured

Using Consumer Reports The Safe Way

The lesson from the recent wave of FCRA class action litigation is clear: make sure that you use consumer reports correctly.

One of the main things to keep in mind about the FCRA when you use a consumer report for employment purposes is timing. In this regard, the FCRA is primarily concerned about three specific time periods: 1) before you obtain a consumer report; 2) before you take adverse action based upon the contents of a consumer report; and 3) after you take adverse action based upon the contents of a consumer report.

First, prior to obtaining a consumer report on a job applicant or an employee, you must notify them in writing that you may obtain a consumer report for employment purposes and you must obtain their written consent to obtain the report. These are commonly referred to as the "notice" or "disclosure" and "authorization" requirements.

One of the most important things in this regard is that your notice or disclosure must be clear and conspicuous and contained in a document that consists *solely* of it. This is commonly known as the "standalone document" requirement and, as you can see from some of the cases mentioned above, has been a central focus of some of the FCRA class-action litigation out there.

Second, before taking an adverse employment action based upon the contents of a consumer report, you must provide the job applicant or employee a copy of the consumer report and a description of their rights under the FCRA. Although it is not expressly required by the FCRA, courts have held that you should provide the applicant or employee with a reasonable opportunity to provide you with any information that disputes the contents of the consumer report.

Last, after taking an adverse employment action based upon the contents of a consumer report, you must provide the job applicant or employee 1) a notice of the adverse employment action; 2) certain statutorily mandated information regarding the disclosure of credit scores; 3) the contact information for the consumer reporting agency that provided the consumer report as well as a statement that the reporting agency did not make the adverse action decision and therefore cannot provide specific reasons as to why the adverse action was taken; and 4) a notice of their rights to obtain a free copy of the consumer report from the consumer reporting agency within 60 days and to dispute with the consumer reporting agency the accuracy or completeness of the contents of the consumer report. This section of the FCRA cannot be enforced by way of private civil actions; its enforcement rests exclusively with the Federal Trade Commission or other authorized federal agencies.

The Bottom Line

Maybe this all sounds a little confusing and overwhelming. It is daunting to hear day after day about multi-million dollar lawsuits being filed over what appear to be issues of hyper-technical compliance with the FCRA. Our advice? Let us work with you to review your current policies and craft a conservative approach. This will go a long way to minimize your risk of a violation of the FCRA, and lessen the chances of a class-action lawsuit.

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

TOP 10 EMPLOYEE HANDBOOK UPDATES

by Candice Pinares-Baez

1. **Vaping - Make sure smoking policy addresses vaping.**
   Employers should consider updating their policies on smoking to address vaping, which has become increasingly popular. Vaping devices are used to smoke tobacco and marijuana products, among other products.

2. **Reporting Policies - Make sure handbook provisions do not discourage employees from reporting potential legal violations to government agencies.**
   The Defend Trade Secrets Act of 2016 provides businesses with a legal remedy if trade secrets are misused. However, for employers to recover attorney's fees and punitive damages, they must provide workers with notice about their right to immunity if they report potentially illegal activity to a government agency or an attorney

   The Occupational Safety and Health Administration began enforcing new anti-retaliation provisions on Dec. 1, 2016. Under these rules, employers cannot retaliate against employees for reporting a workplace injury. The agency noted that it would be looking at employer policies to ensure they would not lead a reasonable employee to believe such retaliation may occur if they reported an injury. Automatic drug testing after every accident is viewed as problematic under the new guidelines.

   The Equal Employment Opportunity Commission and the Securities and Exchange Commission also have targeted any policy or agreement that may be interpreted to curb an employee's right to go to these agencies—or other agencies—to report violations of the law.

3. **Bullying – Make sure your policies address workplace bullying.**
   Workplace bullying is a topic of increased scrutiny among employees and employers alike. Now is the time to get in front of the curve and ensure that you have proper policies in place.

4. **Political Affiliation &Transgender Policies – Are you complying with the law and furthering company values?**
   If you operate in a location with a local or state law that prohibits discrimination based on gender identity or political affiliation, then you should ensure that your equal employment opportunity, discrimination, and harassment policies, as well as your complaint procedures, are updated to reflect coverage. If you are a government contractor/subcontractor update your EEO policy to include gender identity and sexual orientation as protected classes.

5. **At-Will Statement – Ensure you have a comprehensive and robust at-will statement**
   Review your at-will statement and make sure that it states: 1) that the employer can terminate an employee with or without cause and with or without notice; 2) it supersedes any prior agreements or understandings; 3) it can only be changed in writing signed by the owner/president.

6. **Retaliation Policies – They must cover alleged victims and witness**
   Many handbooks say the organization will not tolerate retaliation, but not all such passages state that they protect witnesses and others who participate in an investigation of a discrimination claim or oppose an unlawful practice. In addition, the handbook should state that the employer cannot promise confidentiality for people who make retaliation or discrimination complaints. Instead, it can say that their identities will be revealed only on a need-to-know basis. The process must be fair for both the person making the retaliation or discrimination claim and the individual who is being accused.

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7. Drug Policy – Address changes to medical marijuana laws

Many states, including Florida, have now made marijuana legal, either for medical use or recreational use. It is, however, still illegal on a federal level, so your employee drug policy can simply state that no illegal drugs are allowed. You should also include information on your drug-testing policy.

8. Lactation Policy – Make sure you have one

The Patient Protection and Affordable Care Act (ACA) requires employers subject to the Fair Labor Standards Act (FLSA), (*unless they have fewer than 50 employees and can demonstrate that compliance would impose an undue hardship)*, to provide unpaid, reasonable break time for an employee to express breast milk for one year after her child's birth. Several states and some municipalities have similar requirements.

9. Salaried Exempt Employees Safe Harbor Policy – Ensure that have the safe harbor provision specifically articulated.

The Department of Labor (DOL) has provided employers with an affirmative defense if improper deductions are erroneously made by the employer. An employee will not lose his or her exempt status if the employer has a clearly communicated policy that prohibits improper deductions and sets forth a clear complaint procedure. The DOL has found that such a policy would be considered clearly communicated if it is published in an Employee Handbook or located on the company intranet. The employer must also include information that indicates how an employee should report the violation, such as to notify the human resources department, supervisor or owner in writing.

10. Other Stand Alone Policies

There are additional stand-alone policies and forms that you all should have.

a. FCRA Packet.

b. FMLA Packet.

c. Arbitration Agreement (if applicable).

d. I-9 procedures.

e. HIPAA procedures.

MEDICAL MARIJUANA LAW COMPLIANCE BEST PRACTICES

by Charles S. Caulkins

This is an area of the law that will continue to be tested in the courts. There are some key things you can do to ensure compliance with state and federal marijuana laws.

Understand Your State Marijuana Laws

- It is important that you understand your rights and obligations—and those of your employees—under any state-specific marijuana laws in place where you do business. Each state has different requirements, and by keeping yourself up to date on the constantly changing laws, you can avoid surprises down the line.

  FLORIDA LAW Amendment 2 to the Florida Constitution allows qualified physicians to issue a physician certification for the medical use of marijuana to individuals with debilitating medical conditions. § 381.896, Fla. Stat. In Florida, Employers are not required to accommodate an employee's use of medical marijuana at work and the statute expressly denies the creation of "a cause of action against an employer for wrongful discharge or termination." Additionally, the statute expressly prohibits medical marijuana users from using medical marijuana at their place of employment without their employer's permission. For employers with drug-free policies and programs, § 381.986(15) provides that "this section does not limit the ability of an employer to establish, continue, or enforce a drug-free workplace program or policy." Florida law does not explicitly address whether employers may have to accommodate medical marijuana use outside of the workplace.

  A Florida company, to maintain compliance with federal law, can prohibit its employees from using medical marijuana on and off the worksite by arguing:

  1) that federal law, under the Controlled Substances Act, preempts state law;
  2) that the language of the Florida marijuana statute expressly prohibits on-site use; and
  3) that the lack of language regarding off-site use of medical marijuana is different than the states that have allowed off-site use and discrimination claims against employers because Florida law denies a cause of action against an employer for wrongful discharge or termination based on medical marijuana use.

Drug Testing

- Have a written policy in place
- Have a written procedure in place
- Meet with/interview suspected employee
- Document reasonable suspicion indicators
- Arrange for transportation to and from testing facility (and, if necessary, home)
- Be consistent with procedure
- Be consistent with discipline
- Maintain confidentiality as reasonably appropriate

Policies

- Include information addressing how you treat marijuana use as part of an updated, comprehensive substance abuse and testing policy
- Consider whether use poses a threat to workplace safety and identify areas/positions of high risk
- Notify applicants and current employees of the policy
- Tailor policies to adhere to differing state requirements
- Ensure managers are aware of policies
- Maintain uniformity in policy enforcement and discipline
- Adopt measures for ensuring confidentiality
- Compliant with the Florida Drug Free Workplace Act

DOT Stands Its Ground

- DOT motor carrier regulations cover “safety-sensitive” transportation employees
- Pilots, bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire armed security personnel, ship captains and pipeline emergency response personnel, among others.
- No driver may report for or remain on safety-sensitive duty while using any controlled substance
- No driver shall report for or remain on safety-sensitive duty after testing positive for unlawful drugs
- On 10/22/09, DOT issued a statement asserting that its regulated drug testing program will not change based upon the DOJ’s 10/19 statement.
- DOT regs do not authorize ‘medical marijuana’ under state law to be a valid medical explanation for a transportation employee’s positive drug test result.
- “Therefore, Medical Review Officers will not verify a drug test as negative based upon information that a physician recommended that the employee use ‘medical marijuana...’ It remains unacceptable for any safety-sensitive employee subject to drug testing under the Dept. of Transportation’s drug testing regulations to use marijuana.”

Americans with Disabilities Act

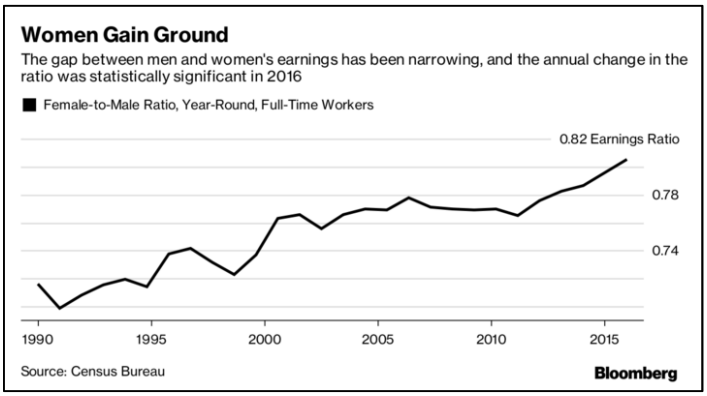
- Employers may prohibit current illegal use of drugs and alcohol in the workplace; and
- Require that employees report for duty without engaging in the unlawful use of drugs.
- A positive test result establishes “current” use.
- Under federal law, medical marijuana use is excluded from protection as illegal drug use.
- Employers should still approach challenges to test results based upon ADA with care.

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

ADDRESSING PAY EQUITY ISSUES

by Suzanne Bogdan

The Equal Pay Act has been in force for many years, yet the pay gap between men and women continues.



The federal Equal Pay Act requires men and women to be paid equally for "equal work." This means for substantially equal jobs, considering sill, effort, responsibility, working conditions and establishment, the compensation must be substantially equal.

"Compensation" includes such things as salary, overtime pay, stock options, profit sharing, bonus plans, life insurance, vacation and holiday pay, tuition remission, health/welfare benefits, and other benefits. There are some exceptions (defenses) to the law that permit different pay, such as a seniority system, a merit system, a system that measures quantity/quality of production, or any other differential based on factors **other than sex**. Notably, offering an applicant higher pay based on market factors is not a defense.

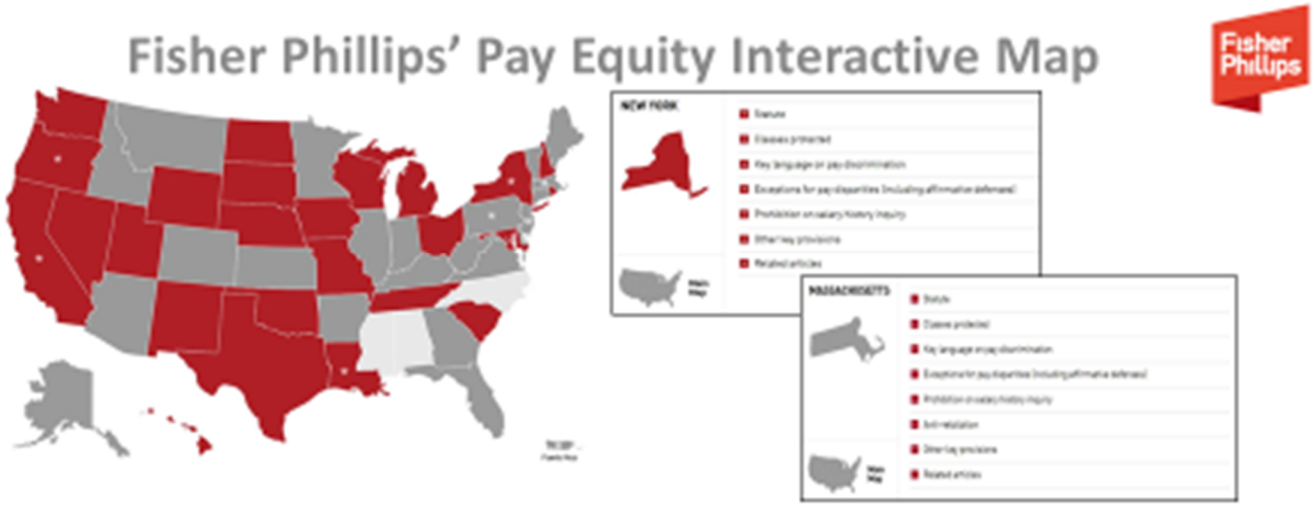
States and cities are passing additional laws to try to close the "pay gap." Some have **pay transparency** provisions that make it unlawful for employers to prohibit employees from discussing or disclosing their pay. Others also prohibit, or limit, an employer from seeking **salary history** from applicants and/or using salary history in setting compensation. Many of the laws also include pay equity requirements based on race, national origin, age, etc.

The number of states enacting such laws is growing. For national employers, it is especially important that you understand the changes that may be happening in the different states. Fisher Phillips has an interactive map on its website that will help give you a starting point regarding the state laws, key language, and specific requirements. https://www/fisherphillips.com/equity

The number of new laws and resulting lawsuits, including class action lawsuits, in this area is growing. All employers should take the time now to assess their pay and employment practices:

- Review or create compensation policies and procedures, including checks and balances, and train managers on implementation.
- Ensure that someone in HR or a similar position is watching for offers that deviate from standard policies (such as providing health insurance at no cost whereas employees typically absorb some percentage of cost).
- Assess the performance evaluation process and its role in pay decisions; standardize the process.
- Train decision-makers:
    - How to make proper pay decisions that comply with organizational policies and the applicable law.
    - The appropriate factors to consider when making pay decisions.
    - How to apply guidelines and exercise discretion properly; and
    - How to document the bases for decisions.
- Consider conducting an attorney-client privileged **pay audit** in specific locations or among certain groups of employees.
    - Some states, such as Massachusetts and Oregon, provide a safe harbor against liability if a pay audit is conducted in accordance with the new laws and reasonable steps are taken to address pay disparities.
    - There is currently no safe harbor under federal law or other state laws so it is important to put the appropriate legal protections into place at the start of the audit to protect potentially harmful documents and information from disclosure.

The pay equity movement has gained ground, especially the last few years. Although the Trump administration withdrew the regulations that was going to require disclosure of pay among categories based on gender and among categories of pay on the EEO-1, this type of initiative will likely be reintroduced at some point in the foreseeable future. Employers should be ready when those disclosures are necessary by discovering and addressing any pay equity issues now.



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5 EMPLOYMENT LAW MYTHS BUSTED

by Colette Wolf

We all know a good myth or two. Unfortunately, because employment law can be complex we may know some on the employment side of things as well. Here are 5 employment laws myths busted:

1. **Salaried Employees are Automatically Exempt under the Fair Labor Standards Act**. With few exceptions, to be exempt, an employee must pass three "tests" -- salary level, salary basis, and job duties -- as outlined by the FLSA. The salary level test: Any employee paid less than $23,600 per year ($455 per week) is nonexempt. The salary basis test: An exempt employee must receive a regular, predetermined amount of compensation each pay period. This predetermined amount cannot be reduced based on variations in the employee's quantity or quality of work. Aside from a few exceptions, an exempt employee must receive the full salary for any workweek during which the employee performs any work, regardless of the number of days or hours worked. The job duties test: An employee who meets the salary level and salary basis tests is exempt only if he/she also performs exempt job duties. The actual tasks of the job are to be evaluated, **not** the job title. There are three typical categories of exempt job duties titled executive, professional, and administrative, known as the white collar exemptions. Certain industries and certain jobs may also by definition be exempt – consult with your legal counsel.
2. **Federal and/or Florida Law Require that Employers Provide Holiday Pay, a Daily Lunch Break, and Breaks every 4 Hours during the Workday**. Neither **Federal law nor Florida law require holiday pay, or vacation for that matter, or require employers to provide any breaks during the workday.** While the Federal and Florida law do not **require** employers to set aside a certain amount of time for **breaks,** if an employer grants a short **break**-- generally 20 minutes or less--then the **break** must be paid.
3. **Employees Cannot Talk About Salary.** While some employee handbooks may still treat the subject of compensation as "taboo" and prohibit employees from discussing compensation with each other, such policies, or shutting down such conversations, run afoul of the National Labor Relations Act. The Act protects employees' rights to discuss the terms and conditions of employment, such as safety and pay **even if you're a non-union employer**. These types of discussions are considered to be "protected concerted activity" and the National Labor Relations Board defines that to be when employees "take action for their mutual aid or protection regarding terms and conditions of employment." So, you cannot forbid employees – either verbally or in written policy – from discussing salaries or other job conditions among themselves. Discussing salaries is protected regardless of whether employees are talking to each other in person or through social media.
4. **It's Perfectly Fine if Supervisors are Subject Matter Experts Only.** Supervisors need to be trained to spot employment law issues and then contact the appropriate personnel as needed. Adequate training is vital for keeping your company out of legal trouble. Due to the numerous laws and regulations surrounding workplace discrimination, harassment, safety, retaliation, FMLA/ADA, etc., you'll want your supervisors to know the ins and outs and how those laws apply to your business. Otherwise, you're setting yourself up for problems and potential litigation. Which brings us to our final myth. . .

5. **We Don't Need a Reason to Terminate Our Employees because they are "At-Will."** While employment in Florida is at-will, meaning either party can terminate the employment relationship at any time, with or without notice, and for any reason not prohibited by law, that last part is important – even though you technically don't need a reason to terminate an employee, you should carefully review (with legal counsel) the facts surrounding a termination to determine whether you are leaving the company open to a lawsuit. What protected classes might the employee fall into? Has the employees recently taken a leave of absence from work, suffered a workers' compensation injury, complained of harassment or discrimination? Also recognize that fact finders (judge or jury) expect employees to be treated with fairness. Absent a violation warranting immediate termination, termination for poor performance should never come as a surprise to an employee. Terminating an employee without any written record of performance issues makes it difficult to defend against allegations that the termination was based on unlawful reasons. To that end, you'll want to train supervisors on the proper documentation of employee misbehavior and performance issues.

Document, Document, Document!

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

SOCIAL MEDIA: 5 THINGS EMPLOYERS NEED TO KNOW

by Lanette Suarez

As of the first quarter of 2018, Facebook reported that there were over 2.2 billion monthly active users of the popular networking site. Despite the widespread use of social media sites, the law continues to struggle to keep up with technology and in many instances the courts are several years behind the evolving electronic workplace. The challenge is apparent in the area of social media. Outlined below are five tips to help employers avoid legal liability when using social media and handling social networking issues that arise in the workplace.

1. **Use Social Networking Sites Sparingly to Screen Applicants:** Half of all U.S. employers use social networking sites to screen applicants. However, there are more risks inherent in this practice than benefits. If a hiring manager searches the internet using a job candidate's name and uncovers the Facebook page of the job candidate, he/she could learn a lot of information about a candidate that would not otherwise be uncovered in the hiring process. For example, by reviewing the public information on the Facebook page, a hiring manager learns many interesting facts about an applicant including her marital status, sexual orientation, or religion.

   The problem with using social networking sites in making employment decisions is that it often provides the decision-maker with too much information. By gaining access to information about the protected characteristics of applicants, employers lose the ability to claim ignorance of such information. This is significant because the EEOC and Courts often assume that employers use any information gained in the hiring process to make the hiring decision. Therefore, we recommend that hiring managers be prohibited from using social networking sites to screen applicants. In the alternative, for those who want to use the internet to screen applicants, the next best choice is to only use the internet to screen the final applicants being considered for the position and to have someone other than the hiring manager screen applicants. Additionally, employers should only search information and sites that contain pertinent and appropriate information.

2. **Be Mindful of Privacy Laws:** Employers who use the internet to mine information about their applicant or employees must be aware of federal and state privacy laws which create privacy expectations for employees. For example, the Stored Communications Act, a federal law, prohibits individuals from gaining intentional and unauthorized access to private electronic communications. Under this law, it is unlawful for a manager to log into an employee's private email account, even if the employee accessed them on a work computer. Similarly, it is unlawful for an employer to force an employee to allow them access to their private electronic communications or the electronic communications of another employee.

3. **Pause Before You Discipline:** The internet and social media sites have become the 21st Century equivalent of the "water cooler." As a result, managers are usually tempted to discipline employees for posts which cast the company, workplace, or themselves in a negative light. However, discipline based on online posts can violate the law. Many employers don't realize or forget that, under federal law, communications about terms and conditions of employment are often protected. For example, employees can make repeated, negative posts about their wages or what an insensitive jerk their manager is on a blog or Facebook, and these posts are likely protected. These protections are being aggressively enforced and, therefore, employers should carefully consider the legal implications of any disciplinary action based on online content posted by employees.

4. **Remind Managers to Exercise Good Judgment:** Many managers are "friends" with employees they supervise on social networking sites. This can be problematic, however, if the manager does not exercise good judgment. Recently, there has been an increase in claims arising out of inappropriate or off-color posts by supervisors or managers on social networking sites that are viewed by employees. As a result, employers should discourage managers and supervisors from "friending" or otherwise connecting with their subordinates on social networking sites because, at times, managers, like employees, do not think before they post something, or the manager forgets his/her role and engages in online conduct that is inconsistent with the expectations of their employer. Employers would be wise to invest in supervisory skills training, or at a minimum, regularly reminding mangers that their online activity can impact their professional relationships and their ability to effectively supervise employees.

5. **Develop a Lawful Policy:** There is a tension between what employers and employees believe are the rules governing an employer's right to make employment decisions based on online activity. The best way to mitigate the tension and ensure legal compliance is to adopt a carefully drafted policy.

   A policy on social networking should incorporate by reference your anti-harassment, workplace violence, and other similar policies to remind employees that such policies apply to online activity. The policy should also prohibit obscene, malicious, threatening, or bullying conduct. Moreover, we recommend the policy prohibit employees from knowingly posting false information about their employer, their co-workers, and customers. This area of the law is constantly evolving. Therefore, social networking polices need regular review and updating at least annually, if not more often.

Conclusion: Social media has many advantages for both individuals and businesses. However, the careless use of social media also has many risks and the potential for legal liability. Therefore, employers should follow the steps outlined above to take advantage of the benefits of social media while minimizing the risks.

EMPLOYMENT AGREEMENTS

SEPARATION, NON-COMPETITION AND ARBITRATION

by Steven A. Siegel

<u>Arbitration Agreements</u>: U.S. Supreme Court decision in *Epic Systems* – Class action waivers are enforceable

- Does arbitration make sense for your organization?
- Class action waiver
- Initial expense
- Total expense
- Effect on early resolution
- Effect on likelihood of summary judgment
- Split-the-baby risk
- Limited pool of arbitrators
- Fights over enforceability
- Electronic signatures

<u>Separation Agreements</u>: One size does not necessary fit all

- Over 40 years old?
- Group layoff?
- State of employment?
- Previous restrictive covenant agreement?
- Include restrictive covenants by reference or add new restrictive covenants?
- Payout severance over time or in lump sum?
- No re-hire?
- Cooperation/Availability for assistance clause?
- Timing of termination and signature?

<u>Restrictive Covenants</u>: Non-Competition, Non-Solicitation and Confidentiality

- What are you trying to accomplish?
- Which restrictive covenants?
- What type of employees should be required to sign?
- In what states are your employees located?
- Geographic scope?
- Time limit?
- Likelihood of enforcement?

VIOLENCE IN THE WORKPLACE

by Kenneth A. Knox

TWELVE POINT ACTION PLAN FOR HANDLING VIOLENCE IN THE WORKPLACE

1. Adopt and publicize a zero-tolerance policy regarding threats, harassment, and violence in the workplace.
2. Update/review employment application as well as pre-employment background checks and interviewing procedures to identify signs of potential problem applicants. Conduct background investigation on all job applicants.
3. Prepare and utilize release forms for personnel records from previous employers, course transcripts from educational institutions, certification records from training and professional organizations, credit reports from consumer credit reporting agencies and criminal conviction records from law enforcement agencies, subject to applicable federal, state and local laws.
4. Update personnel policies and employee handbook to include safety policies dealing with violence in the workplace. Include rules to limit access to work areas, especially during evening and weekend shifts. (Note: Ensure compliance with state concealed weapons laws)
5. Review with your temporary employee provider the procedures they utilize to screen their temporary employees for potential workplace violence problems.
6. Conduct periodic security audits and risk assessments of each facility. Provide adequate security including access control in reception areas, parking areas, common areas, stairwells, cafeterias and lounges.
7. Prepare a comprehensive crisis management plan for each facility which includes a workplace prevention program. Prepare and distribute contact list of all local emergency agencies.
8. Select and train management officials in conflict resolution and nonviolent techniques for handling hostage, hijacking, crisis incidents and counseling situations.
9. As part of the company's overall management safety and health training, instruct all managers and supervisors in how to identify and deal with early warning signs and potential safety problems associated with workplace violence.
10. Identify and publicize Employee Assistance Programs, employee support services and health care resources available to employees and their families.
11. Institute policies to investigate all threats and complaints of harassment and violence immediately. Designate company official(s) and / or office to handle all threats and complaints in a confidential manner.
12. Review and publicize the company-wide procedures as well as the company management officials responsible for handling employees' problems, complaints and concerns involving threats, harassment and violence.

2018 FISHER PHILLIPS ROUNDTABLE IGNITE

HOW TO CONDUCT AN EARLY CASE EVALUATION

by Jim Polkinghorn

It's clear to the participants in the civil justice system that most cases settle somewhere short of trial. It's less clear whether the investment in time and money to advance a case through the entire litigation process produces a demonstrably better settlement than could have been obtained much sooner. A more systematic approach to early case resolution provides the best opportunity to decide which cases can be settled early and at what price.

EVALUATION ANALYSIS

1. Understand publicity concerns. Although not an issue in most cases, publicity in an employment case can be driven by the nature of the allegations themselves as well as by the media style of the plaintiff's lawyer. In each case it's important to evaluate the likelihood of a publicity effort and its potential for traction. Association with public relations professionals should be considered.
2. Determine the viability of claims and defenses. A lawyer should carefully review the complaint and relevant statutory, regulatory and case law. Understand the plaintiff's apparent and potential arguments and determine applicable defenses and how they can be advanced (legal or factual).
3. Know the type of case. Determine whether subject matter expertise will be required and the cost of obtaining it. Consider the cost of staffing an abnormally large case, including data management.
4. Know the court. Understand the court's tendency to grant or deny summary judgment. Know the court's habit of attempting to leverage settlement by setting early trial dates, requiring judicial settlement conferences, holding summary judgment motions hostage as the trial period approaches, etc. Develop an understanding of the potential jury pool.
5. Know the adversary. Learn about the opposing lawyer's litigation history, pattern of taking cases to trial, firm support, financial stability, business model and reputation for reasonableness.
6. Know the plaintiff. Learn the plaintiff's prior litigation and bankruptcy history. Gather information from public social media sites. Consider whether surveillance of the plaintiff would be useful when compared to associated costs and risks.
7. Identify, collect and verify pertinent facts. Accumulate and evaluate documentary evidence, taking a realistic view of how certain documents (or their absence) will look in the context of a summary judgment motion or trial. Interview key witnesses and realistically assess the factual substance of their testimony as well as their apparent credibility in giving it. Consider the amount of time necessary to prepare witnesses for depositions.
8. Set the economic value of the case. Take a formulaic approach by first setting various damages scenarios, including attorneys' fees and costs (e.g., true nightmare scenario, realistic worst case scenario). Factor in the likelihood of success at trial or summary judgment and compute the different scenarios. They should come to about the same place, creating an economic settlement value. Nightmare Scenario Example: 5% chance of damages in the amount of $1,000,000 yields a $50,000 settlement number. Realistic Worst Case Scenario Example: 20% chance of damages in the amount of $300,000 yields a $60,000 settlement number. An economic range of $50-60,000 is thereby created. This can, of course, be discounted by other non-economic factors.

Using this systematic approach allows a litigant to finally decide how to balance reward and risk associated with further litigation. The actual amount of a settlement might tick up or down depending on the willingness of the plaintiff's lawyer to engage early in a case. Voluntary mediation provides an opportunity to move a reluctant plaintiff (or lawyer) into the process. Most plaintiff's lawyers are very familiar with early mediation and welcome the chance to resolve cases without the expenditure of additional time and effort.

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